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

SECRETARY OF LABOR, Complainant, v. METRO PORTS, d/b/a Southeast Crescent Shipping, Respondent.	OSHRC Docket No. 23-1554

DECISION AND ORDER

APPEARANCES:

For the Complainant:

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U.S. Department of Labor
Nashville, TN

For the Respondent:

James McMullen, Esq.
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BEFORE: William S. Coleman
Administrative Law Judge

INTRODUCTION

The Respondent, Metro Ports (Metro), is a California-based stevedoring company that operates marine terminals on the nation's coasts, including a marine terminal at the Port of Wilmington in North Carolina. (*See* Ex. C-7, Bates pagination 0188–0194; T. 156, 160). In July 2023, the U.S. Occupational Safety and Health Administration (OSHA) received a complaint about Metro's handling of hazardous cargo that was being shipped in containers known as "super sacks,"

which have the technical name *flexible intermediate bulk containers* (FIBCs). An OSHA inspection and investigation ensued.[1]

The cargo in the FIBCs was *Waelz oxide*, which is known generically as *zinc-rich flue dust*. (Exs. C-2 & C-3). Zinc oxide is the predominant constituent of Waelz oxide, but the substance also contains a "trace" amount of lead and up to 2.5% cadmium oxide. (T. 26; Ex. C-3 at 1-2). Both lead and cadmium are toxic heavy metals that are regulated by substance-specific health-related OSHA standards codified in Subpart Z, *Toxic and Hazardous Substances*, of 29 C.F.R. pt. 1910 [§§ 1910.1000 to 1910.1450]. The lead standard is codified at § 1910.1025, and the cadmium standard is codified at § 1910.1027.

OSHA determined that the complaint that had precipitated the inspection was not substantiated (T. 113), but nonetheless determined that Metro had violated workplace health standards and issued to Metro a citation that alleged five serious violations, summarized as follows:

- Citation Items 3a and 3b. Separate violations of parallel provisions in the lead [§ 1910.1025(m)(1)(iii)] and cadmium [§ 1910.1027(m)(1)(iii)] standards that require an employer to include those chemicals in the employer's hazard communication program and to provide training specific those chemicals.
- Citation Items 2a and 2b. Separate violations of parallel housekeeping provisions in the lead and cadmium standards that require surfaces "be maintained as free as practicable of accumulations" of lead and cadmium. §§ 1910.1025(h)(1) [lead] and 1910.1027(k)(1) [cadmium].
- Citation Item 1. One violation of the respiratory protection standard at § 1910.134(d)(1)(iii) that requires employers to "evaluate the respiratory hazard(s) in the workplace" in a manner that "include[s] a reasonable estimate of employee exposures to respiratory hazard(s)."

[1] Even though the state of North Carolina has a federally approved "state plan" for the regulation of workplace safety and health, federal OSHA officials conducted the inspection and investigation because "marine terminals" are excepted from the North Carolina state plan. *See* 29 C.F.R. § 1952.5(d) (2021) (citing to a URL for "several notable exceptions" to the North Carolina state plan, one of which is "[m]aritime employment, including shipyard employment, marine terminals, and longshoring").

An evidentiary hearing was conducted over two days. The first day was on August 19, 2024, in Wilmington, North Carolina, during which two witnesses testified—OSHA presented the testimony of the inspecting OSHA compliance officer (CO), and Metro presented the testimony of its national director of safety. The second hearing day was conducted remotely via videoconference on August 23, 2024, for Metro to present to the testimony of one expert witness.

After the initial post-hearing briefing was completed, the undersigned *sua sponte* directed the parties to file supplemental briefs to address certain additional authorities. Supplemental briefing was completed on May 9, 2025.

Based upon the following findings of fact and conclusions of law, all alleged violations are VACATED.

Citation items 3a and 3b are vacated because Metro showed that its handling of the FIBCs was excepted from the application of the lead and cadmium standards by a regulatory exception contained in OSHA's Marine Terminals standard, codified at 29 C.F.R. § 1917.1(a)(2)(xiii)(A). That provision excepts "marine cargo handling activities" from the application of OSHA's toxic and hazardous substances standards "[w]hen a substance or cargo is contained within a sealed, intact means of packaging or containment" that complies with certain requirements established by the International Maritime Organization. Alternatively, citation items 3a and 3b are vacated because the cited provisions in the lead and cadmium standards are preempted by a more specific standard, specifically § 1910.1200(b)(4).

Citation items 2a and 2b are vacated because a preponderance of the evidence showed that Metro exercised reasonable diligence in its efforts to maintain surfaces as free as practicable of accumulations of lead and cadmium.

Citation item 1 is vacated because the evidence is not preponderant that Metro failed to reasonably estimate employee exposure to respiratory hazards posed by the Waelz oxide.

FINDINGS OF FACT

Except where the following numbered paragraphs expressly state that evidence respecting a matter of fact was not presented, the following facts were established by at least a preponderance of the evidence:

Metro's Workplace

1. The entirety of Metro's workplace at the Port of Wilmington in North Carolina constitutes a *marine terminal* as defined in OSHA's Marine Terminals standard at 29 C.F.R. § 1917.2.[2] (T. 11; J. Prehr'g Statement 5).

Waelz Oxide (Zinc-rich Flue Dust)

2. In 2022, Metro contracted with a company called Befesa Zinc US Inc. (Befesa) to handle toxic cargo that Befesa would be shipping through the Port of Wilmington. (T. 178, 210). The common name of the cargo is *Waelz oxide*, and its generic name is *zinc-rich flue dust*. (Exs. C-2 & C-3 at 2).

3. The predominant constituent of Waelz oxide is *zinc oxide* at concentrations between 68% and 85%. (Ex. C-3 at 2). Other constituent chemicals in Waelz oxide include the toxic heavy

[2] Section 1917.2 defines *marine terminal* in pertinent part as follows:

> *Marine terminal* means wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or adjacent areas and structures associated with the primary movement of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidating and loading or delivery of waterborne shipments or passengers, including areas devoted to the maintenance of the terminal or equipment. . . .

metals *lead* (in "trace" amounts) and *cadmium oxide* (in concentrations of between 0.1 to 2.5%). (*Id.*).

4. The trace amounts of lead in Waelz oxide meet the definition of *lead* set forth in OSHA's occupational exposure to lead standard at 29 C.F.R. § 1910.1025(b). (Ex. C-3 at 8). The lead standard is included in Subpart Z, *Toxic and Hazardous Substances*, of 29 C.F.R. Part 1910.

5. The cadmium oxide in Waelz oxide constitutes *cadmium* within the meaning of OSHA's occupational exposure to cadmium standard at 29 C.F.R. § 1910.1027. (Ex. C-3 at 8). The cadmium standard is likewise included in Subpart Z.

6. Befesa commissioned an 18-page safety data sheet (SDS) for the Waelz oxide. (Ex. C-3 at 18). The SDS conformed with the requirements for such documents as prescribed in OSHA's hazard communication standard (HCS), codified at 29 C.F.R. § 1910.1200. (The HCS is also included in Subpart Z.) The SDS was further consistent with the provisions of the United Nations Globally Harmonized System of Classification and Labeling of Chemicals. *See* § 1910.1200(a)(1). (Ex. R-26 at 3).

7. The SDS for the Waelz oxide addresses hazards associated with both lead and cadmium and identifies *exposure controls* and *personal protection* measures respecting those hazards. (Ex. C-3 at 3 thru 9). Under the heading "respiratory protection," the SDS states: "Respirators must be worn if exposed to dust." (Ex. C-3 at 6). And under the "general hygiene considerations" heading, the SDS states: "Do not breathe dust or fume." (Ex. C-3 at 6).

FIBCs (Super Sacks)

8. To prepare bulk Waelz oxide for waterborne transport, Befesa encased it in sack-like receptacles called *flexible intermediate bulk containers* (FIBCs) that are known colloquially within the maritime shipping industry as *super sacks*. (T. 248-49; Ex. R-26 at 2). FIBCs are standardized containers used for the waterborne transport of a large assortment of bulk cargos. FIBCs typically

remain closed during handling and transport so that the bulk cargo remains captive inside. (T. 248-51; Ex. R-2 at 2).

9. FIBCs are designed and manufactured to conform to an international convention called the "International Convention for the Safety of Life at Sea" that requires certain types of cargo to be shipped in receptacles that meet specifications set forth in the International Maritime Dangerous Goods Code (DG Code). (T. 250-51). The DG Code is promulgated by the International Maritime Organization (IMO), which is an agency of the United Nations. (*Id.*).

10. All the FIBCs holding the Waelz oxide that Metro received and handled in Wilmington in 2022 and 2023 met the specifications of the DG Code. (T. 205-06, 250-51; Ex. R-26).

11. The FIBCs had the capacity to hold up to 4,420 pounds (2,005 kg) of material. (Ex. C-2). The FIBCs were constructed of an inner polybag and an outer fibrous bag with integrated straps designed to be used for lifting an FIBC, such as by a crane or forklift. (T. 39-40, 78-79, 205, 276-77; Ex. C-2). The flat base of the FIBCs was about 3x3 feet square. When filled with granular material, an FIBC would expand to about four feet high and would assume a cube-like shape but with rounded edges and vertices. (T. 205-06, 249; Ex. C-2).

12. Exhibit C-4 includes a photograph of FIBCs stowed in a ship's hold. Exhibit C-2 is a photograph of some FIBCs containing Waelz oxide in temporary storage in a warehouse at Metro's marine terminal. (T. 39).

13. The vertical face of each FIBC containing Waelz oxide was emblazoned with a poster-sized warning label, which is depicted in the photograph at Exhibit C-2. The substantive content of the warning label conformed with the requirements of the DG Code. (T. 251-52). At the top of the warning label was a row of three pictograms that replicate the pictograms depicted in

Appendix C, Figure C.1, of § 1910.1200: *Corrosion*; *Exclamation Mark*; and *Health Hazard.* Immediately below the pictograms was the word DANGER in large type. And immediately below the word DANGER were separate "Hazard Statements" and "Precautionary Statements" in tabular format. The Hazard Statements included the following statements: "Causes skin irritation;" "Suspected of causing genetic defects;" and "May cause cancer by inhalation." The Precautionary Statements included the following: "Do not handle until all safety precautions have been read and understood;" "Wear protective gloves, protective clothing, eye protection, face protection;" "Wash thoroughly with water after handling;" and "Do not breathe dust, fumes." (Ex. C-2). The warning label on the FIBCs was silent with respect to the use of respirators.

Metro's Preparations
for Receiving FIBCs Containing the Waelz Oxide

14. In 2022, five Metro managers met multiple times in Wilmington with two Befesa employees to prepare for receiving the FIBCs containing Waelz oxide. (T. 159). One of the reasons for these meetings was for Metro to marshal the information necessary for developing protocols for safely handling the cargo. (T. 160). Those meetings included a detailed review of the 18-page SDS for Waelz oxide. (T. 160-61).

15. Within the maritime shipping industry, FIBCs are known occasionally to tear or break and leak or spill their contents. (T. 276-77). Metro's employees in Wilmington knew this and had previous experience devising and implementing protocols to protect employees exposed to leaks and spills from FIBCs. (T. 164, 167; Exs. C-5 & C-6). In Metro's experience, most leaks or spills from FIBCs could be cleaned up in 15 to 20 minutes, with some cleanups taking only five to ten minutes. (T. 164, 182, 184).

16. In consultation and collaboration with the two Befesa employees who had many years of experience working with Befesa's Waelz oxide product, Metro devised and implemented special

protocols that would pertain exclusively to the Befesa FIBCs containing Waelz oxide. These special protocols set forth measures for mitigating the frequency and severity of any leaks or spills and for responding to any leaks or spills that did occur. (T. 167-71, 200-01, 213-14; Exs. C-5 & C-6). Metro's protocols did not require employees to use respirators when handling the FIBCs or when cleaning up leaks or spills, although employees could opt to voluntarily use respiratory protection in accordance with the requirements of Mandatory Appendix D to OSHA's respiratory protection standard, 29 C.F.R. § 1910.134.[3] (T. 170-71, 213-14; Ex. C-6 at 1). The Befesa employees who assisted and collaborated with Metro in preparing these protocols did not voice any concerns about the protocols not requiring employee use of respirators while handling the FIBCs or when cleaning up leaked or spilled Waelz oxide. (T. 170-71).

17. Components of Metro's special protocol to mitigate the frequency and severity of leaks or spills from the Befesa FIBCs included the following: no compromised FIBCs would be removed from the ship's hold; all FIBCs would be properly rigged and lifted in a straight up and down manner; and once on the dock, the FIBCs would be lifted only by 15,000-pound lift capacity forklifts that were outfitted with custom-made round, long bars for lifting the FIBCs by their fabric straps (so as to better avoid the FIBCs scraping against the mast of forklifts). (Exs. C-5 & C-6; T. 167-71).

18. Components of Metro's specially developed protocol for responding to leaks or spills from the Befesa FIBCs included the following elements: evacuating the area of any leak or spill until any airborne Waelz oxide settled; ceasing operations immediately in the event of a leak or

[3] Mandatory Appendix D provides in part: "Respirator use is encouraged, even when exposures are below the exposure limit, to provide an additional level of comfort and protection for workers." Appendix D implements the provisions of § 1910.134(c)(2), which addresses the elements of an employer's respiratory protection program "[w]here respirator use is not required."

spill and resuming operations only after completion of cleanup; requiring employees engaged in cleaning up leaked or spilled Waelz oxide to wear personal protective equipment that included Tyvek suits, gloves, goggles, safety vests, and steel toe boots; recognizing that employees engaged in handling FIBCs and cleaning up any leaked or spilled Waelz oxide could voluntarily use a filtering facepiece (dust mask) or half-face negative-pressure respirator (if approved to use such a respirator [T. 212-13; Ex. C-6 at 1]); before beginning cleanup, using dust suppression mechanisms, such as the application of water; using a small HEPA filter vacuum for small leaks or spills; engaging a third party environmental contractor for any large spills; having a water truck available to dampen any large spill areas if needed and a vacuum sweeper truck on standby for immediate removal of any spills; having special fabric tape on hand to use on FIBCs that had only minor damage and were reparable with the tape; and prepositioning lined dumpsters for the deposit of any irreparably damaged FIBCs. (T. 171-8l; Exs. C-5 & C-6).

19. Metro trained and authorized only two of its employees to handle the Befesa FIBCs and to clean up any leaks or spills of Waelz oxide. (T. 181). These two employees were trained on and knowledgeable about the SDS for Waelz oxide and Metro's specially developed mitigation and cleanup protocols for Waelz oxide. (T. 57-58, 81, 102, 124, 181, 187, 193-97). Previously, both employees had been authorized and required to use half face respirators when they handled *cement* cargo at the marine terminal. (T. 185-86). Both employees had been informed and were aware that Metro did not require them to use any form of respirator when handling the FIBCs containing Waelz oxide, but that they had the option of voluntarily using a filtering facepiece (dust mask) or the half face respirator that each was required to use when handling cement cargo. (T. 163-64, 201; Ex. C-7 at 3-4).

20. Metro's Respiratory Protection Program provides that the company evaluates whether a material presents a hazard that would require the use of respiratory equipment by doing the following: "Reviewing Safety Data Sheets (SDSs) for substances that Employees use or are exposed to;" "Observing and evaluating changes in procedures that may increase exposure concentrations of hazardous materials or introduce other toxic substances or may increase the degree of Employee exposure;" "Reviewing SDSs and warning information about new materials or processes as they are introduced;" and "Performing appropriate tests, sampling, or monitoring when a responsible supervisor perceives that there may be significant exposure to hazardous airborne substances." (Ex. C-7 at 2). In evaluating the respiratory hazard presented by the Waelz oxide contained in the FIBCs, Metro acted in conformance with its Respiratory Protection Program.

21. Prior to receiving the FIBCs with the Waelz oxide, Metro did not conduct any personal exposure air monitoring for the two employees who would handle the FIBCs and who would be involved in cleaning up leaks or spills of Waelz oxide. (T. 44).

22. In evaluating whether employees handling the FIBCs and who engaged in cleaning up leaks or spills of Waelz oxide would be exposed to respiratory hazards, Metro reasonably considered (a) its prior experience in handling FIBCs, (b) the HCS-compliant SDS for Waelz oxide, and (c) the information and recommendations of the owner and shipper of the Waelz oxide. (T. 255-60, 268-70, 279-80; Ex. R-26 at 3).

23. Metro reasonably tailored the relevant workplace and user factors at its marine terminal that would bear on potential employee exposure to respiratory hazards from handling the FIBCs containing Waelz oxide. This included developing and implementing mitigation and cleanup protocols in consultation and collaboration with the owner/shipper of the Waelz oxide and

designating and training only two employees to handle the FIBCs and to clean up leaks or spills of Waelz oxide in accordance with those specially developed protocols. (T. 255-60, 268-70, 279-80).

24. Metro reasonably estimated that its two employees who had been trained and authorized to handle FIBCs and clean up leaks and spills pursuant to its specially developed protocols would not be exposed to any respiratory hazard associated with Waelz oxide. (T. 166, 255-60, 268-70, 279-80).

25. Metro did not include either lead or cadmium, both of which were constituents of Waelz oxide, in its hazard communication program that it maintained to meet the requirements of OSHA's HCS. (T. 81-82, 268).

Metro's Handling of the FIBCs

26. Metro began receiving FIBCs containing Waelz oxide sometime in the second half of 2022. (T. 211).

27. After FIBCs were offloaded from a ship to the dock, Metro used forklifts to load the FIBCs onto flatbeds for movement to a Metro warehouse at the marine terminal, where the FIBCs were offloaded from the flatbed and stacked in a pyramid-style pattern so that each FIBC would be upright and supported. (Exs. C-4, C-5, & C-6; T. 250). After a time, Metro would load the warehoused FIBCs onto third-party vehicles for transport and delivery to their ultimate destinations. (T. 108, 161; Ex. C-6 at 2).

28. No undamaged FIBCs that Metro employees handled released Waelz oxide. (T. 52, 59, 74).

29. Some FIBCs that Metro first received, sometimes as many as one or two FIBCs in a single day, sustained damage and leaked or spilled Waelz oxide. (T. 182-83). There is no evidence of the exact or even an approximate number of FIBCs that leaked or spilled. There is similarly no

evidence addressing whether any FIBCs sustained damage during handling by Metro employees, and if so, the exact or approximate number.

30. The frequency of leaks and spills that Metro experienced in 2022 upon first receiving the FIBCs did not cause Metro to conduct personal exposure air monitoring for the two employees who were handling the FIBCs and who were involved in cleaning up spills or leaks of Waelz oxide. (T. 44, 182-84, 276).

31. Sometime around late 2022, Metro reported to Befesa the frequency of damaged FIBCs and resulting leaks or spills of Waelz oxide. (T. 177-78). Befesa responded to this report by switching the FIBC that it had been using to a different version FIBC. Befesa made this change early in 2023. The FIBCs that Befesa switched to did not leak or spill with the frequency of the FIBCs used initially. Rather, only one of those different version FIBCs leaked or spilled. That leak/spill event occurred on February 1, 2023. That leak/spill event was the last such event from an FIBC containing Waelz oxide. (T. 178, 182-83).

OSHA Inspection and Investigation

32. On July 27, 2023, the inspecting OSHA compliance officer (CO) conducted personal exposure air monitoring of the two Metro employees during their handling of FIBCs containing Waelz oxide. (T. 38; Ex. R-26 at 4). No leaks, spills, or cleanup of Waelz oxide occurred during this monitoring. (T. 52, 99, 108). This air monitoring detected no zinc, lead, or cadmium (i.e., a result of "non-detect"). (T. 52, 59, 74).

33. During the inspection, the CO observed some kind of powdery substance on the outside of some undamaged FIBCs (T. 79), but there is no substantial evidence that this substance was Waelz oxide. (T. 115-16).

34. OSHA cited Metro for a violation of § 1910.134 because Metro had not conducted personal exposure air monitoring or obtained any empirical data respecting employee exposure to airborne Waelz oxide from leaks or spills or during their cleanup. (T. 52, 59-60, 99-100, 105-06).

Lead and Cadmium Detected on Tabletop in Common Area

35. One of the stand-alone buildings at Metro's marine terminal housed a common room that included a conference table at which employees sometimes ate and drank. Exhibit C-12 is a photograph of that conference table. (T. 62-64). This building was about 600 feet from the building where the FIBCs with the Waelz oxide were warehoused. (T. 86, 197).

36. On July 27, 2023, the CO collected two "swipe" samples from the table's top surface. An OSHA laboratory in Salt Lake City processed the two swipe samples and detected the presence of lead in both samples (70.7760 and 21.3300 micrograms respectively) and the presence of cadmium in one sample (1.9324 micrograms).[4, 5] (T. 69; Ex. C-10, Bates pagination 0073).

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[4] Excerpts from a report generated by the OSHA laboratory (Ex. C-10) were admitted in evidence over Metro's hearsay objection. (T. 70-71). The report's conclusions that lead and cadmium were present on the swipe samples are accepted for their truth pursuant to Federal Rule of Evidence 803(8), which sets forth the "public records" exception to the rule against hearsay evidence. Rule 803(8) provides in part that a "record or statement of a public office" is not excluded by the rule against hearsay in civil cases if it "sets out … factual findings from a legally authorized investigation" and further if "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8)(A)(iii) & (B); *see United States v. Oates*, 560 F.2d 45, 66–67 (2d Cir. 1977) (stating that "it seems indisputable" that the official report and worksheet of a U.S. Customs Service chemist that identified a substance to be heroin constituted "factual findings resulting from an investigation made pursuant to authority granted by law" under the predecessor provision to current Fed. R. Evid. 803(8)(A)(iii)). The excerpts of the report from OSHA's laboratory in Salt Lake City meet the criteria of Rule 803(8)(A)(iii), and Metro has not shown the reported results lack trustworthiness under Rule 803(8)(B). The lab's reported results set forth in Exhibit C-10 are therefore accepted for their truth pursuant to Rule 803(8).

[5] On the swipe sample that detected both lead and cadmium, there was roughly 35 times more lead than cadmium. (T. 69; Ex. C-10, Bates pagination 0073). In contrast, according to the

37. The most recent spill or leak of Waelz oxide at Metro's marine terminal had occurred on February 1, 2023, which was about six months before the CO collected the two swipe samples from the tabletop. (T. 178-79, 183).

38. Throughout 2022 and 2023, Metro utilized a cleaning contractor to perform weekly cleanings of the building where the conference table was located. (T. 199-200). The weekly cleaning included cleaning the surface of the conference table. (T. 199-200). Metro had originally implemented this professional cleaning, among other precautions, in response to the COVID-19 pandemic. (T. 199).

39. There is no substantial evidence that the source of the lead or the cadmium captured on the swipe samples taken on July 27, 2023, originated from an FIBC containing Waelz oxide. (T. 262).

40. Metro exercised reasonable diligence in its efforts to maintain surfaces as free as practicable from accumulations of lead and cadmium. (T. 263).

DISCUSSION

The Commission has jurisdiction pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (Act). (J. Prehr'g Statement, § D). Metro is an "employer" as defined in section 3(5) of the Act and is thus subject to the compliance provisions of section 5(a). 29 U.S.C. §§ 652(5) & 654(a).

To prove a violation of an OSHA standard, the Secretary must prove that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees were exposed to, or had access to, the violative condition, and (4) the employer knew or, through the exercise of

SDS, the ratio of lead to cadmium in Waelz oxide is the inverse, with only "trace" amounts of lead but concentrations of cadmium between 0.1% and 2.5%. (Ex. C-3 at 2).

reasonable diligence, could have known of the violative condition. *See Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

Citation Items 3a and 3b

(*§§ 1910.1025(m)(1)(iii) [lead] & 1910.1027(m)(1)(iii) [cadmium]*)

Citation Items 3a and 3b are vacated because Metro has established that the cited lead and cadmium standards do not apply to its handling of the FIBCs pursuant to a limited exception to the application of those standards that is set forth in OSHA's Marine Terminals standard at 29 C.F.R. § 1917.1(a)(2)(xiii)(A).

Cited Lead and Cadmium Standards

In Citation Items 3a and 3b, the Secretary alleged violations of parallel provisions of the separate lead and cadmium standards codified at §§ 1910.1025(m)(1)(iii) [lead] and 1910.1027(m)(1)(iii) [cadmium]. Both cited subparagraphs (iii) were promulgated in 2012 in conjunction with OSHA's modification of the hazard control standard (HCS) at § 1910.1200 to conform to the United Nations' Globally Harmonized System of Classification and Labelling of Chemicals. Hazard Communication, 77 Fed. Reg. 17474, 17780-81 (Mar. 26, 2012) (to be codified at 29 C.F.R. pt. 1910).

The cited subparagraphs require an employer to (a) include lead and cadmium in its hazard communication program that the employer has established to comply with the HCS, (b) ensure employees have access to labels on containers of lead and cadmium and to safety data sheets, and (c) provide training on topics specific to lead and cadmium.[6] Both citation items allege that Metro

[6] The substantially identical cited subparagraphs in the respective lead and cadmium standards are underscored in the quotations below. The subparagraphs (i) and (ii) that precede the

violated the cited subparagraphs in each of those three particulars. However, the Secretary has not argued that Metro failed to comply with the subparagraphs' requirements to "ensure that each employee has access to labels on containers" of lead and cadmium and "to safety data sheets" (e.g.,

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cited subparagraphs (iii) in each of the standards are set out also to provide context to the cited subparagraphs (iii):

> **§ 1910.1025 Lead.**
> (a) *Scope and application.* …
> * * *
> (m) *Communication of hazards*—(1) *Hazard communication—general*. (i) Chemical manufacturers, importers, distributors and employers shall comply with all requirements of the Hazard Communication Standard (HCS) (§ 1910.1200) for lead.
> (ii) In classifying the hazards of lead at least the following hazards are to be addressed: Reproductive/developmental toxicity; central nervous system effects; kidney effects; blood effects; and acute toxicity effects.
> (iii) Employers shall include lead in the hazard communication program established to comply with the HCS (§1910.1200). Employers shall ensure that each employee has access to labels on containers of lead and to safety data sheets, and is trained in accordance with the requirements of HCS and paragraph (*l*) of this section.
>
> **§ 1910.1027 Cadmium.** …
> (a) *Scope.* …
> * * *
> (m) *Communication of cadmium hazards to employees*—(1) *Hazard communication.—general.* (i) Chemical manufacturers, importers, distributors and employers shall comply with all requirements of the Hazard Communication Standard (HCS) (§ 1910.1200) for cadmium.
> (ii) In classifying the hazards of cadmium at least the following hazards are to be addressed: Cancer; lung effects; kidney effects; and acute toxicity effects.
> (iii) Employers shall include cadmium in the hazard communication program established to comply with the HCS (§ 1910.1200). Employers shall ensure that each employee has access to labels on containers of cadmium and to safety data sheets, and is trained in accordance with the requirements of HCS and paragraph (m)(4) of this section.

Sec'y Supp. Br. 6), and thus those components of the two alleged substantially identical violations are deemed abandoned. *See L&L Painting Co.*, 23 BNA OSHC 1986, 1989, n. 5 (No. 05-0055, 2012) (treating an issue not argued in brief to be abandoned); *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1181-82 (D.C. Cir. 2014) (ruling that a claim that was mentioned in a brief "only in a cursory manner" was forfeited).

The cited subparagraphs' requirements to include lead and cadmium in the employer's hazard communication program (HCP) established to comply with the HCS (§ 1910.1200) implements subparagraph (e)(1)(i) of the HCS, which requires an employer to include in its HCP a "list of the hazardous chemicals known to be present" in the workplace.

The cited subparagraphs' training requirements are set forth (1) in § 1910.1025(*l*) of the lead standard, which is comprised of 15 subparagraphs and references material in appendices that have more than 7,000 words, and (2) in § 1910.1027(m)(4) of the cadmium standard, which is comprised of 14 subparagraphs and references material in an appendix that has more than 5,000 words. In addition to that substance-specific training on lead and cadmium, the cited subparagraphs require that employees receive the training required by § 1910.1200(h) of the HCS, which is comprised of 10 subparagraphs.

Metro does not argue that it complied with these two requirements of the cited subparagraphs, and there is no evidence indicating that it did comply. Rather, Metro's principal defense to the alleged violations is that the lead and cadmium standards do not apply pursuant to a limited exception contained in OSHA's Marine Terminals standard, 29 C.F.R. pt. 1917.

Metro Established a Limited Exception Applies to the Violations Alleged in Items 3a and 3b

Section 1917.1(a)(2)(xiii)(A) of OSHA's Marine Terminals standard provides that Subpart Z of 29 C.F.R. Part 1910 (which contains OSHA's toxic and hazardous substances standards and

includes the cited lead and cadmium standards) "applies to marine cargo handling activities except … [w]hen a substance or cargo is contained within a sealed, intact means of packaging or containment complying with Department of Transportation or International Maritime Organization requirements."[7] The entirety of this limited exception, along with its organic footnote (numbered footnote "1") is set forth below in the context of its main paragraph (a):

> **§ 1917.1 Scope and applicability.**
>
> (a) The regulations of this part apply to employment within a marine terminal as defined in § 1917.2, including the loading, unloading, movement or other handling of cargo, ship's stores or gear within the terminal or into or out of any land carrier, holding or consolidation area, any other activity within and associated with the overall operation and functions of the terminal, such as the use and routine maintenance of facilities and equipment. All cargo transfer accomplished with the use of shore-based material handling devices shall be regulated by this part.
>
> (1) ….
>
> (2) Part 1910 of this chapter does not apply to marine terminals except for the following provisions:
>
> (i) ….
>
> (xiii) *Toxic and hazardous substances*. Subpart Z applies to marine cargo handling activities except for the following:
>
> (A) When a substance or cargo is contained within a sealed, intact means of packaging or containment complying with Department of Transportation or International Maritime Organization requirements;[1]
>
> [1] The International Maritime Organization publishes the International Maritime Dangerous Goods Code to aid compliance with the international legal requirements of the International Convention for the Safety of Life at Sea, 1960.

There is no dispute that the Marine Terminals standard (Part 1917) applies to Metro's workplace and thus no dispute that the limited exception would defeat the violations alleged in

[7] The parties litigated the limited exception's reference to requirements of the International Maritime Organization. The parties offered no evidence or information respecting requirements of the Department of Transportation as referenced in the limited exception.

citation items 3a and 3b if Metro succeeds in proving it. (T. 11; J. Prehr'g Statement 5). *See Ford Dev. Corp.*, 15 BNA OSHC 2003, 2010 (No. 90-1505, 1992) ("[T]he party claiming the benefit of an exception bears the burden of proving that its case falls within that exception.").

The record evidence established that all FIBCs Befesa used to ship the Waelz oxide complied with the requirements of the DG Code as published by the International Maritime Organization (IMO). (Finding of Fact ¶ 10). (On this issue of fact there was no contradicting evidence.)

Consistent with that established fact, Metro contends that "so long as the means of packaging are IMO/DOT approved, no further review into or application of the standards in Subpart Z … is necessary." (Metro Supp. Brief 11; *see also* Metro Responsive Brief 19-20). In opposition, the Secretary argues that the limited exception does not apply to an FIBC that no longer confines its contents (i.e., an FIBC that is not "sealed, intact"). [8] (Sec'y Brief-in-Chief 13).

The issue then is whether the limited exception applies to an employer's handling of containers that comply with the requirements of the DG Code as published by the IMO but that have the potential to leak or spill their contents from tearing or breaking.

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[8] The Secretary neither asserts nor presented evidence that FIBCs that did *not* leak or spill Waelz oxide (i.e., most of the Befesa FIBCs that Metro handled) were *not* "sealed, intact." The Secretary does argue, however (albeit practically in passing), that employees were exposed to uncontained Waelz oxide from FIBCs that were not leaking or spilling contents. (Sec'y Brief-in-Chief 13, lines 6-8). The evidentiary basis of this argument is the CO's testimony that he observed a "dusting" of Waelz oxide "on top of all the bags." (T. 79). But the CO did not collect a sample of the substance that he noticed on the top of any FIBC for evaluation by OSHA's laboratory in Salt Lake City. (T. 115-16). The CO's apparent assumption that the substance he noticed was Waelz oxide is unsupported by any corroborating evidence. The CO's testimony alone does not constitute substantial evidence that would support a finding of fact that the substance he observed on the outside surface of an FIBC was Waelz oxide. *See Keystone Body Works*, 4 BNA OSHC 1523, 1524 (No. 6606, 1976) ("A violation cannot be affirmed on the basis of mere speculation and conjecture" or "on the basis of an 'educated guess.' ").

To resolve this issue entails first considering the limited exception's text and structure. *See JESCO, Inc.*, 24 BNA OSHC 1076, 1078 (No. 10-0265, 2013) ("When determining the meaning of a standard, the Commission first looks to its text and structure," and "[i]f the wording is unambiguous, the plain language of the standard will govern.").

The limited exception states: "Subpart Z applies to marine cargo activities except for the following: (A) When a substance or cargo is contained within a sealed, intact means of packaging or containment …." 29 C.F.R. § 1917.1(a)(2)(xiii)(A). The use of the conjunction *when* bears on whether textually the limited exception applies only to containers that are always "sealed, intact."

Undefined terms in OSHA standards carry their ordinary meaning. *See Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *2 (OSHRC, July 20, 2021) (referring to contemporaneous dictionary for common usage and meaning of undefined word in standard). The five definitions of the conjunction *when* in Webster's New Universal Unabridged Dictionary 2164 (1996) are: (1) "at what time: *to know when to be silent*;" (2) "at the time or in the event that: *when we were young; when the noise stops*;" (3) "at any time; whenever: *He is impatient when he is kept waiting*;" (4) "upon or after which; and then: *We had just fallen asleep when the bell rang*;" and (5) "while on the contrary; considering that; whereas: *Why are you here when you should be in school?*"

The conjunction *when* as used in the limited exception is textually susceptible of either the Secretary's or Metro's competing interpretations. However, if between these two permissible textual constructions there is only one reasonable construction, the provision is not "genuinely ambiguous" and that the one reasonable construction must be given effect. *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019). A "court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether [a] regulation really has more than one reasonable meaning." *Id.* at 589-90.

After reviewing the text of the exception, OSHA's commentary on its purpose, and the structure of the Marine Terminals standard, the undersigned concludes that the only reasonable interpretation is that a qualified "sealed, intact" receptacle that later fails to contain all its contents nevertheless remains qualified under the limited exception.

In discerning whether there is a single reasonable construction of the limited exception, the structure, context, and overall purpose of the entire Marine Terminals standard should be considered. *See Otis Elevator*, 24 BNA OSHC 1081, 1087 n. 10 (No. 09-1278, 2013) (reviewing standard's language "along with the structure and context of the standard" to determine the standard's scope), *aff'd*, 762 F.3d 116 (D.C. Cir. 2014); *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1580-81 (No. 94-1979, 2009) (interpreting a training provision in the context of entire standard and its overall purpose); *Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("Regulations are to be read as a whole, with each part or section ... construed in connection with every other part or section.") (citation modified).

The Marine Terminals standard includes § 1917.22, which like the standard's limited exception at issue here pertains to hazardous cargo.[9] It is therefore appropriate to read the two provisions as a harmonious whole. *See S. Scrap Materials Co., Inc.*, 23 BNA OSHC 1596, 1608 (No. 94-3393, 2011) (reading both the lead and cadmium standards "as a whole" and their "provisions construed together"); *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1594 n. 6 (No. 82-12, 1985) ("It is a fundamental rule of statutory construction that a standard must be read as a harmonious whole, with meaning given, if possible, to every word or phrase.").

[9] The Marine Terminals standard defines the term *hazardous cargo* in § 1917.2 to include "[a]ny substance listed in 29 CFR part 1910, subpart Z."

Paragraph (c) of § 1917.22 reflects the commonsense reality that hazardous cargo sometimes leaks or spills:

> **§ 1917.22 Hazardous cargo**[2]
>
> [Footnote numbered 2 to § 1917.22:] [2] The Department of Transportation and the United States Coast Guard apply requirements related to handling, storing and transportation of hazardous cargo (see 33 CFR Part 126, 46 CFR, 49 CFR).
>
> (a) Before cargo handling operations begin, the employer shall ascertain whether any hazardous cargo is to be handled and shall determine the nature of the hazard. The employer shall inform employees of the nature of any hazard and any special precautions to be taken to prevent employee exposure, and shall instruct employees to notify him of any leaks or spills.
>
> (b) All hazardous cargo shall be slung and secured so that neither the draft nor individual packages can fall as a result of tipping the draft or slacking of the supporting gear.
>
> (c) If hazardous cargo is spilled or if its packaging leaks, employees shall be removed from the affected area until the employer has ascertained the specific hazards, provided any equipment, clothing and ventilation and fire protection equipment necessary to eliminate or protect against the hazard, and has instructed cleanup employees in a safe method of cleaning up and disposing of a spill and handling and disposing of leaking containers. Actual cleanup or disposal work shall be conducted under the supervision of a designated person.

The original notice of proposed rulemaking for the Marine Terminals standard contained a discussion of then-proposed § 1917.22 that addressed hazardous cargo contained in sealed and intact packaging. This discussion informs the analysis of the regulatory intent underlying the limited exception:

> It is important to note, however, that although any substance included in the proposed definition of "hazardous" has the potential to cause harm, specific circumstances vary, depending on the toxicity of the substance involved, the duration of the exposure, and the susceptibility of the individual exposed. *In the case of hazardous cargo moving in trade, these circumstances occur rarely and only by accident, because cargo of this type is contained in sealed and intact packaging, which prevents employee exposure entirely. It is only when such packaging leaks or breaks that*

> *hazardous exposures can occur. The precautions for handling hazardous cargo included in the proposal are intended to prevent such occurrences if at all possible and to protect employees from harmful effects when they do occasionally occur*.
>
> Proposed paragraph (a) requires the employer to determine the nature of the hazardous cargo to be handled and then to inform employees both of any potential hazards and special precautions required to handle the cargo and the proper methods for cleaning up any leaks or spills.
>
> Proposed paragraph (b) requires that hazardous cargo be handled by methods that will prevent damage to the container, to minimize the risk of employee exposure. Examples of appropriate precautions might be nets or lashings.
>
> *Paragraph (c) proposes precautions to be taken to reduce exposure to hazardous substances that have leaked or spilled from containers.* For example, if leaks or spills occur, employers are required to clear the danger area of personnel other than those engaged in the cleanup operations, to provide appropriate protective and cleanup equipment, and to instruct employees in the proper method of cleaning and disposing of the hazardous substance. . . .

46 Fed. Reg. at 4191-92 (emphasis added).

The substantive requirements of § 1917.22 apply to all hazardous cargo, even hazardous cargo that qualifies for the limited exception. Thus, Metro was required to meet the requirements of § 1917.22 when handling the FIBCs containing Waelz oxide regardless of whether that cargo qualified for the limited exception to the application of Subpart Z. Section 1917.22 expressly contemplates the possibility that any container holding hazardous cargo could leak or spill, even containers that comply with the DG Code. Read in tandem with the limited exception, § 1917.22 is consistent with a regulatory intent that the limited exception applies even when a DG Code compliant container leaks or spills its contents.[10]

[10] The Secretary did not allege a violation of § 1917.22, and so Metro's compliance with that provision was not litigated. Nevertheless, there is no record evidence to indicate that Metro was noncompliant with § 1917.22.

OSHA's hazard communication standard (HCS), § 1910.1200, further informs the analysis of the regulatory intent underlying the limited exception of § 1917.1(a)(2)(xiii)(A). Section 1910.1200(b)(4) significantly limits the scope of HCS's coverage over "work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use (*such as are found in marine cargo handling*, warehousing, or retail sales) . . . ." (emphasis added).[11] The entirety of § 1910.1200(b)(4) provides:

> (b) *Scope and application*. (1) ….
>
> (4) In work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use (such as are found in marine cargo handling, warehousing, or retail sales), this section applies to these operations only as follows:
>
> (i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;
>
> (ii) Employers shall maintain copies of any safety data sheets that are received with incoming shipments of the sealed containers of hazardous chemicals, shall obtain a safety data sheet as soon as possible for sealed containers of hazardous chemicals received without a safety data sheet if an employee requests the safety data sheet, and shall ensure that the safety data sheets are readily accessible during each work shift to employees when they are in their work area(s); and,
>
> (iii) Employers shall ensure that employees are provided with information and training in accordance with paragraph (h) of this section (except for the location and availability of the written hazard communication program under paragraph (h)(2)(iii) of this section), to the extent necessary to protect them in the event of a spill or leak of a hazardous chemical from a sealed container.

[11] The HCS, which is included in Subpart Z, would not apply to Metro's handling of the FIBCs if Metro qualified for the limited exception. However, if the FIBCs did not qualify for the limited exception, then the HCS would apply to Metro's handling of the FIBCs containing Waelz oxide, but the provisions of paragraph (b)(4) would substantially limit the scope of that coverage.

In the 1987 preamble to the final rule promulgating the HCS's subparagraph (b)(4), OSHA explained the purpose of limiting the HCS's coverage to "work situations where employees only handle sealed containers of chemicals" such as in "marine cargo handling":

> *Coverage determined by "exposure."* The HCS covers situations where employees "may be exposed" to hazardous chemicals (paragraph (b)(2)), and such exposure is defined to include potential exposure as well as actual exposure. This is to ensure that employees receive information about all chemical hazards in their work areas, and that they are prepared to deal with any unexpected releases or emergency situations, as well as exposures during the normal course of employment. …
>
> *There are a number of work situations where employees only handle sealed containers of chemicals, and under normal conditions of use would not open the containers and would not expect to experience any measurable exposure to the chemicals.* Such work operations include, for example, warehousing, retail sales, *marine cargo handling* and trucking terminals. *It is reasonable to assume, however, that all such containers are subject to leakage and breakage, and these employees are in fact potentially exposed by virtue of the presence of these hazardous chemicals in their workplaces*. Because of this potential exposure, they need information to protect themselves from the hazards of these chemicals in the event such an emergency situation occurs.
>
> *However, OSHA has considered the extent of information necessary or appropriate in this type of operation, and the practicality of requiring such work operations to be subject to all of the provisions of the rule. The primary need is to ensure that these employees know how to acquire and use the hazard information available to them, and to handle an emergency exposure situation. As in laboratory operations, maintaining lists of chemicals where the chemicals present may change on short notice; sometimes on a daily basis, is not a useful requirement. Similarly, obtaining material safety data sheets for every chemical in a sealed container that passes through a facility--even if it is there less than a day in some situations--would result in a considerable amount of paperwork, with little discernable benefit for the employees involved. Therefore, OSHA has added a provision, paragraph (b)(4), to limit the duties of employers for those work operations where employees only handle sealed containers that are not intended to be opened under normal conditions of use.* … In these

> situations, employers must not remove labels affixed to incoming containers of hazardous chemicals; must maintain, and provide access to material safety data sheets that are received for hazardous chemicals while the chemicals are in the workplace, and obtain material safety data sheets when they are not received but an employee requests one; and must train employees in accordance with the provisions of the rule to ensure they are protected in the event of a spill or leak.
>
> The employees in these operations will always have access to the label information, which will provide appropriate hazard warnings and be a visual reminder of the potential hazards if exposure occurs. Employees will also be trained regarding the general classes of chemical hazards faced and the means by which they can protect themselves from these hazards when there is a spill or leak. The training must also address the availability and use of substance-specific information found on labels and material safety data sheets, where available. *These requirements should provide employees handling only sealed containers of chemicals with the information they need.*
>
> … OSHA believes the limited coverage described will effectively protect employees while recognizing the constraints of the particular work operations involved with regard to the applicability of the current rule to these types of work.

Hazard Communication, 52 Fed. Reg. 31852, 31861-62 (Aug. 24, 1987) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1926 and 1928) (emphasis added except for italicized lead sentence). An expert witness for Metro echoed much of the preamble's logic that underlies limiting the HCS's coverage to work operations such as marine terminals, testifying knowledgeably about myriad impracticalities of the wholesale application of Subpart Z to marine cargo handling operations. (T. 245-46, 269-71; Ex. R-26 at 12). *Cf. Lauhoff Grain Co.*, 13 BNA OSHC 1084, 1087 (No. 81-984, 1987) (considering expert testimony in determining whether there was ambiguity in an otherwise unambiguous term).

The "conscientious effort" required by *Kisor v. Wilkie* to discern whether the limited exception in § 1917.1(a)(2)(xiii)(A) has more than one reasonable meaning by considering its

"text, structure, history, and purpose" yields this conclusion: the only reasonable interpretation of the limited exception is that it applies to cargo contained within sealed, intact, IMO-compliant containers, even if such containers may subsequently tear/break and leak/spill contents.

The contrary interpretation that the Secretary propounds would effectively render the limited exception illusory. That IMO-compliant containers may sometimes leak or spill their contents cannot be gainsaid—as discussed above, there is express recognition of this commonsense reality in regulatory text, structure, and history. The Secretary's interpretation would effectively nullify the limited exception because no marine terminal operator could reasonably assure that the IMO-compliant containers that it handles would not leak or spill, and thus no marine terminal operator could reasonably rely on the limited exception. Under the Secretary's interpretation of the limited exception, marine terminal operators would have no reasonable option other than to comply with Subpart Z with respect to IMO-compliant containers. The Secretary's interpretation is unreasonable because the regulatory intent underlying the limited exception could not have been to create an exception whose criteria are unachievable.[12]

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[12] Even if the Secretary's construction of the limited exception represented its unambiguous textual meaning, that interpretation still could not reasonably prevail in the face of compelling indications of a contrary regulatory intent. *See Maxim Crane Works*, No. 17-1894, 2021 WL 2311880, at *6 (OSHRC, May 20, 2021) (consulting regulatory history to ensure that there is no express intent contrary to provision's plain language). As discussed, to adopt the Secretary's interpretation would result in the limited exception effectively being unavailable to the marine terminals industry. (*See* T. 268-69; Metro Supp. Reply Brief 9-10). This would be an absurd result that certainly could not have been intended in the creation of the limited exception. *See Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993) ("It is well established that a statute or, in this case, a standard must be construed so as to avoid an absurd result."); *Manganas Painting Co., Inc.*, 21 BNA OSHC 1964, 1977 (No. 94-0588, 2007) ("It is also well-established, however, that even 'plain meaning' may have to yield where its result would be absurd."); *King v. Burwell*, 576 U.S. 473, 494 (2015) (rejecting strict textual approach to interpreting a statute upon concluding that it was "implausible that Congress meant the Act to operate in this manner"); *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting government's interpretation of a

Accordingly, the FIBCs containing Waelz oxide that Metro handled at its marine terminal were not subject to the requirements of Subpart Z because they qualified for the limited exception. The cited lead and cadmium standards, which are included in Subpart Z, are therefore not applicable, and so items 3a and 3b of the citation must be vacated.

Alternatively, the Standards Cited in Items 3a and 3b Are Preempted by § 1910.1200(b)(4)

Even if the lead and cadmium standards did apply to Metro's handling of the FIBCs, the subparagraphs of the standards that are cited in citation items 3a and 3b would be preempted by the more specific provisions of subparagraph (b)(4) of the HCS by operation of 29 C.F.R. § 1910.5(c)(1), which provides that a specific standard preempts a general one if "a condition, practice, means, methods, operation, or process" is already dealt with by the specific standard.[13]

"A general standard prescribing compliance action is not preempted by a specific standard unless both address the same particular hazard." *McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1879, 1880 (No. 90-2337, 1994) (citation modified), *aff'd*, 71 F.3d 208 (6th Cir. 1995). A specific standard preempts the more general standard where "the two standards are not additive and complementary, but instead are directly conflicting." *McNally Constr.,* 16 BNA OSHC at 1883.

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statute that "would produce an absurd and unjust result which Congress could not have intended") (citation modified).

[13] Section 1910.5(c)(1) provides in relevant part:

> **§ 1910.5 Applicability of standards.**
>
> (a) ….
>
> (c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process....

As discussed above, paragraph (b)(4) of the HCS (§ 1910.1200) prescribes only limited coverage of the HCS over work operations such as marine terminals where the hazardous cargo that employees handle is in sealed containers that are not opened under normal cargo handling conditions. Section 1910.1200(b)(4) is more specific than the cited provisions of the lead and cadmium standards, in that it specifically applies to hazardous chemicals "in sealed containers which are not opened under normal conditions of use," whereas the cited provisions of the lead and cadmium standards apply to those substances regardless of their containers or mode of use and handling. Both § 1910.1200(b)(4) and the cited provisions of the lead and cadmium standards address the same hazards: employee exposure to hazardous chemicals. The two standards are not additive or complementary but rather are irreconcilably conflicting in the following particulars:

- The cited subparagraphs of the lead and cadmium standards require employers to include lead and cadmium in the employer's hazard communication program established under the HCS. The more specific standard, subparagraph (b)(4) of the HCS, in its listing of the *only* components of the HCS that apply to sealed containers, does not include the requirement of paragraph (e)(1)(i) of the HCS that the employer list in the employer's hazard communication program the constituent hazardous chemicals that make up a hazardous substance that is in a sealed container.
- The cited subparagraphs of the lead and cadmium standards require employers to maintain safety data sheets for lead and cadmium. The more specific subparagraph (b)(4)(ii) of the HCS requires that employers maintain only the safety data sheet for the substance in the sealed container, not for any of that substance's constituent chemicals.
- The cited subparagraphs of the lead and cadmium standards require employers to provide the substance-specific training that is prescribed by each of those standards. The more specific subparagraph (b)(4)(iii) of the HCS requires employers to provide only the training required by paragraph (h) of the HCS "to the extent necessary to protect [employees] in the event of a leak or spill."

- The cited subparagraphs of the lead and cadmium standards require employers to "insure each employee has access to labels on containers." The more specific subparagraph (b)(4)(i) of the HCS requires only that "labels on incoming containers of hazardous chemicals are not removed or defaced."

The more specific standard of paragraph (b)(4) of the HCS prevails over the more general and conflicting cited subparagraphs in the lead and cadmium standards. And, thus, even if the limited exception to the application of Subpart Z does not apply to the FIBCs that Metro handled, the cited subparagraphs of the lead and cadmium standards are preempted and do not apply.[14]

Citation Items 2a and 2b

(*§§ 1910.1025(h)(1) [lead] & 1910.1027(k)(1)[cadmium]*)

In citation items 2a and 2b, the Secretary alleged violations of parallel provisions of the separate lead and cadmium standards pertaining to housekeeping. §§ 1910.1025(h)(1) [lead] & 1910.1027(k)(1) [cadmium]. The cited subparagraphs of those standards employ identical language and provide as follows: "(1) *Surfaces.* All surfaces shall be maintained as free as practicable of accumulations of [lead/cadmium]." The citation items allege that Metro violated these standards as follows: "On or about July 27, 2023, the employer did not ensure employee break/office table was free of [lead/cadmium] accumulation."

The Secretary's theory of the case is that the FIBCs containing Waelz oxide were the source of the lead and cadmium detected on the swipe samples the CO took from the surface of a conference table in a breakroom. (Sec'y Brief-in-Chief 10). As set forth in Findings of Fact ¶¶ 35

[14] The Secretary did not cite Metro for having violated the provisions of subparagraph (b)(4) of the HCS, and so Metro's conformance with that standard was not litigated. Nevertheless, the record evidence indicated Metro to have generally conformed with the requirements of that section, notwithstanding Metro's successful litigation position that it was excepted from complying with the provisions of the HCS (and all of Subpart Z) in connection with its handling of the FIBCs containing the Waelz oxide.

through 39, there is no substantial evidence that the FIBCs were the source of the lead or cadmium detected on the break room table. Consequently there is no evidence to support a conclusion that the limited exception to the application of Subpart Z in § 1917.1(a)(2)(xiii)(A) is operative with respect to the housekeeping provisions of the lead and cadmium standards.[15]

As determined in Findings of Fact ¶¶ 38 & 40, the record evidence is that Metro exercised reasonable diligence in its efforts to maintain surfaces as free as practicable from accumulations of both lead and cadmium. The preamble to the final rule of the lead standard discusses the "free as practicable" housekeeping standard as follows:

> OSHA's view is that a rigorous housekeeping program is absolutely necessary to keep airborne lead levels below permissible limits but that the obligation should be measured by a standard of practicability. This contemplates a regular housekeeping schedule based on exposure conditions at a particular plant and the capability for emergency cleanup of spills or other unexpected sources of exposure.

Occupational Exposure to Lead, 43 Fed. Reg. 52952, 52994 (Nov. 14, 1978) (to be codified at 29 C.F.R. pt. 1910) (citation modified).

The Secretary presented no evidence reflecting the significance of the quantum of lead and cadmium detected on the swipe samples other than the non-expert testimony of the CO, who characterized those concentrations as being "low." (T. 76). The Secretary presented no evidence that Metro's housekeeping schedule and regimen, as set forth in Findings of Fact ¶ 38, reflected a lack of reasonable diligence. To the contrary, the only record evidence of the reasonableness of

[15] If the Secretary had proven that the FIBCs had been the source of the lead and cadmium detected on the table, then the citation items would be vacated for the same reason the other two alleged violations of the lead and cadmium standards were vacated—because Metro's cargo handling activities of the FIBCs was exempt from the requirements of Subpart Z by operation of the limited exception in § 1917.1(a)(2)(xiii)(A) of the Marine Terminals standard.

Metro's housekeeping measures was that of Metro's expert witness, who credibly testified that Metro's housekeeping protocols and practices were "a little more than most marine cargo handling employers do." (T. 263). The alleged violations of the housekeeping provisions of the lead and cadmium standards have not been proven and must be vacated.

Citation Item 1

(*§ 1910.134(d)(1)(iii) [evaluation of respiratory hazards]*)

Citation item 1 alleges a violation subparagraph (d)(1)(iii) of OSHA's respiratory protection standard, 29 C.F.R. § 1910.134. The cited subparagraph provides in relevant part as follows: "The employer shall identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazard(s). …"

The citation item alleges that Metro violated subparagraph (d)(1)(iii) in the following manner:

> On or about July 27, 2023, where employees were being exposed to unknown levels of cadmium and lead dust while engaged in handling 2-ton zinc sacks with PITs, a respiratory assessment had not been conducted to determine if the GVS half face respirators being provided to employees was adequate protection especially during spill cleanup activity.

Before addressing the merits of the alleged violation, it must be noted that a factual averment in the above description misstates the facts. While it is true that Metro had provided the two employees who were designated to handle the FIBCs with half face respirators (brand name GVS), Metro had *not* required those employees to use them when handling the FIBCs or when cleaning up leaks or spills from FIBCs. Rather, the uncontroverted evidence showed that Metro had provided those employees with half face respirators to use when handling *cement* cargo. Metro had neither selected nor required the employees to use any respirator when handling FIBCs or when cleaning up leaks and spills from the FIBCs. (T. 58-59, 93-96, 99, 192-93, 213-14; *cf.* Ex.

C-1 at 1-3). Rather, the employees had been instructed that they were permitted to wear half face respirators (or filtering facepieces [dust masks]) when handling the FIBCs. The employees had been trained on the requirements of § 1910.134(c)(2) and Mandatory Appendix D to § 1910.134 regarding the voluntary use of half face respirators or filtering facepieces.[16] (Finding of Fact ¶ 19; T. 93-96, 163-64, 192-93).

Cited Standard Applies

Section 1917.1(a)(2)(x) of the Marine Terminals standard specifies that the respiratory protection standard, § 1910.134, applies to employment within marine terminals. The cited standard therefore applies to Metro's marine terminal in Wilmington.[17]

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[16] The CO testified that on July 27, 2023, he observed at least one employee wearing a half face respirator while handling FIBCs (though no evidence corroborative of the CO's observation was presented). Assuming the accuracy of the CO's recollection, if respirator use were not required, the employee's voluntary use of the half face respirator would be deemed permissible under § 1910.134. (*See* T. 47, 93, 97-98).

[17] If the lead and cadmium standards had been determined to apply to Metro's handling of the FIBCs (as the Secretary unsuccessfully contended with respect to the alleged violations set forth in citation items 3a and 3b as discussed above), then the cited subparagraph of § 1910.134 in citation item 1 would *not* apply by operation of provisions in both the lead and cadmium standards that except the application of the cited subparagraph with respect to lead and cadmium. Sections 1910.1025(f)(2)(i) [lead standard] and 1910.1027(g)(2)(i) [cadmium standard] expressly except lead and cadmium from the cited subparagraph [1910.134(d)(1)(iii)] by the following identical language in both:

> (2) *Respirator program.* (i) The employer must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (*except (d)(1)(iii)*), and (f) through (m), which covers each employee required to use a respirator.

(emphasis added). In the 1998 preamble to the final rule (§ 1910.134), OSHA explained the reasoning behind these exceptions in the lead and cadmium standards (and in other substance-specific standards):

> Paragraph (d)(1)(iii) of the revised respiratory protection standard [§ 1910.134], which requires employers to estimate exposure levels in selecting appropriate respirators, has not been incorporated into OSHA's substance-specific standards in the final rulemaking. The

Noncompliance Not Proven

The Secretary relies principally on the testimony of the inspecting CO to establish noncompliance with subparagraph (d)(1)(iii).[18] The CO testified that Metro was cited for violating subparagraph (d)(1)(iii) because employee exposure to airborne lead and cadmium during leak or spill events "was not evaluated, and, therefore, [Metro] does not have any knowledge as to what those exposures are." (T. 60; *see also* T. 105-06). The CO explained further that "other than the spills" he was "okay with everything," thus indicating that Metro was not regarded to have otherwise failed to comply with subparagraph (d)(1)(iii). (T. 99-100).

The CO described the following ways that a reasonable estimate of employee exposure to lead and cadmium during leak or spill events could have been accomplished: (1) conducting personal air monitoring that included monitoring during leak or spill events and cleanup (T. 42); (2) using "historical data" from other companies that have "a similar operation where they're doing similar things, similar tasks, similar duration, et cetera," or using "objective data" collected by trade associations of the same nature (T. 42-43, 142-44); and (3) using "mathematical approaches" based on "chemical properties and their nature" to estimate what employee "exposure would be" (T. 43). The CO believed that Metro had failed to utilize any of these methods in estimating

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> existing substance-specific standards … already include exposure assessment provisions that are more specific than the general exposure-assessment requirement in the final respiratory protection standard.

Respiratory Protection, 63 Fed. Reg. 1152, 1267 & 1288 (Jan. 8, 1998) (to be codified at 29 C.F.R. pts 1910 and 1926).

[18] The CO has worked for OSHA as a compliance officer and industrial hygienist for nearly 30 years. He has bachelor's and master's degrees in environmental health, but he does not have a degree in industrial hygiene. Over his nearly 30-year career with OSHA, he has conducted about 20 to 25 inspections of marine terminals and ports, and he considers himself to be "somewhat" familiar with those industries. (T. 22-25, 85).

potential employee exposure to airborne lead and cadmium in the cleanup of leaks and spills of Waelz oxide. (T. 43-44, 52-53).

The means for estimating employee exposure to respiratory hazards that the CO testified about are consistent with OSHA's discussion in the 1998 preamble to the final rule. Respiratory Protection, 63 Fed. Reg. 1152 (Jan. 8, 1998) (to be codified at 29 C.F.R. pts. 1910 and 1926). In that preamble, OSHA stated that it "has always considered personal exposure monitoring the 'gold standard' for determining employee exposures," but that it "recognizes that there are many instances in which it may not be possible or necessary to take personal exposure measurements to determine whether respiratory protection is needed." *Id.* at 1199. OSHA noted further that "there are numerous other substances for which there are no readily available methods for personal sampling." *Id.* With respect to using "mathematical approaches and obtainable information" in conducting the "reasonable estimate of employee exposures to respiratory hazards" required by subparagraph (d)(1)(iii), OSHA noted the "complex factors" that bear on such estimates, such as "the physical and chemical properties of air contaminants, combined with information on room dimensions, air exchange rates, contaminant release rates, and other pertinent data, including exposure patterns and work practices, to estimate the maximum exposure that could be anticipated in the workplace." *Id.* OSHA noted further that in some cases "the nature of the materials and products being used in the workplace, and the way in which they are used, make it highly unlikely that an employee working with them would be exposed in a manner that would make respiratory protection necessary." *Id.* In those "kinds of situations, [subparagraph (d)(1)(iii)] permits employers to use other approaches for estimating worker exposures to respiratory hazards," such as (1) "information and data that indicate that use or handling of a product or material cannot, under worst-case conditions, release concentrations of a respiratory hazard above a level that

would trigger the need for respirator use," and (2) "[o]bjective data … obtained from an industry study or from laboratory test results conducted by manufacturers of products or materials being used in the workplace," if such data had been "obtained under conditions closely resembling the processes, types of materials, control methods, work practices, and environmental conditions in the workplace to which it will be generalized, i.e., the employer's operation." *Id.*

A large component of the CO's concern regarding the adequacy of Metro's estimate of employee exposure to lead and cadmium when FIBCs leaked or spilled arose out of his interviews in late July 2023 with the two employees who handled the FIBCs. (T. 52-53). Based on what those employees told him, the CO understood that Metro had been experiencing "multiple spills on a week -- from a daily to a weekly basis, depending on how damaged the cargo was" (T. 108), although he recalls the employees saying that the most recent leak or spill event had been about three months earlier in the April/May timeframe. (T. 109-11, 126-27, 138). The employees told the CO that prior to that most recent leak or spill, Befesa had started to put the Waelz oxide in a different version FIBC—one that did not tear or break with the frequency of the FIBCs that Befesa had first used. The employees told the CO that while this most recent leak or spill event had involved the more recent version FIBC, that leak/spill event had been the only such instance involving the more recent version FIBC. (T. 109-11, 126-27).

While there is no reason to doubt the CO's recollection of what the employees told him, the more reliable evidence of when an FIBC last leaked or spilled was the testimony of Metro's national safety director. He testified that Metro maintained a log of FIBC leak/spill events and that this log showed that the last leak/spill occurred on February 1, 2023, nearly six months before the CO interviewed the employees in late July 2023. (T. 178, 182-83; *see* Finding of Fact ¶ 37). This Metro witness testified further that in 2022, after Metro initially began to handle the FIBCs,

Metro informed Befesa that there were "issues with the bag quality" in that on some days Metro had experienced one or two FIBCs leaking or spilling Waelz oxide requiring cleanup. (T. 177-78). The Metro witness testified that Befesa responded to that information by starting to use a different version FIBC in early 2023. (T. 178, 182-83; *see* Finding of Fact ¶ 31). After that change, leak and spill events "became almost nonexistent," with the last recorded leak or spill event (and the only such event that involved the more recent version FIBC) occurring on February 1, 2023.[19] (T. 182).

Other than the testimony described in the two preceding paragraphs, no other evidence was presented as to the frequency of leaks or spills. No evidence was presented as to the exact or even approximate number of leak or spill events that occurred prior to February 1, 2023 (the date of the last documented leak/spill event at the marine terminal).

Metro did not conduct personal exposure air monitoring in reaction to the leak or spill events that occurred prior to February 1, 2023, in part because the duration of the cleanup effort (and thus the time window for conducting the air monitoring) was generally no more than 20 minutes. Additionally, under Metro's special protocols, no cleanup activity commenced until after any visible airborne dust had settled, whereupon employees were permitted to return to the area of the leak or spill to perform the cleanup in accordance with protocols that were designed to keep the leaked or spilled Waelz oxide out of the air. (T. 183-85, 215-17, 219).

Metro's expert witness was qualified pursuant to Federal Rule of Evidence 702 to testify "on the custom and practice in the marine terminal and stevedoring industry with respect to the

[19] Metro's expert witness testified that "there are six categories" of FIBCs and that FIBCs "are known to break" but that the rate of breakage of any IMO–certified bags "is very, very small." (T. 276). There was no evidence presented respecting the nature of the six classifications of FIBCs or whether the apparently sturdier FIBCs that Befesa started to use in early 2023 carried a different classification than the FIBCs that Befesa first used.

handling of commodities from the [water's] edge to delivery to the customer off the marine terminal."[20] (T. 273-74). Metro's expert witness characterized Metro's efforts in evaluating the respiratory hazards presented by the Waelz oxide contained in the FIBCs as demonstrating "a level of diligence that was a little bit above what many others exercise." (T. 256). He testified that a marine terminal operator could reasonably rely on information in the SDS and other objective data in lieu of relying on the results of personal exposure air monitoring in evaluating and estimating employee exposure to respiratory hazards when the SDS and objective data "shows that the risks are limited based upon the empirical data." (T. 258-59). The expert witness opined that infrequent leaks or spills from FIBCs would "not . . . immediately trigger [an] air sampling scenario." (T. 260). He indicated further that it would be inappropriate for an employer to replicate an actual leak or spill of a hazardous substance for the purpose of conducting personal exposure air monitoring to estimate what employee exposure to respiratory hazards would be during an actual

[20] Metro's expert witness has been employed continuously for 55 years (from 1969 to date) in positions in or relating to the marine terminals industry. His past positions have included the following: longshoreman; assistant manager of a marine terminal; intermodal equipment manager for two steamship companies; OSHA compliance officer; manager/understudy director/acting director of OSHA's Office of Maritime Standards; director of occupational safety and health for a seven-port terminal operator; and director of regulatory compliance for the intermodal subsidiaries for one of the largest shipping companies in the world (this position included responsibility for 13 marine terminals). His current position is the president of a company that provides regulatory and consultative services to various components of the marine transportation and allied industries. (Ex. R-26 at 11-13; T. 244). He is a member and active participant in many professional associations and organizations involved in occupational safety and health at ports and marine terminals. (Ex. R-26 at 13).

While serving as a manager and later the acting director of OSHA's Office of Maritime Standards from 1980 to 1992, Metro's expert witness served as the project officer for the development of OSHA's Marine Terminals standard (Part 1917), and he was the principal drafter of that standard when it was originally promulgated. (T. 245-46; Ex. R-26 at 12). He was also involved in updating OSHA's longshoring standard (Part 1918) and shipyard standard (Part 1915). (T. 246).

leak or spill event and cleanup. (T. 259). The expert witness regarded Metro's specially developed protocols to prevent leaks and spills from the FIBCs and for cleanup of any leaks and spills that did occur to be "totally consistent with the norms within the industry." (T. 266). When asked about the provision in the SDS for Waelz oxide that provided "Respirators must be worn if exposed to dust" (Ex. C-6 at 6), the expert witness testified:

> Well, as I indicated before, the maximum concentration expected when you're handling these types of FIBCs is going to be essentially nil. A reasonable assessment would come to that conclusion. So talking about what type of filter you're going to use and what type of mask you're going to be using is really a meaningless exercise.
>
> Now I could see the viability of this section of the safety data sheet if you were dealing with a manufacturing process or a process that Befesa would be using to process this commodity. But that's not the case. These are being shipped in super sacks that are sealed and intact. Any kind of fugitive dust is going to be, at best, very minimal. So it gets to be an exercise in futility trying to look at what kind of dust mask and what kind of efficiencies you're talking about for the filters of those dust masks. It's looking at a situation that essentially is not going to happen.

(T. 279-80).

In OSHA's preamble to the respiratory protection standard, OSHA aptly describes subparagraph (d)(1)(iii) to be a "performance oriented" standard, observing that it does not specify "precisely how employers are to conduct the required evaluation." 63 Fed. Reg. at 1198. Performance oriented standards such as the cited subparagraph "may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2198 (No. 00-1052, 2005); *see also Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) ("[b]ecause performance standards . . . do not identify specific obligations, they are interpreted in light of what is reasonable"); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201,

2205-06 (No. 87-2059, 1993) (stating that a broadly worded standard "must be interpreted in the light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation"); *CentiMark Corp.*, 24 BNA OSHC 1903, 1912 (No. 12-0920, 2013) (ALJ) (observing that the cited performance oriented standard "allows the employer some discretion in its method of compliance" and that "[c]ompliance is evaluated according to what would be reasonable for a particular situation").

Accordingly, an employer's compliance with a performance standard is measured by what a "reasonably prudent employer" would do under the same circumstances. *Associated Underwater Servs.*, 24 BNA OSHC 1248, 1250 (No. 07-1851, 2012) (discussing a performance standard applicable to diving operations that requires a pre-dive "assessment of the safety and health aspects of . . . [s]urface and underwater conditions and hazards"). "A reasonably prudent employer is a reasonable person familiar with the situation, including any facts unique to the particular industry." *Id.* "[I]ndustry practice is relevant to [the 'reasonably prudent employer'] analysis, but it is not dispositive." *Id.* (citing *W.G. Fairfield*, 19 BNA OSHC 1233, 1235-36 (No. 99-0344, 2000)), *aff'd*, 285 F.3d 499 (6th Cir. 2002).

Both the CO and Metro's expert provided measured and reasoned testimony in espousing divergent conclusions. As previously noted, the CO's testimony was consistent with the considerations that OSHA discussed in its 1998 preamble to the cited subparagraph. *See* 63 Fed. Reg. at 1198-1200. However, given the performance-oriented nature of the cited standard, and the CO's far more limited exposure and experience with the marine terminals industry in comparison with that of Metro's expert witness, the whole of the evidence is insufficient to establish that Metro failed to perform the "reasonable estimate of employee exposures to respiratory hazard(s)"

required by § 1910.134(d)(1)(iii) with respect to the handling of the FIBCs from which Waelz oxide leaked or spilled and was then cleaned up. Non-compliance with the cited standard in citation item 1 has not been proven and thus citation item 1 must be vacated.

Limitations Defense

Metro's argument that the entire citation is barred by the six-month limitations period of section 9(c) of the Act is rejected. 29 U.S.C. 658(c) ("No citation may be issued under this section after the expiration of six months following the occurrence of any violation."). Metro bases its limitations argument on evidence that the most recent leak or spill from an FIBC had occurred on February 1, 2023, so the citation is time-barred because it was issued more than six months later (on September 13, 2023).

Contrary to Metro's argument, the violative conditions alleged in citation items 1, 3a, and 3b did not last occur on the date there had been a leak or spill from an FIBC. *See Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2135 (No. 89-2614, 1993) ("For section 9(c) purposes, a violation … 'occurs' whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger" quoting *Cent. of Ga. R.R.*, 5 BNA OSHC 1209, 1211 (No. 11742, 1977), *aff'd* 576 F.2d 620 (5th Cir. 1978)). It is uncontroverted that employees handled FIBCs within the six-month limitations period. The employees were thus exposed to the violative conditions alleged in items 1, 3a, and 3b because of the reasonably foreseeable possibility that the FIBCs being handled were capable of being damaged and leaking or spilling Waelz oxide. *See* 63 Fed. Reg. at 1198 (stating the "reasonable estimate" of employee exposure that § 1910.134(d)(1)(iii) requires includes "those likely to be encountered in reasonably foreseeable emergency situations"); *cf.* OSHA's HCS, § 1910.1200(c), (defining *exposure* or *exposed* to a hazardous chemical as including "potential (e.g., accidental or possible) exposure," and defining *foreseeable emergency* to mean "any potential occurrence such as . . . rupture of

containers . . . which could result in uncontrolled release of a hazardous chemical into the workplace").

As to citation items 2a and 2b, the swipe samples of the conference table in the common room that showed the presence of lead and cadmium were taken on July 27, 2023, which was within the six-month limitations period.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that as to Citation 1:

1. Item 1, alleging a violation of 29 C.F.R. § 1910.134(d)(1)(iii), having not been proven, is VACATED.

2. Item 2a, alleging a violation of 29 C.F.R. § 1910.1025(h)(1), having not been proven, is VACATED.

3. Item 2b, alleging a violation of 29 C.F.R. § 1910.1027(k)(1), having not been proven, is VACATED.

4. Item 3a, alleging a violation of 29 C.F.R. § 1910.1025(m)(1)(iii), having not been proven, is VACATED.

5. Item 3b, alleging a violation of 19 C.F.R. § 1910.1027(m)(1)(iii), having not been proven, is VACATED.

SO ORDERED.

/s/ William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: September 8, 2025