

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2619-94

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ON-SITE ELECTROSTATIC PAINTING, INC.

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

After our hearing officer issued his recommended order to this commission, we called the case for review under our authority contained in section 47 (3) of our rules of procedure (ROP) to consider those citations which refer to alleged exposure to lead. We asked the parties to brief on whether the evidence tends to prove or disprove the existence of lead in the Hythane Ultra paint, in addition to other issues they wished to address. Both parties responded to our order.

This commission² reviewed the testimony, exhibits, recommended order and the briefs of the parties. We shall dismiss citation 1, item 6b and citation 1, item 7 as explained below. In all other respects, we affirm our hearing officer's recommended order and adopt it as our own.

On-Site contracted with the Kentucky Association of Electric

¹ Enacted as section 47 (3), 803 KAR 50:010.

² KRS 338.071 (4) grants to the review commission the authority to "hear and rule on appeals from citations..."

Cooperatives to spray paint a large annealing oven which had already been sandblasted to remove the old paint. Recommended order page 2 (RO 2). The secretary of labor, the enforcer of the Kentucky occupational safety and health act (KRS chapter 338), issued citations to On-Site following an inspection triggered by an employee complaint. RO 2. Those citations alleged violations of the regulations on hazard communications programs, the lead standard and standard operating procedures (SOP) for using respirators. The hearing officer sustained citations on hazard communications and respirator SOPs as well as two items dealing with lead in the Hythane Ultra paint (citation 1, items 6b and 7).

This commission called the case for review because it did not appear in the record that Hythane Ultra paint contained lead but the hearing officer affirmed citation 1, items 6b and 7, nevertheless. RO 20-21. It was difficult for this commission to review the material safety data sheet (MSDS)³ for Hythane Ultra paint, admitted into evidence as secretary's exhibit 1, because it had been 'copied far too often. But On-Site, when it responded to our order for briefs, submitted an affidavit with a fresh copy of the MSDS attached. We admit the tendered fresh copy of the MSDS, received without objection, into evidence as respondent's exhibit A. In any event labor, in its brief to us, did not argue that the paint contained lead.

Citation 1, item 6b, charges respondent with not providing its


³ 29 CFR 1926.59 (g), adopted in Kentucky by 803 KAR 2:403E, requires that employers keep on hand (for review by employees) an MSDS for each hazardous chemical to which employees are exposed.

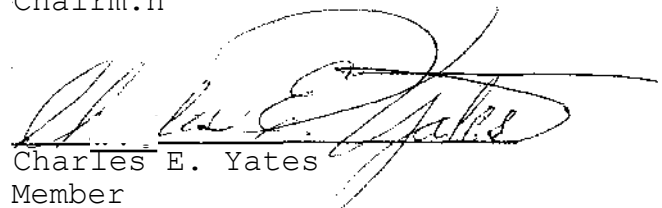
employees with interim protection to exposure to lead (biological monitoring), an alleged violation of 1926.62 (d) (2)(v) (E). Then the secretary in citation 1, item 7, charged On-Site with not communicating information about the hazards of lead to its employees, an alleged violation of 1926.62 (1) (1) (i). Our hearing officer in paragraphs 23 and 24 of his conclusions of law, sustained both items because "...the safety data sheet for Hythane Ultra warns of the potential for lead exposure."

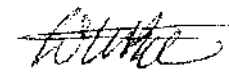
Our review of the Hythane Ultra MSDS, respondent's exhibit A, compels us to find that the paint does not contain lead. We therefore conclude that respondent did not violate 1926.62 (d) (2) (v) (E) or (1) (1) (i) as charged. Accordingly, we dismiss citation 1, items 6b and 7.

It is so ordered.

Entered February 4, 1997.


George R. Wagoner
Chairman


Charles E. Yates
Member


Donald A. Butler
Member

Copy of the foregoing Order has been served upon the


following by Messenger Mail:

HON GORDON R SLONE
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and by Certified Mail, postage prepaid, upon:

HON GERALD L STOVALL
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This 5th day of February, 1997.



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