

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2697-95

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

LADISH CO. INC - KENTUCKY DIVISION

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

Before us is a petition for discretionary review (PDR) ¹ filed by the secretary of labor, complainant in this action and enforcer of the Kentucky occupational safety and health act (KRS chapter 338), asking this commission to reverse the recommended order of our hearing officer who dismissed all but one of the eight citations contested by Ladish Company. We asked the parties to submit briefs which were to include, among other points, answers to two questions: 1) who bears the risk of an inaccurate material safety data sheet (MSDS), the employer or employees ² and 2) when must an initial determination be made under 29 CFR 1910.1025 (d) (2) ³ if an MSDS indicates the presence of lead? We received

¹ Our rules of procedure (ROP), section 48 (1), enacted as 803 KAR 50:010, section 48 (1).

² An employer is required by occupational safety and health law to keep an MSDS on hand for each hazardous substance so affected employees may read them and be alerted to potential dangers and the availability of techniques and equipment to avoid those dangers. 29 CFR 1910.1200 (g), adopted in Kentucky by 803 KAR 2:523

³ Adopted in Kentucky by 803 KAR 2:523.

briefs from both parties.

This case arose from an inspection of respondent Ladish's premises in Cynthiana by the secretary of labor's compliance officer. Following that inspection, the secretary issued eight serious citations and six nonserious (also known as other than serious) citations. The secretary proposed penalties under the authority of KRS 338.991 (2) and (3). Ladish then filed a notice under KRS 338.141 contesting items 3a, 3b, 4a, 4c and 4d, citation 1 and items 4, 5 and 6, citation 2.⁴ This commission which "...shall hear and rule on appeals from citations..." (KRS 338.071 (4)) appointed a hearing officer to take proof and issue a recommended order. ROP 3 (1) and KRS 338.081. According to KRS 338.071 (4) and ROP sections 47 and 48, this commission bears the ultimate authority to rule on contested citations.

Ladish makes valves and valve fittings from carbon steel. Transcript of the evidence (TE) 12 and secretary's exhibit 1. During the manufacturing process, the valves are heated to 1,600 degrees fahrenheit, acquiring "scale" which must be removed using a devise called a Wheelabrator which shoots steel shot at the parts. TE 18. As the Wheelabrator is operated, dust accumulates around it. TE 76. Julie Pate, industrial hygienist compliance officer for Kentucky OSHA, inspected Ladish in pursuit of a complaint filed under KRS 338.121 (1) which alleged the Wheelabrator exposed employees to dust and pollution. TE 12.

⁴ The uncontested citations became final, unappealable orders of this commission 15 working days after their issuance by the secretary and play no part in this case. KRS 338.141 (1).

As the compliance officer (CO) began her inspection, she acquainted herself with the factory and then, to determine what harmful substances or chemicals employees might be exposed to, she asked to **see** material safety data sheets (MSDS). TE 14 and 18. Secretary's exhibit 1 (the MSDS) listed lead and manganese (both are elements) as components of the steel used by the company. An employer must have an MSDS which contains a complete list of potentially hazardous substances found in each hazardous chemical it uses. 29 CFR 1910.1200⁵ (g). A chemical, as defined by the hazard communications standard, may be an element (1910.1200 (c)) and a solid metal (1910.1200 (f) (2) (i)).

Because the MSDS listed lead and manganese **(among, others) as components of the steel it sold to Ladish, that is what the compliance officer tested for in addition to some other metals. Secretary's exhibits 1, 2 and 3.**

Ladish buys steel from a supplier. That supplier sends along an MSDS⁶ which shows the steel contains lead and manganese (both toxic metals). When the MSDS shows lead, the company under the regulations must test for the amount of lead in the working environment. 1910.1025 (d) (2). If the test shows 30ug/m3⁷ or more for lead, for example, the company must take some action under

⁵ Adopted in Kentucky by 803 KAR 2:320E.

⁶ 1910.1200 (g) (1) requires a supplier of chemicals (here solid metal elements) to provide an MSDS along with the product it sells.

⁷ The symbol "ug" means millionth of a gram. So 30 ug/m3 is 30 millionths of a gram per cubic meter.

the standard. 1910.1025 (d) (2). If below the action level, the company need do nothing until it buys raw materials with more lead or changes its method of production; then it must perform more tests but not until. 1910.1025 (d) (7).

Compliance officer Pate did three types of tests. She took bulk samples of the dust from around the machine and the collecting bin; she took wipe samples directly off the skin and clothing of the Wheelabrator operator; and she took samples from the air in the operator's breathing zone.

Bulk samples revealed the presence of lead and manganese (TE 26 and secretary's exhibit 3) in small amounts - the levels of lead and manganese found were below the action level, the point at which an employer must take positive steps to protect its employees. 1910.1025 (b) for lead and 1910.1000 (a) for manganese.

Because the testing also revealed the presence of cadmium, a metal and a chemical element with its own OSH standard (1910.1027), the secretary issued several citations. But cadmium is not mentioned in the MSDS for carbon steel and we so find. Secretary's exhibit 1. In his brief to us the secretary admits Ladish had no reason to make an initial determination about potential employee exposure to cadmium (1910.1027 (d)) as it was not listed in the MSDS. Secretary's brief p. 5. We therefore dismiss citation 1, item 3b, and citation 2, item 6. Further, we delete the word cadmium from items 4a, 4c and 4d of citation 1.

We turn, then, to consider the remaining contested citations.

Citation 1, item 3a, charges respondent Ladish with not making

an initial determination to see if employees are exposed to lead.

The cited lead standard reads:

Initial determination. Each employer who has a workplace or work operation covered by this standard shall determine if any employee may be exposed to lead at or above the action level.
1910.1025 (d) (2)

Determine, according to the standard, means testing since 1910.1025 (d) (3) says "The employer shall monitor...and shall base initial determination...on the employee exposure monitoring results..." Once the MSDS says lead, then according to the cited 1910.1025 (d) (2) standard, there must be testing to confirm or deny the exposure to lead at or above the action level.

We hold whenever there is occupational exposure to lead, here the MSDS discloses the presence of lead in the working environment, the company must test for it. 1910.1025 (d) (2). If low levels are found (as is the case here), the company need not test again until it changes its manufacturing processes. 1910.1025 (d) (5), (6) and (7). We find the company did not specifically test for lead when alerted to potential employee exposure to lead and, we conclude, was therefore properly cited. TE 54.

Ladish argued that because the material safety data sheet was inaccurate it had no duty to test. Ladish brief to us, p. 11. Ladish's industrial hygienist (IH) Kenneth Troutman testified the MSDS was inaccurate since carbon steel used to make the valves and fittings does not require lead. TE 158-159. In fact, lead is a contaminant in carbon steel. TE 159. But when Ladish suspects the MSDS was inaccurate, it must contact the company supplying the

steel and the MSDS for a clarification if it wishes to avoid testing. Failing that, we hold the company is bound to accept the MSDS and test for lead according to 1910.1025 (d).

Mr. Troutman testified the lead found by OSHA's compliance officer in the single air sample, for example, was one tenth (1/10) of the action level of 30ug/m³ for lead and 6% of the permissible exposure level (PEL) of 50ug/m³ for lead (1910.1025 (c)). TE 187. Ladish's expert said the company should be relieved from the citation because the MSDS was mistaken about lead in carbon steel (it is only an impurity in carbon steel and is not desired in any way). No Ladish officer or employee testified, only their expert witness - the industrial hygienist. But even so, Mr. Troutman agreed on cross examination that an inspecting IH would first look at the MSDSs for materials used and then take the harmful substances listed as starting points in an investigation. TE 177. That is exactly what labor's compliance officer did.

We cannot say whether testimony from Ladish officials they had no reason to suspect lead in their steel would have been persuasive since only Mr. Troutman testified for the company; but given the 1910.1200 (g) (1) requirement for material safety data sheets, the threshold for such proof would have been quite high.

The issue, really, is this: assuming an inaccurate MSDS, who assumes the risk, Ladish or its employees?

Because Ladish did not test when it looked at the MSDS, it did not know if it had lead in the working environment or not. This leaves employees without the protections designed into the lead and

hazard communications standards. Under 1910.1200 an employer must make all pertinent **MSDSs** available to employees so they may understand the hazardous chemicals they use and how they may protect themselves. Ladish cannot absolve itself from liability under the OSH act (KRS chapter 338) by claiming an inaccurate MSDS. Were this to be a valid defense, then employees could not rely on an **MSDS** but would instead have to investigate each **MSDS** for themselves. This the hazardous communications standard, which requires an **MSDS**, does not demand.

We conclude it is proper to place the burden on an employer under 1910.1025 (d) to test for lead when the MSDS it receives from its supplier discloses the presence of lead. If, as the facts of this case suggest, an employer believes the MSDS is inaccurate then it must investigate. For us to conclude otherwise, the burden then falls on the employee who deals with hazardous chemicals daily and looks to the protections of the occupational safety and health act - here the hazardous communications and lead standards.

In his recommended order our hearing officer dismissed citation 1, item 3a, because (he said) the company had "no reasonable expectation" the air or working surfaces would contain lead. Recommended order (RO) 10. The hearing officer dismissed the cadmium citations for the opposite reason, pointing out the company had no reason to perform an initial determination because cadmium is not listed in the **MSDS**; but the same reasoning cuts the other way for lead since it is listed in the MSDS. Because the **MSDS lists** lead and because **the** company ignored the **MSDS** and did

not investigate, we reverse our hearing officer and affirm citation 1, item 3a (a violation of 1910.1025 (d) (2)).

Labor cited Ladish for a serious violation of 1910.1025 (d) (2) but it should have been nonserious due to the extremely low levels found. Durez Division of Occidental Chemical Corp. v. OSHA⁸, 906 F.2d 1 (DC CA 1990), CCH OSHD 28,974. Had Ladish tested before the inspection and found low levels, then it would not have to test again until its manufacturing processes or materials changed. 1910.1025 (d) (5), (6) and (7). We therefore reduce the citation to nonserious.

We set the penalty for citation 1, item 3a, at \$550 and find it comparable with that proposed for citation 2, item 4, since both deal with potential exposure to lead. Citation 2, item 4, carried an unadjusted penalty of \$1,000. TE 73. Compliance officers, when proposing penalties, utilize standard adjustment factors: size, good faith and history. Ladish received from the secretary a 20 percent credit for size (employers with fewer employees may receive up to 40 percent credit), 15 percent for good faith because the company had some employee safety programs and 10 percent for history (no prior citations within three years). TE 48. We find the assigned values reasonable. Then \$1,000 less 45 percent for adjustment factors yields an adjusted penalty of \$550. TE 77-78.

Next Ladish was cited for not having a hazard communications program **which** discussed the hazards associated with exposure to

⁸ **As a** state program, federal OSH cases do not bind this commission. But we often find their reasoning persuasive as we do here.

manganese and iron, citation 1, items 4a, 4c and 4d (4b was not contested). The CO testified Ladish had a hazard communications program but not about manganese and iron and we so find. TE 61 -62. We thus delete citation 1, item 4a (1910.1200 (e) (1)) but affirm citation 1, items 4c and 4d as nonserious since there are defects within the existing hazard communications program. The bulk test (complainant's exhibit 3) indicated the presence of manganese and the MSDS (complainant's exhibit 1), manganese and iron. But due to the low levels of the chemicals, the citations are nonserious. An MSDS must be provided even when the concentration of harmful substance is less than the PEL (permissible exposure limit). Durez, supra. Where the amount of chemical released is below the PEL, the citation would be nonserious for not including the information in an MSDS.

Gates Rubber Co., a federal ALJ decision, CCH OSHD 28,733, says there must be a showing of serious physical harm or death to justify a serious citation alleging a failure to warn employees of hazards on an MSDS.⁹ In our case we find the levels were well

⁹ General Carbon Company, a Division of St. Mary's Carbon Co. v. OSHRC and Secretary of Labor, 860 F.2d 479 (DC CA 1988), CCH OSHD 24,340, says if a company is considering whether to publish an MSDS for a chemical which, in the end product, will produce amounts of the chemical significantly below the permissible exposure level (PEL) for that chemical, the company must still publish the MSDS for the use of downstream employers. This is true because all chemicals known to be hazardous have the potential for harm regardless of the amount released. When insignificant amounts of the chemical are released by downstream employers, a nonserious citation for failure to include the chemical in the MSDS is appropriate.

In the case at bar the steel manufacturer must send downstream employers the MSDS listing the chemicals, regardless of their concentration. Then, under the lead standard, the employer (who

below the action level for manganese and iron. While the compliance officer testified cumulative exposure to lead is always serious, we presume the standards (which set threshold amounts which must be reached before action is taken), do not regard low level exposure to lead to be a serious health problem.

Our hearing officer found no hazard. But the metals are hazardous. The permissible exposure level for iron is 10 mg/m³ while for manganese it is 5 mg/m³. TE 193. Ladish knew of the presence of the metals through the MSDS.

We reverse our hearing officer and affirm citation 1, items 4c and 4d as nonserious with a single penalty of \$550 since both items are grouped. We set the penalty at \$550 because of the similar hazards presented in citation 1, item 3a. We set the penalties in this case under our authority contained in KRS 338.991 (6).

Ladish was next cited for not keeping working surfaces (the area around the Wheelabrator) clean of dust containing lead. Citation 2, item 4. Dust which contained lead accumulated around the Wheelabrator, as the CO testified. Complainant's exhibit 3. Because of the low levels found, we affirm citation 2, item 4, but reduce it to nonserious. For reasons already stated, we reject our hearing officer's conclusion that Ladish had no expectation it would find lead in the shop near the Wheelabrator. To the

better understands his own manufacturing process) must then test to see whether the chemicals (solid metals too) are released at or above the action level. If not, then a violation for not testing is nonserious as well.

^{io} The abbreviation "mg." means milligram.

contrary, the MSDS for the steel clearly states the steel contained lead. We find accumulated dust from the operation of the Wheelabrator was not cleaned up. TE 76. Since Ladish neither tested nor investigated the MSDS which indicated lead, we conclude the employer was compelled by 1910.1025 (h) (1) to clean the dust in the work area.

Again, we set the penalty at \$550 for reasons already stated. We note that complainant's lawyer stipulated the \$450 penalty proposed in several citations was actually the figure by which the \$1,000 initial penalty was to be reduced. TE 78

Finally, Ladish was cited for not informing its employees about appendices A and B within 1910.1025, citation 2, item 5. These two appendices outline the provisions of the standard. As the CO testified, the company did not provide appendices A and B to their employees as required and we so find. TE 74. Section 1910.1025 (1) (1) (i) says A and B must be supplied to employees where there is "potential exposure" to lead. We conclude the reference to lead in the MSDS for the steel demonstrates for the potential exposure already discussed and required by the standard. This was cited as nonserious but the hearing officer changed it to de minimis. This citation we restore to nonserious and affirm with no penalty. Obviously our hearing officer meant nonserious since Kentucky has no de minimis violation although federal law does.

Ladish's attorney put the de minimis reduction into his proposed findings which the hearing officer accepted. This illustrates the problems which arise when a hearing officer

uncritically accepts the proposed findings and conclusions tendered by the winning side.

Our hearing officer said he found the testimony of Ladish's expert witness, industrial hygienist Troutman, more credible than that of the inspecting compliance officer. We do not see this case turning on the relative credibility of the witnesses. Instead we decided this case by construing the intent of the standards. The lead standard, for example, requires an initial determination of employee exposure to lead. (1910.1025 (d) (2)). The introductory paragraph of the lead standard says "This section [the lead standard] applies to all occupational exposure to lead..." (emphasis added). Ladish by virtue of the MSDS for its steel was on notice of its employees' potential exposure to lead. Had Ladish investigated the MSDS through its supplier, it might have obtained a corrected version. But that is not the proof in this case.

Barring a clarification on the MSDS which as is indicates the presence of lead, the company is obligated by 1910.1025 (d) (2) to test its employees for lead exposure. If test results come back negative or below the action level (1910.1025 (b)), then the company is relieved from further testing until such time as its manufacturing processes change. 1910.1025 (d) (7). Again, that did not occur in this case.

Therefore, we conclude Ladish employees were occupationally exposed to lead. Until Ladish could demonstrate otherwise, the employer bears the risk of an inaccurate MSDS, not the employee.

Although respondent made several objections to offers of proof

by complainant, those objections are now abandoned as Ladish did not, in its brief to us, ask this commission to reverse the hearing officer.

Ladish argues the recommended order should be upheld because the secretary of labor did not submit its petition for discretionary review within the allotted 25 days. ROP 48 (2). That would be true except for the operation of ROP 6 (2) which grants parties mailing their filings an additional three days. That makes labor's PDR timely.

We affirm citation 1, item 3a, as non serious with a penalty of \$550. We affirm grouped citation 1, items 4c and 4d as non serious with a penalty of \$550.

We affirm citation 2, item 4, as non serious with a penalty of \$550 and affirm citation 2, item 5, as non serious with no penalty.

We dismiss citation 1, item 3b, and citation 2, item 6. We delete the word "cadmium" from all citations.


If abatement has not already been accomplished by respondent, we order it to do so within 30 days.

It is so ordered.

Entered November 13, 1996.



Georg R. Waggoner
Chairman



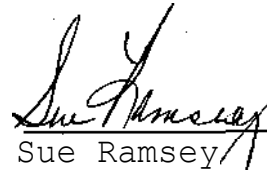
Charles E. Yates
Member

Copy of the foregoing Order has been served by
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