COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4327-06

COMMISSIONER OF DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

STEPHENS PIPE AND STEEL, LLC — RESPONDENT

* * * * * * * * * *

John D. Parsons, Frankfort, Kentucky, for the commissioner. David L. Williams, Burkesville, Kentucky, for Stephens Pipe and Steel.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on complainant commissioner of labor's petition for discretionary review of the hearing officer's recommended order. We granted review and asked the parties to submit briefs. Sections 47 (3) and 48 (5), 803 KAR 50:010.

After an inspection by two industrial hygienist compliance officers, the commissioner issued eleven serious and ten nonserious citations. Exhibit 2. For the serious citations, the total proposed penalty was $38,250; the nonserious citations carried no penalties. Before a trial on the merits commenced, by stipulation the commissioner of labor agreed to dismiss serious items 4 and 10, lead citations with a proposed penalty of $4,500 each; Stephens within the same stipulation agreed to withdraw its notice of contest to nonserious items 1, 2, 3 and 4. For serious item 1, the stipulation said Stephens contested only the penalty of $2,250. Exhibit 1.

In his recommended order Hearing Officer Stephen Humphress affirmed serious item 1 but with a reduced penalty of $1,875. He affirmed serious items 2a and 2b with a reduced

penalty of $1,875 but dismissed serious item 2c. Then our hearing officer dismissed serious items 3a, 3b, 5, 6, 7, 8a, 8b, 9 and 11. According to our hearing officer's recommended order, the total penalty for serious items 1, 2a and 2b was $3,750.

Our hearing officer dismissed nonserious items 5, 6, 7 8, 9 and 10.

KRS 336.015 (1) grants the commissioner of labor the authority to enforce the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the review commission; the commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass,[1] 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799, page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics, Inc v OSHRC, 515 F2d 828, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA

[1] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

3 OSHC 1299, 1302, where the court said "the Commission is the fact-finder, and the judge is an arm of the commission..."[2]

Our supreme court in Secretary, Labor Cabinet v Boston Gear, Inc, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In Terminix International, Inc v Secretary of Labor, Ky App, 92 SW3d 743, 750 (2002), the court of appeals said "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

Stephens Pipe and Steel, LLC, headquartered in Russell Springs, distributes fence products and performs light manufacturing. With approximately 850 employees, the company has operations throughout the eastern United States from Connecticut to Florida. Volume I, Transcript of the Evidence, pages 41- 43 (I TE 41- 43).

Senior Industrial Hygienist Michael Pocernich and Industrial Hygienist Tina Jackson conducted the general scheduled inspection at the Russell Springs plant. I TE 94, 95 and 96. Ms. Jackson testified for the complainant; Mr. Pocernich did not testify.

When Ms. Jackson was hired by the department of labor, she took six weeks of industrial hygiene course work at the Chicago Training Institute. Each year thereafter, she must complete an additional 40 hours of training. I TE 95. Prior to coming to work for the department, Ms. Jackson graduated from the University of Kentucky with a bachelor of science degree in biology with a chemistry minor. At the time of the inspection, Ms. Jackson had just completed her six month initial training program as a compliance officer; she said Mr. Pocernich was her trainer.

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[2] See federal commission rule 92 (a), 29 CFR 2200.

By the time this case came to trial, Compliance Officer Jackson had completed two and one half years of service with the department. I TE 95 and 114-115.

We find Stephens Pipe is the employer. KRS 338.031 (1) (b). The Kentucky department of labor has the burden of proof. 803 KAR 50:010, section 43 (1). In Ormet Corporation, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135, the federal review commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,[3] or with the exercise of reasonable diligence, could have known of the violative conditions.

Serious item 1

For serious item 1 Stephens admitted the violation but contested the amount of the penalty. Labor cited Stephens for not providing "quick drenching or flushing of the eyes and body...for immediate emergency use" when an employee is exposed to "injurious corrosive material." The critical element of the standard[4] is "immediate emergency use." The standard reads as follows:

> Where the eyes or body of any person may be exposed to injurious corrosive material, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.
>
> Section 4, 803 KAR 2:310 (emphasis added)

This standard requires an employer to have an eye wash facility wherever an employee can get a harmful substance in his eye or a full body shower where that is appropriate. The standard spells out the hazards, eye and body injury from corrosive materials, and then specifies a remedy: a

[3] The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated in the OSHRC on line original as well as CCH and BNA.
[4] We use the words standard and regulation interchangeably.

device for "quick drenching." For potential eye injuries, the facility is usually called an eye wash station which pumps water into the employee's face and eyes.

Item 1 charged two instances of violative conduct: employees used phosphoric and sulfuric acid in the coating and hardware building and maintenance employees at the filtration building used a strong chlorine solution containing sodium hypochlorite. An existing eye wash station must be close enough so an employee can "immediately" get to it, should he be splashed with a harmful substance.

This citation carried a proposed penalty of $2,250; Stephens, as we said, contested only the penalty. Exhibit 1 and I TE 15.

For a serious penalty, the department first considers the gravity of the violation which is composed of two factors: the seriousness of an injury should one occur and the probability of an injury given the circumstances of the violation. This gravity calculation comes from the statutory definition of a serious violation. That statute says in part:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition...
>
> KRS 338.991 (11) (emphasis added)

Industrial Hygienist Jackson said a "violation of the standard could result in permanent injury, irreversible injury." I TE 98-99. She said the seriousness was high; the options for seriousness are high, medium and low. I TE 100 -101. She said the most serious injury, due to the lack of an accessible eye wash station, would be "blindness or irreversible eye damage." I TE 109. The CO said the company had an eye wash station but it was at least fifty yards from the point where Stephens maintenance department employees worked near a filtration tank which contained chlorine, a corrosive substance. I TE 111 and 113. According to the CO, the general

rule was a company should have an eye wash station only about 20 feet away from where employees worked with hazardous chemicals which could get into the face and eyes. I TE 114.

Then the CO said the probability of an injury would be either greater or lesser. She found, for the purpose of calculating the serious penalty, the probability of an injury for item 1 to be lesser. The CO said the gravity based penalty, composed of the high serious and lesser probability factors, was $2,500. I TE 101.

Kentucky regulation 803 KAR 2:115, section 1 (2) says penalties may be adjusted according to the company's size (the number of employees), good faith (interpreted by the department of labor as the company's commitment to its safety and health programs) and history of prior violations. An employer with more than 250 employees will get no size credit which describes Stephens Pipe with over 800 employees nation wide. I TE 101. Good faith credit can be 0 %, 15 % or 25 %. According to the CO's testimony, the compliance manual[5] says the good faith factor is usually dependent upon whether the company had developed and implemented safety and health programs. For good faith, the department of labor's policy is an employer will get no good faith credit for any citation when at least one serious citation is graded as high serious/greater probability. I TE 103 and 106. For serious item 3, the first lead citation, the compliance officer said the violation rated high serious because of lead's toxicity and greater probability because the welders did not wear respirators while breathing the welding fumes. II TE 33-34. And so, no penalty credit would be given for good faith for any citation since the lead violations were determined to be high serious and greater probability.

[5] Compliance officers use the manual to guide them through the inspection process, including the writing of citations and the determination of penalties. Penalties are set by statute. KRS 338.991. 803 KAR 2: 115, section 1 (2) prescribes a penalty adjustment scheme. Because the compliance manual is simply an internal reference guide for the COs, it is not enacted as a regulation. I TE 116.

During an exchange between the two lawyers, the department's lawyer asked the CO if she would have awarded good faith for serious item 1 "if there hadn't been any other violations high/greater." She said yes. I TE 108. Then the CO told the hearing officer a company would get the highest good faith credit if they had safety and health programs which were "running smoothly." If there were deficiencies in the programs, she would award 15 % good faith credit. I TE 120. Then she said the compliance manual specified an employer would receive no good faith credit where other citations (the lead citations) were rated as high serious/greater probability. I TE 120-121. She told Mr. Williams Stephens had "several programs." I TE 123. When she prepared her report, she recommended 15 % credit for good faith, the safety and health programs, and 10 % for history, a total of 25 % credit for serious item 1. She said she could not control what her supervisors did: eliminate the 15 % good faith credit. I TE 125.

For history of prior violations, the employer is entitled to a penalty credit of 10 % toward the gravity based penalty if, within the three past years, he has not received any serious citations. Stephens got this 10 % credit for history, the maximum permitted. I TE 103.

The gravity based penalty of $2,500 was reduced by the ten percent credit: 2,500 times .1 = 250; then 2,500 – 250 = $2,250 which is the proposed penalty for serious item 1.

In his recommended order, the hearing officer reduced the penalty for serious item 1 to $1,875. He said the CO's supervisor had rejected her recommendation for 15 % credit for good faith for safety programs it had implemented. And so he applied the 15% credit to the calculation of the proposed penalty. He said the 15 % credit was appropriate because the evidence showed Stephens had employee safety in mind. His decision increased the total penalty credit to 25 %: 10 % for history and 15 % for good faith. When the 15 % credit for good faith and the 10 % for history are deducted from the gravity based penalty of $2,500, that leaves

$1,875 for the penalty as fixed by the hearing officer. Recommended order, pages 32 and 33 (RO 32, 33).

Because Stephens contested only the penalty for serious item 1 we affirm the citation. We reverse our hearing officer's decision to reduce the penalty and reinstate the $2,250 proposed penalty. Our administrative familiarity with the mechanics of penalty determination for these cases, related as it is to the interplay between the compliance manual and the penalty credits found in 803 KAR 2: 115, section 1 (2), leads us to the conclusion the department of labor's policy is designed to achieve uniformity of application from one case to another. We are of course aware of the commissioner's policy to deny an employer credit for good faith when any citation is rated as high serious and greater probability as the lead citations in this care are. While this commission has the last word on penalty determination for contested cases, KRS 338.081 (3) and KRS 338.991 (6), we look with favor on the commissioner's uniform calculation of penalties in the first instance. We are aware many employers, when confronted with a citation and proposed penalty, pay the penalty and abate the violation without attempting to settle or to contest. KRS 338.141 (1).

When the hearing officer deleted all the lead citations, he, at least for the purposes of his recommended order, eliminated the source of the high serious, greater probability characterization. At that point then, the hearing officer could have, for his recommended order, properly recognized the compliance officer's 15 % credit for good faith and added it to the 10 % credit for history of prior violations. Instead, the hearing officer erred when he, without sufficient cause, ignored the commissioner's uniform penalty calculation policy of many years standing.

Serious item 3a

Ordinarily, in our decisions we take up each citation in numerical order. To facilitate our analysis of the citations based on air sampling for toxic substances, we will next discuss serious item 3 which alleges overexposure to lead. Stephens, during the trial and in its brief to the commission, takes the position all citations based on air monitoring should be dismissed because the compliance officers did not follow the correct procedures. Serious item 2 says Stephens exposed its employees to zinc fumes while serious items 3, 5, 6, 7, 8, 9 and 11 and nonserious item 10 allege exposure to lead. Our decision resolving Stephens's objections to the sampling methods will of necessity require a discussion about a recent federal review commission lead case and the sampling methods used by the Stephens COs. Because the sampling for lead and zinc were performed at the same time, using the same filters, our decision about item 3 will shed considerable light on serious item 2, the zinc fume citation. To maintain continuity, we will first review all the serious lead citations and then come back to zinc, item 2.

During their walk around inspection of the Stephens premises, industrial hygienist compliance officers Pocernich and Jackson found employees welding galvanized steel in the gate shop and the ornamental building and so decided to perform air quality monitoring for "different metals." Ms. Jackson said she and Mr. Pocernich, during their inspection, looked for "something that's creating noise or something that's creating fumes or dust." For welding, air monitoring covers "approximately fifteen metals;" she said "Anytime an OSHA inspector hears the word galvanized steel, we're automatically going to test for lead..." I TE 127, 132-133. To take the air samples, the COs used SKC pumps which draw air, and any airborne, toxic substances present, onto a filter. For each employee sampled, the COs use four filters in succession to avoid

overloading. I TE 134. Once the test is complete, the COs seal the filters and "hand deliver" them to the state laboratory for testing. I TE 134, 136 and 139.

For serious item 3a, the citation says:

> ...1910.1025 (c) (1):[6] The employer did not ensure that employees were not exposed to lead at concentrations greater than fifty micrograms per cubic meter of air averaged over an 8-hour period:
>
> a) A welder in the Ornamental building...was exposed to airborne lead levels of 84.5 ug/m3[7] as an eight-hour time weighted average...This severity was 1.69 times the permissible exposure limit of 50 ug/m3 during the 420 minutes sampled...
>
> (emphasis added)

In order for this commission to affirm serious item 3a, the department of labor must prove the Stephens welder, we will call him welder A, was exposed to at least 50 micrograms of lead which is the permissible exposure limit according to the standard. If the monitoring says the welder was exposed to 49 ug/m3 of lead, there is no violation.

Stephens at the trial and in its briefs to this review commission raised three defenses. Stephens said the lead standard did not apply to the welding monitored by the compliance officers; Stephens then said the Kentucky department of labor failed to prove it had knowledge of the lead violation. Ormet, supra. Finally, Stephens argues all lead citations should be dismissed because the compliance officers failed to follow US department of labor guidelines which, at the time of the inspection, specified the cassette containing the sampling filters should be placed under a welder's hood. Exhibit 18, Correct placement of air sampling cassettes on employees performing welding operations, Standards interpretation 02/03/1999. We will take up these three issues before proceeding to the lead citations themselves.

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[6] Adopted in Kentucky by 803 KAR 2:320, section 6 (1) and (2).

[7] For the lead standard, the permissible exposure limit is measured in micrograms, abbreviated as ug; a microgram is one millionth of a gram or 1/1,000,000 - ug/m3 is scientific notation for micrograms per cubic meter of air.

Scope of the
lead standard

For each citation labor must prove the standard applies to the cited condition; oftentimes this is a simple matter. For example, the scaffolding standard applies to scaffolds. If the secretary of labor cannot prove the standard applies, this commission will dismiss the citation. Ormet, supra. In our case Stephens received a number of serious and nonserious citations alleging violations of the lead standard, the first paragraph of which reads "**1910.1025 (a) Scope and application. (1)** This section applies to all occupational exposure to lead," excepting out the construction industry which now has its own lead standard found at 29 CFR 1926.62.

At the time of the inspection Stephens had three employees welding galvanized steel pipe, two working in the ornamental building and one in the gate shop. From their air monitoring, the compliance officers learned the three employees were exposed to lead and zinc as our discussion of serious items 2 and 3 will demonstrate. After the inspection, Stephens determined the lead came from the galvanizing material covering the pipe. I TE 76-77. As our hearing officer found,[8] the Chinese supplier of the galvanized pipe substituted lead for the zinc since, at the time, lead was less expensive. RO 9.

Our hearing officer dismissed all of the lead citations; he concluded "the term 'occupational exposure' used in 29 CFR 1910.1025 (a) (1) means occupations where employees are exposed, or [are] known to be potentially exposed, to lead as a normal part of business operations." RO 37. Our hearing officer came to this conclusion in error and we reverse him on this point.

In support of his erroneous conclusion, the hearing officer, without citing to any authority, said his "own legal research" led him to believe the lead standard only "dealt with

[8] We adopt our hearing officer's findings of fact to the extent they support our decision in this case.

occupations where employees routinely dealt with lead as a part of normal occupational operations such as battery manufacturing or occupations dealing with lead paint." RO 37. (emphasis added) His faulty analysis caused him to write restrictions into the standard which do not exist.

In Morrison-Knudsen Industrial Services Co, a federal review commission administrative law judge decision, CCH OSHD 28,862, BNA 14 OSHC 1624 (1990), the company had been using a silica based, sand blasting agent. Because silica is a toxic substance with permissible exposure limits prescribed by table Z-3, 1910.1000, the company switched to Blackhawk grit for its sand blasting operations. Unbeknownst to Morrison-Knudsen, the Blackhawk grit contained lead which caused the secretary of labor to issue the company a citation alleging lead exposure. Had Morrison-Knudsen refrained from purchasing the Blackhawk grit, then its sand blasting employees would not have exposed its employees to lead.

Morrison-Knudsen was also cited for exposing its employees to lead based paint. Here, the ALJ said:

> It is common knowledge that some paints are lead based. An employer using paints or engaged in paint removal, therefore, is required to inquire into the nature of the paint involved.
>
> CCH page 38,509, 14 OSHC 1625, 1626

As we shall soon explain, the ALJ dismissed Morrison-Knudsen's lead citations. For now, it is important to keep in mind the company received the lead citations because its employees were exposed to substances containing lead, not because it was in the lead business as such. To avoid the application of the lead standard, Morrison-Knudsen had only to limit itself to products which contained no lead. In other words, an employer may be cited for a violation of the lead standard even though he does not make batteries or "routinely" work with lead paint,

either applying or removing it. Morrison-Knudsen. We find nothing in the lead standard which confines it to a particular industry. In fact, the construction industry is also subject to a lead standard which mirrors the general industry standard. 29 CFR 1926.62.

What is important, what the standard requires to trigger its application, is proof of "occupational exposure" to lead. 1910.1025 (a) (1). Because our hearing officer's recommended order misapprehended the term occupational exposure and because the term is not found in the lead standard's definitions section, we will briefly examine what the two words mean when read together. Webster's Third New International Dictionary,[9] says occupational means "of or relating to occupation or an occupation." The Legal Thesaurus[10] lists the following synonyms for occupation: work, craft, employment. Webster's Third defines exposure as "accessibility to something that may affect detrimentally" and then cites an example: exposure "to infection." At 2 b, page 802. The Legal Thesaurus cites to a definition of expose: to "lay open to harm." At pages 215-216.

Exposure is a term of art within the occupational safety and health law. It means access to a hazardous condition. Gilles and Cotting, Inc, a federal review commission decision, CCH OSHD 20,448, page 24,425, BNA 3 OSHC 2002, 2003 (1976), citing to Brennan v OSHRC and Underhill Construction Corp, 513 F2d 1032, 1038 (CA2 1975), CCH OSHD 19,401, page 23,165, BNA 2 OSHC 1641, 1645. In Commissioner Cleary's concurring opinion in Gilles and Cotting, he said the secretary could prove a violation "upon a showing that a condition exists in a worksite in violation of a safety standard and that the hazard posed by the violation is accessible to employees." CCH page 24,427, 3 OSHC 2005.

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[9] G and C Merriam Company, Springfield, Mass, 1966, page 1560.
[10] Burton, William C, Macmillan Publishing Co, Inc, New York, 1980, page 354.

We conclude the term occupational exposure, as used in 1910.1025 (a) (1) to define the scope and application of the lead standard, means employees with access to lead. And so the standard section can be restated as follows: This section applies to employees who have access to lead... Of course, the standard puts it more concisely: occupational exposure to lead. 1910.1025 (a) (1).

We find the three Stephens welders on November 16, 2005 had occupational exposure to lead and so the standard applies. Ormet, supra.

Employer knowledge

In order for this commission to sustain a citation, labor must prove Stephens knew of the hazardous condition, the lead in the galvanizing zinc, or could have with reasonable diligence. Ormet, supra. In N & N Contractors Inc,[11] a federal review commission decision, CCH OSHD 32,101, BNA 18 OSHC 2121 (2000), the commission determined the employer did not have actual knowledge of a fall hazard. Quoting the statute, 29 USC 666 (k),[12] the federal commission said labor had to prove "the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." Then the commission said:

> Reasonable diligence also requires an employer to inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations.
>
> At CCH page 48,239, 18 OSHC 2123 (emphasis added)

Stephens at trial and before this commission argued it had no knowledge the zinc galvanizing contained lead and so the lead citations should be dismissed.

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[11] Go to oshrc.gov; select decisions and click on final commission decisions for 2000.
[12] In Kentucky KRS 338.991 (11).

In his recommended order, our hearing officer dismissed all lead citations. Although Hearing Officer Humphress did not express his reasons for dismissing the lead citations in terms of employer knowledge, one of the four elements labor must prove for each citation according to Ormet, his two points, together and separately, amount to the same thing. First, the hearing officer referred to exhibit 3, an April 11, 2003 loss prevention services report written for Stephens's Bernard Ridge facility in Russell Springs. Terry Stephens, Stephens sole owner, was copied on the Wausau report. I TE 42. Exhibit 3, the Industrial Hygiene Service report, said Stephens employees were exposed to zinc; but the report said nothing about lead. RO 38. While this is true, the hearing officer's reference to exhibit 3 was selective. Exhibits 7 and 8 are Wausau loss prevention reports for other Stephens locations. Company president Terry Stephens was on the distribution list for both of them as well. Wausau, for its two reports, sampled the welding process; the hygienists who conducted the sampling found lead, albeit in small quantities. Exhibits 7 and 8.[13]

In addition to exhibits 7 and 8, exhibit 9, a NIOSH report, said lead is found when sampling welding operations performed on galvanized steel. See numbered page 29. Because exhibit 3, the Bernard Ridge Wausau insurance report, made no reference to lead, while the authors for exhibits 7, 8 and 9 found lead to be associated with welding galvanized steel, we infer the IH did not sample for it. We find exhibit 3 does not tend to prove either the presence or absence of lead at the Stephens Barnard Ridge facility.

Second, Hearing Officer Humphress said:[14]

> even if Stephens had not conducted airborne testing, 29 CFR 1910. 1200 (d) (1) gave Stephens Pipe the right to rely on MSDS's [sic] to determine whether its employees had occupational exposure to lead.

[13] Exhibit 7, pages 1 of 3, 2 of 3 and 3 of 3; exhibit 8, enclosure, pages 1 and 3, and pages 1 of 2 and 2 of 2.
[14] RO 38.

An MSDS is, of course, a material safety data sheet: "Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use." 1910.1200[15] (g) (1). Section (g) (2) (i) (C) (1) says an MSDS shall contain "The chemical and common name(s) of all ingredients which have been determined to be health hazards..." Lead is a toxic substance, and if present in a product must be listed on the MSDS which accompanies it. See 1910.1025, Appendix A, II, Health Hazard Data, A.

During the trial before the hearing officer, Stephens repeatedly stated it had a "representative" MSDS for the galvanized steel which did not say the product contained lead. Because its representative MSDS did not alert it to the potential for occupational exposure to lead, Stephens says it had no knowledge of the lead hazard. Without knowledge of the hazard, Stephens says all lead citations should be dismissed. Employer knowledge may be actual or constructive; if constructive, labor must prove the employer with the exercise of reasonable diligence could have known of the violative condition. N & N Contractors, supra.

Labor called Terry Stephens, the owner of the company, as its first witness. I TE 41 and 42. During Mr. Stephens's testimony, the company offered its exhibit 13 which he said was a "manufacturer safety data sheet." I TE 63. After a few questions and answers about the exhibit, Stephen's attorney said:

> We will stipulate that this [exhibit 13] is representative of the MSDS sheets that we received on all Kingland pipe.
>
> I TE 65

Then Stephens lawyer says, about exhibit 13, "This is representative of what came from that mill." I TE 66.

[15] Adopted as a Kentucky standard by 803 KAR 2:320, section 6 (1).

Jack Rogers, Stephens's safety director, testified; he was asked about exhibit 13:

> Q. Now, you're not making any representation that that particular MSDS sheet was the sort of MSDS sheet or attached document on the particular pipe that was used in this situation, you're not making that representation, is that correct?
> A. Yes, sir. No. I'm not. No. I'm not making that representation. No.
>
> III TE 33-34

Somewhat later in the trial, Stephens introduced exhibit 19 which it said "is an attachment which comes with the MSDS, the material safety data sheet from China..." II TE 37-38. On the second day of the trial Stephens's lawyer said "we cannot prove that this is the particular one, but it is representative." III TE 5-6. Our hearing officer found exhibit 19 to be a "representative mill test certificate" which did not list lead. RO 9.

Stephens during the trial made no claim exhibits 13 and its alleged attachment, exhibit 19, arrived at the Russell Springs Barnard Ridge facility contemporaneously with the galvanized steel pipe it welded on the day of the air monitoring. We find Stephens did not have at hand an MSDS which matched up with the galvanized steel pipe at issue, the pipe being welded during the monitoring by the two COs. An examination of exhibits 13 and 19 confirms Stephens received these documents after the monitoring which took place on November 16, 2005 according to the compliance officer's notes. Exhibit 11, page 149. Exhibit 13 has the date October 19, 2005 printed on it; but it also bears a fax reference which indicates it was received from Kingland, the manufacturer of the galvanized steel, on November 23, 2005, some 7 days after the air monitoring. Exhibit 19 which Stephens said was an attachment to exhibit 13 has several hand written notations in red ink: "ETA into New Orleans, approx 12-5-05, Vessel 'Nagire.'" We infer exhibit 19 refers to an overseas shipment which was not scheduled to arrive

in New Orleans until December 5, 2009 on the vessel "Nagire," almost a month after the monitoring.

Even though there is evidence to the contrary, our hearing officer found the galvanized steel had, at the time of the inspection, been recently purchased; it purchased the steel, indirectly, from Kingland Mill in China. RO 8-9. We agree. Hearing Officer Humphress's findings are supported by Mr. Stephens who testified the company had recently bought the galvanized steel from a China supplier. I TE 60-63. Mr. Stephens said prices for zinc, the primary component of the hot dipped galvanizing coating on the steel pipe, had "skyrocketed...from thirty cents to $2 a pound...And what they were doing, they were cheapening their zinc...in China..." I TE 77. Mr. Stephens's testimony was corroborated by his industrial hygiene expert Gregory Boothe who said he reviewed the tests Stephens had conducted on the galvanized steel once it learned the results of the air sampling. Mr. Boothe said "one batch" of the Kingland Steel had "1,000 times more lead than the other batches..." II TE 169-170. As a result of Stephens's independent testing, the company immediately removed the steel from production. II TE 170-171. Here, Stephens tells a compelling story: it recently purchased the steel, determined it was the likely source of lead, tested it for lead content and promptly removed it from production.

Industrial Hygienist Compliance Officer Jackson, on the other hand, said Mike Adams, a Stephens employee, told her the galvanized steel had been "on a back lot for twenty years or more." II TE 41. Neither Stephens nor the department of labor called Mr. Adams as a witness and there is no other mention of the back lot. We accept our hearing officer's finding on this subject.

Given the number of lead citations issued and the source of the recently acquired galvanized steel, the critical issue in this case is whether Stephens had knowledge of the presence of lead in its environment. We accept Stephens's explanation it did not know about the lead in its working environment until the two compliance officers found it as a result of their air monitoring. With no evidence to the contrary, we find the department of labor did not prove Stephens had actual knowledge of the lead hazard presented to their employees. What remains, then, is the question whether Stephens had constructive knowledge of the lead. Morrison-Knudsen Industrial Services Co, supra.

Stephens in its brief to this commission, but without citing to authority, argues its MSDS, exhibit 13 together with 19, is a defense to the lead citation. This defense raises several issues. First of all, Stephens's argument to the commission makes no reference to its admission at trial it did not have an MSDS for the steel, what it then characterized as a representative MSDS. Second, Stephens's brief assumes its exhibits 13 and 19 are, together, an MSDS. Both of these issues require examination.

In the Morrison-Knudsen recommended order, supra, the administrative law judge said when an employer examines an MSDS, he is entitled to rely on it. "Examination" means the employer, to rely on this MSDS defense to employer knowledge, must have read the document before permitting the work using the new product to proceed. Then the judge said the employer may rely on the MSDS "unless he had reason to doubt the accuracy of that document." CCH OSHD 28,862, 14 OSHC at 1625. We agree with the reasoning in Morrison-Knudsen. When an employer such as Morrison-Knudsen has in hand a valid MSDS, one which matches up with the product being used, he is entitled to rely on it. Stephens did not have an MSDS in hand.

Section (d) (1) of 1910.1200, the MSDS standard, says "Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement." Then 1910.1200 (g) (1) says in part "Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use."

Stephens did not have an MSDS for the galvanized steel pipe. Stephens has not cited to any authority for the proposition that a representative MSDS complies with section (g) (1) of the MSDS standard requiring each employer to have an MSDS in hand "for each hazardous chemical which they use." We know of no such authority.

We conclude the MSDS standard, 1910.1200, does not provide for, or permit, a representative MSDS; were that so, then an employer would never have to comply with the requirements of 1910.1200 (g) (1). A representative MSDS would make a mockery of the whole MSDS standard which requires employers to "have a material safety data sheet in the workplace for each hazardous chemical which they use" and to tell their employees about those hazardous chemicals. Given the language of section (g) (1) and the avowed purpose of the standard, a representative MSDS cannot be used as a defense to a citation and we so conclude.

Next is the question whether exhibit 13 with its attachment, exhibit 19, is an MSDS? In Article II Gun Shop, Inc, dba Gun World,[16] CCH OSHD 30,563, page 42,301, BNA 16 OSHC 2035, 2038 (1994), the review commission said "MSDSs must be available in the workplace for possible use by emergency personnel," citing to Super Excavators, Inc,[17] CCH OSHD 29,498, page 39,804, BNA 15 OSHC 1313, 1316 (1991).

[16] Go to oshrc.gov; select decisions and click on final commission decisions for 1994.
[17] Go to oshrc.gov; select decisions and click on final commission decisions for 1991.

In Amarillo Redi-Mix Inc, a federal ALJ decision, CCH OSHD 28,751, BNA 14 OSHC 1372, 1373 (1989), labor cited the company "for failure to list hydrochloric acid (HCL) and silica as hazardous chemicals at its workplace." Amarillo also says the MSDS must be available to employees, a violation of 1910.1200 (g) (8).

In Halocarbon Products Corp, CCH OSHD 29,882 (1992), the ALJ said "A serious 1910.1200 (g) (2) (iv) charge of failure to identify the hazards associated with cracker products on its MSDS was affirmed; the MSDS did not warn of hazards to target organs..."

Article II Gun Shop says an MSDS must be available for potential use by emergency personnel. Halocarbon Products says an MSDS must identify the hazards associated with chemicals contained in the product – the galvanized steel in the instant matter. Amarillo says an MSDS must list the hazardous chemicals found in the product. Morrison-Knudsen says an employer, to rely on it as a defense, must examine an MSDS to discover the chemicals contained in the product and to acquaint himself with the warnings about those chemicals.

When we apply the lessons derived from these four cases to exhibits 13 and 19, upon which Stephens relies, we learn the two exhibits are not MSDSs or at the very least are so deficient, so lacking in essential, required information, no employer could rely upon them. Exhibit 13 says it is a material safety data sheet and yet it lists only two chemicals; iron oxide as well as hydrogen which according to the MSDS may be released when exposing the product to strong acid. Exhibit 13 contains no reference to zinc even though it is the primary component of galvanizing material. Compliance Officer Jackson testified zinc can cause "metal fume fever." I TE 147. Exhibit 13 contains no such warning. As such it is of no value to the employer and his employees who may wish to consult it and is of no value to emergency personnel who, upon entering the facility, would refer to it to see how to protect themselves.

Exhibit 19, on its face, says it is a mill test certificate, not an MSDS. Even though the test certificate does list some chemicals, it does not list iron, chemical symbol Fe, as a chemical found in steel. Steel of course is composed primarily of iron. Exhibit 19 makes no mention of possible hazards employees or emergency workers might face from exposure to the galvanized steel. Because exhibit 19, the mill test certificate, contains no warnings about chemicals and does not list the primary component of steel, we find it is not an MSDS and thus cannot be relied upon by employers, employees or emergency responders.

In order for this commission to decide whether labor proved Stephens had constructive knowledge of the lead in its working environment, we first had to explore whether the company could rely on exhibits 13 and 19 to tell them the galvanized steel pipe contained no lead. We have concluded Stephens could not rely on the two documents.

Without an MSDS for the galvanized steel, the MSDS standard required Stephens to make its own investigation:

> Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement.
>
> 1910.1200 (d) (1)

We do not know if the steel pipe manufacturer performed an evaluation; what we do know is Stephens did not have one which told it about the product, that is, an MSDS for the galvanized pipe. Under these circumstances, 1910.1200 (d) (1) places the burden on Stephens to find out about the chemicals, lead is a chemical,[18] present in the steel. Stephens did not take this

[18] "Pure lead (Pb) is a heavy metal...and is a basic chemical element." Appendix A to 1910.1025, section I, A.

next step. The statutory definition of a serious violation, and item 3a was a serious violation, says:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.
>
> KRS 338.991 (11) (emphasis added)

In the ordinary course of events, Stephens could have examined an MSDS which was written for the galvanized pipe it was welding on the day of the inspection; that would have constituted reasonable diligence. And if the MSDS did not disclose the presence of lead, Stephens would have discharged its responsibility. Bereft as Stephens was of an MSDS, however, it had to take the next step and that would have been to investigate the galvanized steel product. According to 1910.1200 (d) (1), Stephens had no other alternative. Because Stephens did not take that next, required step, it failed in its duty to be reasonably diligent about discovering if the steel contained any hazards. In other words, Stephens failed in its statutory duty to exercise reasonable diligence to make itself aware of the "presence of the violation...," the presence of lead in the galvanized steel. We conclude the department of labor proved Stephens had constructive knowledge of the lead hazard because it did not then "evaluate" the steel to ascertain what harmful chemicals, if any, it contained. Morrison-Knudsen, supra, KRS 338.991 (11) and 1910.1200 (d) (1).

In his recommended order for Morrison-Knudsen the administrative law judge found:

> Morrison-Knudsen was entitled to rely on the contents of the MSDS. Examination of the MSDS constitutes the exercise

> of due[19] diligence unless it is shown the employer had reason to doubt the accuracy of that document.
>
> CCH OSHD 28,862 page 38,509, BNA 14 OSHC 1625
> (emphasis added)

Stephens, to state the obvious, had to doubt the accuracy of an MSDS because it had none.

Labor proved Stephens had constructive knowledge of the lead in the galvanizing material, but not in the way it suggests.

Labor in its brief argues the NIOSH document, exhibit 9, provided Stephens the impetus to examine the steel for hazards. Here labor is mistaken. Stephens is correct when it asserts the NIOSH report is not proof it had constructive knowledge of the presence of lead in its environment. This is so for two reasons: one, the NIOSH report is not a regulation and, two, there is no proof Stephens was aware of the report. Having said that, however, the NIOSH report does serve two useful purposes for the resolution of this case. It tends to discredit expert witness Gregory Boothe's testimony he has never heard of lead being associated with the galvanizing process. On the other hand, it credits Industrial Hygienist Jackson's testimony she was taught to monitor for lead when she sees employees welding galvanized steel; Stephens during her cross examination had suggested she had no reason to monitor for lead. She did. Exhibit 9.

Although it had no MSDS for the galvanized steel, Stephens was in possession of the two Wausau reports which provide additional support for our conclusion the company had constructive knowledge of the lead. Exhibits 7 and 8 are the two Wausau reports for other Stephens locations which disclose the potential for lead exposure when welding galvanized steel. With an MSDS in hand, Stephens could begin to weld. But Stephens had no MSDS. All it had were the three insurance reports: two said lead could be found during the welding process while

[19] Elsewhere in the decision, the ALJ said "The secretary...must establish that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition." 14 OSHC 1625. This language comes from the statute. 29 USC 666 (k) and its Kentucky equivalent, KRS 338.991 (11).

the third did not test for lead. Exhibits 3, 7 and 8. Exhibits 7 and 8, the Wausau reports, not only put Stephens on notice the welding of galvanized steel could result in occupational exposure to lead, they also communicated the idea that air monitoring was one way to determine the level of exposure.

KRS 338.991 (11) says in part:

> ...a serious violation shall be deemed to exist...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Stephens did not know the galvanized steel contained lead. And yet, KRS 338.991 (11) puts Stephens under a duty to exercise reasonable diligence; this raises another question: what was reasonable according to the facts of this case.

It would be reasonable for Stephens to make further inquiries about the safety of the galvanized steel when it did not have possession of the manufacturer's evaluation because that is the law. 1910.1200 (d) (1) and KRS 338.991 (11). It would be reasonable for Stephens to test for lead exposure when it, one, had the two Wausau reports which said lead could be present but, two, did not have an MSDS which would rule out lead as a potential contaminant. Morrison-Knudsen, supra. We find it was reasonable for Stephens to make further inquires about the safety of the galvanized steel. Stephens made no such inquiries.

Placement of the
sampling cassettes

Stephens in its brief to the commission argues all citations dependent upon air sampling for zinc and lead should be dismissed because "monitoring procedures and placement of the filters were not in accordance with standards..." Brief, page 11. Then the company refers to a letter of interpretation issued by federal OSHA. Exhibit 18 is a US department of labor

standards interpretation titled "02/03/199 – Correct placement of air sampling cassettes on employees performing welding operations." It says in part:

> The correct placement for air sampling cassettes is near the breathing zone of the employee. It should be as close as possible to the nose and mouth of the employee, ie, in a hemisphere forward of the shoulders with a radius of 6 to 9 inches. If the employee is wearing a welding helmet and either no respirator or a negative pressure respirator, sampling should be done inside the helmet.

Labor's two inspecting industrial hygienists performed air monitoring on seven Stephens employees. Each employee wore a pump which pulled air through a filter placed inside the sampling cassette; these pumps were numbered A through G. See exhibit 15 which contains pages 128 through 307 of the CO's notes. The values obtained for three Stephens employees resulted in citations for overexposure to zinc and lead. For example, serious citation 2a says results for three employees were over the permissible exposure limit for zinc. Exhibit 2, page 5. These three employees in item 2a are referred to separately as instances a), b) and c); for the sake of convenience we refer to the employees as welders A, B and C as did our hearing officer.

Although Hearing Officer Humphress affirmed serious item 2a, he dismissed instances a) and c). He said "Since proper testing procedures as to Welders A and C were not established, the Hearing Officer will not consider the air test results for them as being unreliable." Here Mr. Humphress said because no photographs were taken of welders A and C, he could not "determine whether the filter placement and testing complied with the OSHA interpretation letter." RO 34. We note only welder B's monitoring documentation carried the notation "filter inside hood." Page 146 of exhibits 11 and 15.

While Stephens in its brief says all the air monitoring citations should be dismissed because the department of labor did not follow proper procedures, the company's expert witness, Gregory Boothe is not so certain. He says:

> Welder B is the only one that had the notation that it was taken inside the hood and so that's the only one that I would say meet[s] the proper collection technique.
>
> II TE 158

Mr. Boothe said his problem with not sampling inside the hood, in addition to not being in compliance with federal OSHA's directive, was the results obtained "can vary by as much as fifty to sixty percent." II TE 200. Mr. Boothe's only concern about welder B's monitoring was the three words "filter inside hood" were written by Compliance Officer Pocernich who did not testify. II TE 206. Stephens did not dispute the documentation or calculation of the sampling results. In fact Stephens stipulated the laboratory results could be admitted without calling the technicians who analyzed the filters. Exhibit 1.

We agree with our hearing officer's finding on this issue; we find only the monitoring results for welder B were properly obtained by following the correct procedures.

Stephens in its brief on the sampling issue cites to TTX Company, Acorn Division,[20] a federal review commission ALJ decision, CCH OSHD 30,302, BNA 16 OSHC 1631 (1993). TTX repaired old railroad cars and regularly encountered lead paint which had to be removed before welding could commence. A compliance officer sampled welders; he did not place the filter inside the welding hood as specified by the Industrial Hygiene Technical Manual. At 16 OSHC 1633. The American Hygiene Association Journal, in a survey, said "the concentration of welding fumes at the actual breathing zone inside a welding helmet is reduced 36 percent to 71 percent from concentrations outside of the helmet." At 16 OSHC 1632. Judge Spies in TTX dismissed the lead citation.

[20] Go to oshrc.gov; select decisions and click on final ALJ decisions for 1993

More recently the federal commission has upheld air sampling techniques which did not meet guidelines laid down in TTX. In E. Smalis Painting Co, Inc,[21] CCH OSHD 33,030 (2009), citing to Manganas Painting Co,[22] a review commission decision, CCH OSHD 32,908, page 53,390, BNA 21 OSHC 1964 (2007), the federal commission upheld a finding of overexposure to lead even though "the COs did not fully comply with several guidelines in the OSHA Technical Manual." Smalis employees worked inside a contained area sandblasting a bridge which had previously been painted with lead based paint. When the compliance officers monitored for lead, their results ranged between 12,604 ug/m3[23] to 33,485 ug/m3 or 252 to 669 times the permissible exposure limit for lead which is 50 ug/m3.

Smalis argued the CO's sampling was deficient because the workers entered the lead containment area but the CO did not follow and so could not observe the employees; once the workers were in the containment area, the CO had instructed them to "reattach the [filter] cassette to the top of his shoulder, or wherever the employee could best attach it..." Workers were instructed by the CO to point the cassette downward, so dust could not fall into it, and to keep the cassette "within his breathing zone." At CCH page 54,351. In their decision, the commission accepted the departures from OSHA's technical manual, and affirmed the citation, because "the degree of overexposure...is simply unprecedented..." and because the sampling results "consistently show overexposure..." At CCH page 54,350. Smalis said the cassettes should have been placed "inside, rather than outside, the employees' blasting hoods..." At CCH page 54,352. To this the commission observed that 1926.62 (d) (1) (i), the construction lead standard, adopted from the general industry lead standard, 1910.1025, says "'employee exposure

[21] Go to oshrc.gov; select decisions and click on final commission decisions for 2009.
[22] Go to oshrc.gov; select decisions and click on final commission decisions for 2007.
[23] While the zinc PEL is defined in milligrams (1/1,000 of a gram), lead's PEL is stated in micrograms or 1/1,000,000 of a gram.

is that exposure which would occur if the employee were not using a respirator.'" The Smalis containment workers wore a blasting hood with a built in respirator. CCH page 54,350.

While we do not reject the federal commission's analysis in Smalis, we find the facts of our case are distinguishable.

Serious item 3a alleges Stephens welder A was exposed to 84.5 ug/m3 of lead or 1.69 times the permissible exposure limit of 50 micrograms. Item 3b says welder B was exposed to 59.0 ug/m3 of lead which is 1.18[24] times the permissible exposure limit (PEL) of 50 micrograms.

For the Smalis paint removers, their exposure to lead ran from 252 to 669 times the PEL. In their decision the Smalis commission said it found "the CO's methodology and results sufficiently reliable to determine whether employees were overexposed to lead." CCH page 54,350. From this statement we take it the federal commission felt comfortable accepting the results as proof of overexposure because of the very wide margin of error defined by the lead PEL of 50 ug/m3 versus the obtained results of 12,604 ug/m3 to 33,485 ug/m3 for the sampled employees.

Stephens's expert Gregory Boothe testified results obtained "can vary by as much as fifty to sixty percent," depending on whether the filter cassette was placed outside or under the welder's hood. II TE 200. His was the only testimony on the point. Assuming for the sake of argument Mr. Boothe was correct, then conservatively reducing the Smalis figures by 50 percent, the employee exposures to lead would range from 126 times the PEL to 332 times.

Recall Stephens welder B's monitoring was conducted with the filter cassette inside his helmet. For Stephens welder A whose cassette was outside of his hood, if we apply Mr. Boothe's

[24] 59/50 = 1.18.

fifty percent reduction factor, then welder A's exposure would be .845[25] times the PEL which is less than 50 ug/m3 of lead and not a violation of the standard.

We are unwilling, for our case, to adopt the position taken by the Smalis commission which found the compliance officer's flawed sampling procedures acceptable because of the "unprecedented" lead exposure levels. At CCH page 54,350. While any violation of the lead standard is significant, the overexposure to lead for the Stephens welders are in a much narrower range than the Smalis workers. Serious citation 3a alleges welder A was exposed to 1.69 the permissible exposure limit to lead and, as we have observed, the Boothe fifty percent reduction factor suggests the welder would not have found to have been overexposed had the filter been placed under his hood. The same, however, cannot be said for welder B whose filter cassette was correctly placed under his welding hood; serious item 3b says welder B was exposed to lead levels of 59.0 ug/m3 of lead which, according to the citation, was 1.97 times the action limit for lead which is 30 ug/m3. 1910.1025 (d) (2).

Having resolved the issues raised by Stephens's three defenses, we shall return to serious item 3.

Our hearing officer dismissed serious item 3a which said welder A was exposed to 84.5 ug/m3 of lead. Because the compliance officers were unable to place the filter cassettes beneath welder A's helmet, and thus could not adhere to the procedures laid down by standards interpretation 02/03/1999, we agree with our hearing officer and dismiss serious item 3a. For serious item 3a, we conclude labor was not able to prove Stephens violated the terms of the standard. Ormet, supra.

Serious item 3b

[25] 1.69/2 = .845.

Serious item 3b charges Stephens with exposing welder B, referred to in the compliance officer's report as pump E, to lead at or above the action level of 30 micrograms. While the permissible exposure limit for lead is 50 micrograms per cubic meter of air, the action level for lead is 30 micrograms. 1910.1025 (b). This is what the lead standard says about the action level:

> ...1910.1025 (d) (2) *Initial determination.* Each employee 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.

And

> E. *Action Level*: The standard establishes an action level of 30 micrograms per cubic meter of air (30 ug/m3), time weighted average, based on an 8-hour work-day. The action level initiates several requirements of the standard, such as exposure monitoring, medical surveillance, and training and education.
>
> Appendix A to 1910.1025, section (emphasis added)

Serious item 3b:

> ...1910.1025 (d) (2): The employer who had a workplace or work operation covered by this standard did not determine if any employee was exposed to lead at or above the action level:
>
> a) A welder in the Ornamental building welding galvanized steel for gate production was exposed to airborne lead levels of 59.0 ug/m3 as an eight-hour time weighted average. The exposure was derived from four samples taken on the first shift on 11/16/2005. This severity was 1.97 times the action level of 30 ug/m3 during the 427 minutes sampled...
>
> (emphasis added)

Welder B's exposure level of 59.0 ug/m3 of lead proves Stephens violated the terms of the standard. Although Stephens had no objection to the sampling data, we will for the sake of clarity about the process briefly review the calculations for the four filters used for the lead and

zinc monitoring process for welder B. For filter 1, the first filter used on the day of the sampling, the laboratory found 79 up/m3 of lead. Then the COs performed the following calculations to convert the raw data obtained from each filter to an eight hour time weighted average required by 1910.1025 (b) and (c):

filter E-1 was used for 107 minutes; 79 ug/m3 of lead
filter E-2 was used for 97 minutes; 97 ug/m3 of lead
filter E-3 was used for 123 minutes; 47 ug/m3 of lead
filter E-4 was used for 100 minutes; 48 ug/m3 of lead

Then the CO multiplied the minutes sampled times the lead found:

E-1: 107 times 79 = 8453
E-2: 97 times 97 = 9409
E-3: 123 times 47 = 5781
E-4: 100 times 48 = 4800

subtotal 28,443

Then the CO divided 28,443 by 480 which is the number of minutes in 8 hours (60*8).

Thus, 28,443/480 = 59.3 ug/m3 of lead for item 3b, the 8 hour time weighted average of welder B's exposure to the lead fumes. Exhibit 11, page 151.

Since welder B was exposed to lead on the day of the monitoring, the standard applies. Labor proved Stephens violated the terms of the standard: welder B was exposed to 59.3 ug/m3 of lead which exceeds the action level of 30 micrograms. Labor proved employee access to the hazard because welder B performed the welding process which emitted the lead fumes. We have already concluded Stephens had constructive knowledge of the violation. We reverse our hearing officer and sustain serious item 3b. Ormet, supra, and KRS 338.081 (3).

Lead is so toxic the standard is measured in micrograms per cubic meter of air while zinc exposure, serious item 2, is set in terms of milligrams. Compliance officer Jackson said exposure to lead was high serious due to its toxicity and greater probability because the welders

worked all day without either engineering controls or respirators. II TE 33-34. As we found for serious item 1, we award no credit for good faith because this lead citation was evaluated to be high serious and greater probability. High serious/greater probability yields a $5,000 gravity based penalty. Then with a 10 % credit for history, the compliance officer calculated the proposed penalty to be 4,500. II TE 34. We sustain the $4,500 penalty.

Stephens, once it learned the galvanized steel pipe contained lead, immediately took the pipe out of production. II TE 170-171. With the lead removed from the work environment, abatement was not an issue. KRS 338.141 (1).

Serious item 5

In item 5 labor cited Stephens for not providing protective clothing to its welders who were exposed to lead fumes above the permissible exposure limit of 50 ug/m3. Labor tested three welders for lead but the exposure data for two, welders A and C, was unreliable because the filter was not placed by the compliance officer under their welding hoods. Only welder B had the filter correctly placed under his helmet. Labor, however, cited only welder A for this item. As we have ruled, the department of labor could not prove welder A was exposed to lead above the permissible exposure limit of 50 ug/m3 because of improper placement of the filter cassette outside of his welding helmet.

Serious item 5 says:

> ...1910.1025 (g) (1): Where the employee was exposed to lead above the PEL, without regard to the use of respirators or where the possibility of skin or eye irritation exists, the employer did not provide at no cost to the employee and assure that the employee used appropriate protective work clothing and equipment:
>
> a) A welder in the Ornamental building welding galvanized steel for gate production was exposed to airborne lead levels of 84.5 ug/m3 as an eight-hour time-weighted average. The exposure was derived from four samples taken on

> first shift on 11/16/2005. The severity was 1.69 times the permissible exposure limit of 50 ug/m3 during the 420 minutes sampled...
>
> (emphasis added)

In order for this commission to sustain item 5, the department of labor must prove an employee was exposed to lead above the permissible exposure limit. Central Brass Manufacturing Company, CCH OSHD 28,109, BNA 13 OSHC 1609, 1610 (1987). Because the Kentucky department of labor failed to prove welder A, the only employee referenced in the citation, was exposed to lead above the PEL, we dismiss serious item 5. Labor failed to prove the terms of the standard were violated. Ormet, supra.

Serious item 6

Serious item 6 charges Stephens with permitting dust containing lead to accumulate in areas where employees work, a housekeeping violation. This dust can be stirred up and inhaled or get on clothing. Item 6 says:

> All surfaces were not maintained as free as practicable of accumulations of lead:
>
> 1910.1025 (h) (1)

This standard does not require a showing of lead either at the PEL or the action level, only that lead be present in a wipe sample.

Item 6, instances a) through e), refers to five locations where the compliance officer took a specially treated cloth and wiped a surface. She sent these five cloths to a laboratory to be tested for lead. According to instance a), for example, the department of labor said it found 53.7 ug (that's micrograms or 53.7/1,000,000 of a gram) of lead on a surface measuring 10 centimeters by 10 centimeters, in other words 53.7 ug/100cm2. Federal OSHA and Kentucky have adopted a Department of Housing and Urban Development (HUD) document which says

200 ug of lead per square foot[26] is an acceptable amount of lead on a surface. Any amount of lead greater than 200 micrograms on this square foot of surface space is not acceptable according to the US department of labor letter of interpretation, 01-13-2003, admitted into evidence as exhibit 20.

To obtain a wipe sample of the required 100 cubic centimeters (10 times 10), the CO had to use a template of the correct size, put the template on the surface and then wipe within that 100 cubic centimeter template; otherwise, there is no correlation between the amount of lead found, here 53.7 micrograms, and the required 100 square centimeters. Without using a template, an inspecting compliance officer could wipe any sized surface and still report finding sufficient lead to violate the standard.

On cross examination the CO said she had no recollection of the size of the wipes made. There was no testimonial or documentary proof, using the example above, 53.7 ug of lead was found on a one hundred square centimeter surface because the CO could not recall making a wipe of the correct size. II TE 82 and 84-85. We dismiss serious item 6 because labor could not prove Stephens violated the terms of the standard. Ormet, supra. For this commission to affirm a lead wipe citation, labor must connect the amount of lead found by laboratory analysis to the size of the area wiped during the inspection.

Serious item 7

According to item 7, Stephens permitted welder A to be in an area where, one, he was exposed to lead above the PEL and, two, Stephens permitted beverages and tobacco products which would be contaminated with lead dust and then be consumed. For the commission to sustain this citation, labor must prove both elements.

Serious item 7:

[26] Nine-hundred square centimeters equals one square foot, according to Stephens's expert witness. II TE 86.

> ...1910.1025 (i) (1): The employer did not assure that in areas where employees were exposed to lead above the PEL, without regard to use of a respirators, [sic] food or beverage was not present or consumed, tobacco products were not present or used, and cosmetics were not applied, except in change rooms, lunch rooms, and showers:
>
> a) A welder in the Ornamental building welding galvanized steel was exposed to airborne lead levels of 84.5 ug/m3 as an eight-hour time-weighted average. The exposure was derived from four samples taken on first shift on 11/16/2005. The severity was 1.69 times the permissible exposure limit of 50 ug/m3 during the 420 minutes sampled...CSHO[27] observed beverages and tobacco products in the employee's work area.

The Kentucky department of labor failed to prove welder A was exposed to an excessive level of lead because, as we have ruled, his filter cassette was not placed under his welding hood. Because labor failed to prove the terms of the standard were not met, we dismiss serious item 7. Ormet, supra, and KRS 338.081 (3). At the trial labor had the opportunity to move to amend this citation, and others, to substitute welder B for A once it came out at trial A's filter cassette was not placed under his welding hood.

Serious items 8a and 8b

Serious item 8a charges Stephens with not providing its employees clean changing rooms while item 8b charges the company with not providing employees with showers for use at the end of their shifts; these measures are designed to protect employees from the toxic effects of lead. Serious items 8a and 8b refer only to welder A who, the items allege, was exposed to 84.5 ug/m3 of lead. We have ruled the air monitoring data for welders A and C was not reliable because their filter cassettes were not placed beneath their welding hoods as required by the US department of labor standards interpretation titled "02/03/199 – Correct placement of air sampling cassettes on employees performing welding operations." Exhibit 18. Both standards

[27] CSHO is an acronym for compliance officer.

require proof an employee, here welder A, was exposed to lead above the PEL, the permissible exposure limit.

Serious item 8a says in part:

> 1910.1025 (i) (2) *Change rooms*. **(i)** The employer did not provide clean change rooms for employees who work in areas where their airborne exposure to lead is above the PEL, without regard to the use of respirators.
>
> a) A welder in the Ornamental building welding galvanized steel was exposed to airborne lead levels of 84.5 ug/m3 as an eight hour time weighted average...

Then serious item 8b says in part:

> 1910.1025 (i) 3) *Showers*. **(i)** The employer did not assure that employees who work in areas where their airborne exposure to lead is above the PEL, without regard to the use of respirators, shower at the end of the work shift.
>
> a) A welder in the Ornamental building welding galvanized steel was exposed to airborne lead levels of 84.5 ug/m3 as an eight hour time weighted average...
>
> (emphasis added)

Our hearing officer dismissed serious item 8 because he determined the lead standard did not apply to Stephens. While we have ruled the lead standard does apply to Stephens, we dismiss serious item 8a and 8b because labor did not prove Stephens violated the terms of the cited standards. Ormet, supra.

Serious item 9

Item 9 says the employer did not ensure that employees who wore protective clothing or equipment did not enter lunchroom facilities without first removing surface lead dust by vacuuming, downdraft booth, or other cleaning method.

The citation, referring to standard, 1910.1025 i) (4) (iv), says:

> The employer did not ensure that employees do not enter lunchroom facilities with protective work clothing or equipment unless surface lead dust has been removed by vacuuming, downdraft booth, or other cleaning method:
>
> a) A welder in the Ornamental building welding galvanized steel for gate production was exposed to airborne lead levels of 84.5 ug/m3 as an eight hour time weighted average...

Employers must "provide lunchroom facilities for employees who work in areas where their airborne exposure to lead is above the PEL..." 1910.1025 (i) (4). Where labor cannot prove an employee was exposed to lead above the PEL, then the employer need not provide the lunchrooms. For serious item 9 the department of labor cited to welder A who, labor alleged, was exposed to 84.5 micrograms of lead per cubic meter of air.

For this citation, the department of labor must prove this Stephens employee who entered the lunchroom facilities without first removing surface lead dust had been exposed to lead above the PEL.

Complainant department of labor failed to prove welder A, the only employee cited, was exposed to lead above the permissible exposure limit of 50 micrograms per cubic meter because the sampling filter was not placed under his welding hood. Because labor did not prove Stephens violated the terms of the standard, an essential element for any citation, we dismiss serious item 9. Ormet, supra.

Serious item 11

Item 11 charges Stephens with not training its employees who "were subject to exposure to lead at or above the action level..." Stephens produced no lead training records or materials.

Item 11 says in part:

> 29 CFR 1910.1025 (l) (1) (ii) The employer did not institute a training program for and assure the participation of all employees who were exposed to lead at or above the action

level or for whom the possibility of skin or eye irritation exists:

> a) A welder in the Ornamental building galvanized steel for gate production was exposed to airborne lead levels of 84.5 ug/m3 as an eight-hour time-weighted average...
>
> b) A welder in the Ornamental building welding galvanized steel for gate production was exposed to airborne lead levels of 59.0 ug/m3 as an eight-hour time-weighted average...
>
> (emphasis added)

Serious item 11 carried a proposed penalty of $4,500. CO Jackson figured the penalty for item 11 as high serious and greater probability with a 10 % credit for history. II TE 108-109.

Lead is so toxic a substance, employers must begin training their employees about lead as soon as exposure reaches the action level of 30 ug/m3. Labor proved welder B, that is instance b) of serious item 11, was exposed to lead at 59.0 ug/m3 – this is because the CO put the sampling filter beneath his welding helmet as required. Labor for item 11 must prove two things and it proved both: one, welder B had a lead exposure level of 59.0 ug/m3 which is almost twice the action level of 30 ug/m3 and, two, it did not train its employees about lead exposure.

When labor's attorney asked the compliance officer about how the probability factor for the penalty determination was calculated, he got the following response:

> It was greater because the employees were not aware of the specific hazards associated with their work environment, protective measures which could have – could be taken, the danger of lead to their bodies, including their reproductive systems and their rights under the standard, if they had potential exposure to lead at any level...
> Under Appendix A of the standard employees are to be informed of health hazards of lead, ways in which lead enters the body, affects the overexposure – of over-exposure to lead, short and long term, health protection goals of this standard and reporting signs and symptoms of health problems.
>
> II TE 109-110 (emphasis added)

On cross examination, CO Jackson admitted if the employer did not know about the lead exposure, there was no need to train. II TE 110-111. But of course the question did not account for the fact Stephens had constructive knowledge of the lead because, one, Stephens did not have an MSDS for the galvanized steel as the standards require and, two, Stephens had in its possession two insurance loss reports for other Stephens locations which indicated lead could be found in galvanizing material. Stephens had a duty to investigate.

As we have already demonstrated, the lead standard applies. Stephens violated the standard because it did not institute a lead training program for its employees who were exposed to 30 micrograms of lead per cubic meter of lead, the action level. 1910.1025 (b) and (l) (1) (ii). Labor proved welder B was exposed to 59.0 ug/m3 of lead. Stephens had constructive knowledge of the violation. Ormet, supra. We affirm serious item 11, instance b), for welder B. We dismiss instance a) because labor did not prove a level of exposure for welder A. We affirm the $4,500 penalty.

Serious item 2

Item 2a

Item 2a says Stephens exposed three employees to zinc, the main component of the galvanizing material which coated the steel pipe the employees were welding. Compliance Officer Jackson said employees exposed to excessive zinc fumes "come down with flu like symptoms, achiness, fatigue, symptoms that you would encounter as if you had the flu." I TE 147.

Here is what the citation says, in part:

> 1910.1000 (a) (2):[28] The employer did not ensure that employee exposure to any substance in Table Z-1 did not exceed the

[28] Adopted in Kentucky by 803 KAR 2:320, section 6 (1).

8 – hour time weighted average given for that substance in any 8 – hour work shift of a 40 – hour week:

a) The welder in the Ornamental building welding galvanized steel for gate production was exposed to airborne zinc levels of 13.38 mg/m3 as an eight – hour time weighted average... This severity was 2.6 times the permissible exposure limit of 5 mg/m3...

b) The welder in the Ornamental building welding galvanized steel for gate production was exposed to airborne zinc levels of 15.7 mg/m3 as an eight – hour time weighted average... This severity was 3.14 times the permissible exposure limit of... 5 mg/m3...

c) The welder in the Ornamental building welding galvanized steel for gate production was exposed to airborne zinc levels of 6.27 mg/m3 as an eight – hour time weighted average... This severity was 1.256 times the permissible exposure limit of 5 mg/m3...

(emphasis added)

This serious item 2 carried a proposed penalty of $2,250.

Instances a) and c) of item 2a are welders A and C. This commission has already determined the air monitoring data for them is invalid because the filter cassettes were not placed beneath their welding helmets. Welder B, instance b), was exposed to 15.7 mg/m3[29] of airborne zinc according to the citation. Welder B's filter was correctly positioned under his hood. For the zinc exposure data, the CO used the same calculation method she used for lead. See exhibit 11, page 151 for the zinc exposure calculations for pump E and the four filters used to conduct the monitoring. Stephens stipulated the laboratory results for zinc, as well as lead, could be admitted without calling the laboratory technicians to testify. Exhibit 1. Stephens at trial did not take issue with either the values obtained for lead and zinc or the compliance officer's computations.

[29] The zinc standard is stated in terms of milligrams. A milligram is one thousandth of a gram or 1/1,000. The notation is translated as milligrams per cubic meter of air or mg/m3.

For both lead and zinc, the standards say exposure levels should be calculated as time weighted averages. The phrase "time weighted average" means if the sampling did not last the full eight hours, the sampled amount of material, zinc for serious item 2, lead for serious items 3, 5, 7, 8, 9 and 11, would be averaged over an eight hour period or 480 minutes. If, for example, the CO only sampled for six hours, then the amount of substance obtained would be spread out over the eight hour period of time – the last two hours as if there were zero exposure. See 1910.1000 (c) and 1910.1025 (b) and (c) (1). For pump E, welder B, the four filters were used for a total of 427 minutes of monitoring. This meant the compliance officer's calculations for the eight hour time weighted average accounted for 53 minutes when no exposure to zinc was found. The same is true for the lead data. Exhibit 11, pages 146 and 151.

Our hearing officer for serious item 2a, instance b), found the filters for welder B were "properly affixed to and under the welding hood. RO 33. He considered the monitoring results unreliable for welders A and C because "...proper testing procedures...were not established..." RO 34. We agree. See exhibit 18 which was US department of labor standards interpretation 02/03/1999, "Correct placement of air sampling cassettes on employees performing welding operations."

Because welder B was exposed to zinc, the standard applies. With a PEL of 5.0 mg/m3 for zinc and welder B's exposure to 15.7 milligrams, Stephens violated the terms of the standard. Stephens welder B proves employee exposure. In its brief to the commission, Stephens asserts it had no actual or constructive knowledge of zinc exposure despite the fact welders A, B and C were welding galvanized steel when the compliance officers monitored them for zinc and lead exposure. These welders worked in an open area where the compliance officers could see them

welding. I TE 192. Exhibit 3, the loss prevention services report for the Russell Springs facility, says welders were exposed to zinc. Stephens had actual knowledge of the zinc exposure.

Because the galvanized steel used and the welding performed was in plain sight, Stephens had constructive knowledge of exposure to zinc. In Kokosing Construction Co, Inc,[30] a federal review commission decision, CCH OSHD 31,207, page 43,723, BNA 17 OSHC 1869, 1871 (1996), the commission found constructive knowledge of uncovered, unprotected reinforcing steel on a construction site, a violation; this unprotected rebar was in plain sight. Exhibits 3, 7 and 8, insurance loss reports obtained by Stephens, confirm our finding Stephens had constructive knowledge of the zinc violation. All three papers discuss the welding of galvanized steel and report finding zinc after sampling. Ormet, supra.

We affirm instance b) for serious item 2a but dismiss instances a) and c) for the same citation; in this respect we agree with our hearing officer who affirmed item 2a, instance b) with a penalty of $1,875. RO 33-34. However, for the reasons given for our penalty determination for serious item 1, we raise the penalty to $2,250. Compliance Officer Jackson rated the penalty for 2a as low serious because exposure to zinc fumes causes flu like symptoms which attenuate in a few days but greater probability because the welders were exposed to the fumes for a full day without respirators or engineering controls. I TE 147-148. As Stephens did for the lead citations, it qualified for the 10 % credit for history of prior violations.

Serious item 2b

Serious items 2b and 2c are grouped with 2a and so carry no additional penalty. Item 2b said the company failed to abate the fume hazard by, among other things, improving ventilation. Item 2b, because it is about abatement using feasible engineering controls, must be grouped with

[30] Go to oshrc.gov; select decisions and click on final commission decisions for 1996.

an exposure citation.[31] For serious item 2, labor grouped the three, separate violations into one citation for purposes of imposing a penalty.

Item 2b says, in part, "Feasible administrative or engineering controls were not determined and implemented to reduce employee exposures" Here is the cited standard:

> 1910.1000 (e) To achieve compliance...administrative[32] or engineering[33] controls must first be determine and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment [respirators] shall be used to keep the exposure within the limits prescribed in this section...
>
> (emphasis added)

Item 2a says Stephens exposed its welders, we have ruled only welder B's monitoring was performed correctly, to excessive levels of zinc. Every citation requires abatement. KRS 338.141 (1). Item 2b simply tells Stephens how to go about abatement:

> Feasible Engineering and/or administrative controls include but are not limited to:
>
> 1. local exhaust.
> 2. Downdraft booths/tables.
> 3. Training to ensure welders stay out of the welding fumes.
> 4. Adjustable work tabled to keep employers out of welding fumes.
>
> serious citation 2b

For item 2b, the department of labor must prove abatement is technologically and economically feasible or, failing that, respirators can be used; labor has the burden of proof for all citations, including abatement requirements. Section 43, 803 KAR 50:010.

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[31] Ohio Precision Castings, Inc, a federal review commission decision, CCH OSHD 22,788, BNA 6 OSHC 1789, 1791 (1978).

[32] Administrative controls means using more than one employee to accomplish a task requiring exposure to a hazard so as to spread that exposure among several employees. Since zinc exposure, and the other hazardous substances listed in 1910.1000, must be measured over an 8 hour time weighted average, using two employees for the 8 hours reduces each employee's exposure to 4 hours or one half the exposure for one employee.

[33] Engineering controls, for item 2b, means localized ventilation – protection the employer builds into the job.

In Harmony Blue Granite Company,[34] CCH OSHD 26,467, page 33,649, BNA 11 OSHC 1277, 1278-1279 (1983), the federal commission held, after much litigation, feasible means "'achievable.'" Achievable controls are those "that achieve a significant reduction..." in the cited condition. According to the cited standard, 1910.1000 (e), as well as Harmony Blue and others, an employer must first implement engineering controls: local exhaust, downdraft booths, training or adjustable work tables. But if those controls do not bring the exposure level down to the permissible exposure level, then the employer must also require the use of respirators along with the engineering controls. Harmony Blue Granite did not state the rule for determining economic feasibility; for that it referred to Sun Ship, Inc, CCH OSHD 26,353, BNA 11 OSHC 1028 (1982).

In Sun Ship the federal commission said:

> "'feasibility...'" includes consideration of whether the cost of compliance with a standard will be so great as to threaten an industry's long-term competitiveness.
>
> At CCH page, 33,421, 11 OSHC 1033

The Sun Ship commission said an expenditure of $2,500 for controls would not affect the company's "long-term profitability and competitiveness" where the company had "annual sales in excess of $100 million." At CCH pages 33,424-33,425, 11 OSHC 1036.

While Sun Ship is a noise case, the commission in Harmony Blue applied its logic to exposure to silica dust, a harmful substance under 1910.1000; the same logic applies to the case at bar.

Although our hearing officer found the department of labor proved the item 2b violation, proof of feasibility (RO 35), he did so for the wrong reasons. Neither the parties nor our hearing officer discussed feasibility. Harmony Blue Granite and Sun Ship.

[34] Go to oshrc.gov; select decisions and click on final commission decisions for 1983.

To prove feasibility, labor should first take up the question whether controls are technologically feasible,[35] and then move onto economic feasibility. In his questioning of the compliance officer, labor's counsel attempted neither. Rather, on cross examination of the compliance officer, Stephens obtained these facts:

The CO said Stephens had no local exhaust on the day of the welding and sampling. II TE 9. She said local exhaust would be right at the point of the welding and Stephens did not have that. II TE 10. She said Stephens did not have downdraft booths or tables. II TE 10-11. The company had no adjustable work tables either. II TE 11. Then the CO said welding the 6 and 3/4 inch galvanized pipe was very unusual work for Stephens. II TE 11. Mr. Williams, Stephens's lawyer, asked the CO if adjustable work tables or downdraft booths or local exhausts would have been practical for "this particular work," meaning welding the 6 and 3/4 inch galvanized pipe. She said:

> Probably those for this particular work wouldn't be practical. These are some things that we suggest, but these aren't limited to those types of – those controls, they're just suggestions.
>
> II TE 12 (emphasis added)

Then the CO answered the following question:

> Q. What sort of other feasible engineering controls could have been in place that would have allowed them to weld six and three quarter inch pipe, if it was just something that was going to be done for a few hours once a year?
> A. In that case, they might look at respirators. Respirators are the last resort that you want to go to, but if they're only doing it a couple times a year, it might be something they would want to look into.
>
> II TE 13

The compliance officer says the engineering controls suggested in item 2b would not be practical. But we find, given the terms used in the question to which she responded, she did say

[35] Sun Ship at CCH OSHD 26,353, page 33,422 , footnote 11, BNA 11 OSHC 1033, footnote 11.

respirators would be feasible, although she did not use that language. II TE 13. Recall Harmony Blue Granite says respirators are to be used where engineering controls do reduce the exposure levels but not below the PEL. CO Jackson said engineering controls were not feasible because of the nature of the work but respirators were.

Mr. Stephens said the company had some $218 million in sales in 2007. I TE 43. Safety directory Jack Rogers said Stephens upgraded ventilation. III TE 36. He also said the company "spent close to $80,000 just in protective equipment for our welders." III TE 36-37. Labor introduced no proof about the technological or economic feasibility of controls for zinc fumes in the work place but did get in proof about resort to respirators for protection.

Because during the monitoring process Stephens employees welded galvanized pipe, the standard about exposure to zinc applies. Stephens violated the standard because labor proved welder B was exposed to zinc fumes above the PEL and could use a respirator for protection; we find labor proved the use of respirators to be feasible. Labor proved employee exposure as well as constructive knowledge of the hazard. Ormet, supra. We sustain serious item 2b, instance b) but dismiss instances a) and c).

Serious item 2c

Although serious items 2b and 2c appear to be the same, they are not. Item 2b says Stephens did not, and we are paraphrasing, determine and implement feasible engineering controls. We have found labor proved respirators would be feasible. Serious item 2c says:

> ...1910.134 (a) (1): When effective engineering controls were not feasible or while they were being instituted, appropriate respirators were not used pursuant to the requirements of this section:

For serious item 2c, the department of labor charged Stephens with not requiring welders A, B, and C to use respirators until such time as the company could determine if engineering

controls were feasible. Compliance Officer Jackson said the company, when welding the galvanized pipe, "would want to look into" respirators. II TE 13. In the box labeled PPE (Type and Effectiveness), Ms. Jackson's report said welder B used a "welding hood" but made no mention of a respirator. Exhibit 11, page 146. Similarly, the box on the same form labeled Job Description, Operation, Work Location(s), Ventilation and Controls carries the notation "filter inside hood" but does not say the welder used a respirator. See also exhibits 16 and 17, two photographs which show the three welders not using respirators. We find welder B was exposed to zinc fumes without the benefit of a respirator.

We have found the standard applies and a Stephens employee, welder B, was exposed to the hazard. Stephens violated the terms of the standard because while welder B was exposed to 15.7 micrograms of zinc per cubic meter of air, it did not require the same welder to use a respirator until such time as it determined whether engineering controls were feasible. We have already found Stephens had constructive knowledge of the hazard. Ormet, supra. We sustain serious item 2c, instance b) but dismiss instances a) and c) because the department of labor could not prove their exposure to zinc; the filter cassettes were not placed under the welding hoods for welders A and C.

Nonserious item 5

Nonserious items 5, 6, 7, 8 and 9 are about three large ovens which reach temperatures of over 600 degrees; the nonserious items carried no proposed penalties. Stephens used the three ovens to bake a vinyl finish onto some metal products. II TE 130 and III TE 39. Items 5, 6 and 7 were written according to the authority of the permit confined space regulation. 1910.146.[36] A confined space is any space where an employee is able to work but will have difficulty getting into and out of, especially if rescue is necessary. While it is possible for an employee to work in

[36] 29 CFR 1910.146 and .147 are adopted in Kentucky by 803 KAR 2:309, sections 2 and 3.

a confined space, the space is not designed for a lengthy stay. Such a space has "limited or restricted means for entry or exit." Tanks, vessels, silos, storage bins and hoppers are listed as examples. 1910.146 (b), definitions.

Nonserious item 5 says Stephens did not determine whether it had any permit confined spaces. The citation reads like the standard:

> ...1910.146 (c) (1): The employer did not evaluate the workplace to determine if any spaces were permit required spaces:
>
> a) The maintenance employee in the Hardware and Coating building entered the ovens weekly for maintenance repairs, and was last entered in October 4, 2005 for repair.
>
> b) The vinyl coating operations manager in the Hardware and Coating building entered the ovens approximately once a month for cleaning.

According to nonserious item 5, Stephens had not evaluated its work place to see if it had any permit required spaces. But then nonserious item 6 charged the company with not retaining confined space entry permits "for at least one year" after entry was completed. If a company had not determined if it had any confined spaces, then it would have no occasion either to issue or to retain confined space permits. Our hearing officer dismissed nonserious item 5 because he said it contradicted nonserious item 6 and because labor offered no proof about item 5. RO 44-45. We agree with our hearing officer and affirm his decision to dismiss nonserious item 5.

Nonserious
items 6 and 7

Nonserious item 6 says:

> ...1910.146 (e) (6): The employer did not retain each canceled entry permit for at least 1 year to facilitate the review of the permit-required confined space program...:
>
> a) The maintenance employee in the Hardware and Coating building entered the ovens weekly for maintenance repairs,

and was last entered in October 4, 2005 for repair.

b) The vinyl coating operations manager in the Hardware and Coating building entered the ovens approximately once a month for cleaning.

Nonserious item 7 says:

...1910.146 (g) (4): The employer did not certify that the training required by paragraphs (g) (1) through (g) (3) of this section had been accomplished:

a) The maintenance employee in the Hardware and Coating building entered the ovens weekly for maintenance repairs, and was last entered in October 4, 2005 for repair.

b) The vinyl coating operations manager in the Hardware and Coating building entered the ovens approximately once a month for cleaning.

The compliance officer said Stephens did not keep permits for the required one year, a violation of the standard. She also said Stephens employees did not receive confined space training required by 1910.146 (1) through (g) (3). II TE 127, 134.

Our hearing officer dismissed nonserious items 6 and 7 because Stephens introduced an exhibit at trial which said the company had evaluated the ovens and found them not to be permit required spaces. Stephens introduced exhibit 21 with no objection from labor. On cross examination the compliance officer, when asked about the exhibit, said it "appears to be a form that says it's not required – it's not permit required confined space." She was referring to the three ovens. II TE 130. Then the CO answered the following question:

Q. Well, if the testimony is that – from Stephens Pipe and Steel that they lower the sides of these ovens before they enter, then it wouldn't be confined space, would it?
A. That would knock out the restricted means for entry.
II TE 133

After Compliance Officer Jackson testified, Stephens called its expert witness Greg Boothe who was asked about the three ovens which are the subject of nonserious items 5, 6, 7, 8 and 9:

> A. I found that when they enter the oven to do work, they lowered three of the walls down and the also turned off the gas to the oven...And, so, at that point, it would no longer fit the definition of a confined space, because you have three areas where you can just walk in. So, you no longer have limited access.
>
> II TE 180

. Labor has the burden of proving the space was a confined space. Cagle's, Inc, a federal administrative law judge decision, CCH OSHD 31,947, page 47,434 (1999). On direct examination the CO was only asked about the hazards presented by the ovens; she said they have atmospheric and engulfment hazards. II TE 127. This contrasts with Mr. Boothe's statement the walls on the ovens can be lowered so workers can simply "walk in." Exhibit 21. Stephens's confined spaces reclassification form is dated March 21, 2001; it says the "hazards are eliminated without entry." With nothing further, we find the department of labor has not proved the three ovens are confined spaces because employees can walk in and out of them to perform work.

Without proof the three ovens are confined spaces, the cited standard, 1910.146, does not apply. Ormet, supra. We affirm our hearing officer's recommended order to dismiss nonserious items 6 and 7.

Nonserious items 8 and 9

Nonserious items 8 and 9 are about the control of potentially hazardous energy, often known as lock-out tag-out, and employee training on the procedures to be used. Standard 1910.147 is designed to protect employees from injury which would occur if a machine which

they are servicing or maintaining is unexpectedly started up or commences operations. Often a lockout device is placed on the machine's controls to prevent its operation until the lock is removed. 1910.147 (a) (1) (i) and (b).

Nonserious item 8 says:

> .....1910.147 (c) (4) (i): Procedures were not developed, documented or utilized for the control of potentially hazardous energy when employees were engaged in the activities covered by this section:
>
> a) The maintenance employee in the Hardware and Coating building entered the ovens weekly for maintenance repairs. The employee utilized lockout procedures, but no written procedures were developed.
>
> (b) The vinyl coating operations manager in the Hardware and Coating building entered the ovens approximately once a month for cleaning. The employee utilized lockout procedures, but no written procedures were developed.

Then nonserious item 9 says:

> ...1910.147 (c) (7) (iv): The employer did not certify that employee training had been accomplished and was being kept up to date:
>
> a) The maintenance employee in the Hardware and Coating building entered the ovens weekly for maintenance repairs, and was last entered in October 4, 2005 for repair. Employees stated that training was last done in 2000-2001.
>
> (b) The vinyl coating operations manager in the Hardware and Coating building entered the ovens approximately once a month for cleaning. Employees stated that training was last done in 2000-2001.

Nonserious items 8 and 9 are about the same ovens referenced in items 5, 6 and 7.

On direct examination the compliance officer said she learned Stephens employees entered the ovens for maintenance and cleaning but they had no written procedures as the standards require. II TE 138. She said she had asked the company for records. II TE 138-139.

Stephens called Jack Rogers, Stephens's safety director. Stephens's lawyer asked him the following questions:

> Q. Do you have a written policy at Stephens on lockout/tag out?
> A. Yes, sir. We do.
> Q. Okay. Do you have that with you today?
> A. I don't have that....
> Q. Okay. And, have you always had that in place during the entire period that you were there?
> A. Yes, sir.

III TE 30 - 31

Our hearing officer dismissed nonserious items 8 and 9. In his recommended order the hearing officer said "Stephens Pipe introduced records showing written lockout/tag out procedures for the ovens." Exhibit 22. RO 48. Our hearing officer said he had, during the trial, asked Stephens Pipe to "produce a copy of its Lockout/Tag out policy about which one witness testified." His order said the policy "shall be admitted into the record as Exhibit 22 if the Commissioner files no objections to its introduction." See our hearing officer's "Order Regarding Proposed Exhibit," our record, tab 29. We have examined the record and found the department of labor filed no such objection. Because labor filed no written objection to exhibit 22, we will treat it as if it had been admitted into evidence during the trial[37] without objection.

Exhibit 22 is a "Lockout/Tag out – Energy Control Program," consisting of six pages of procedures. Then the final nine pages of exhibit 22 are lockout/tagout training documents. Our hearing officer dismissed nonserious items 8 and 9, citing to exhibit 22. Because the department of labor failed to prove Stephens had no set of procedures for, or training about, the control of hazardous energy, we affirm our hearing officer's decision to dismiss nonserious items 8 and 9. Labor failed to prove Stephens violated the terms of the standard. Ormet, supra.

[37] Ordinarily, in our cases the record is closed at the end of the trial; labor had every right to object to the late filed lock-out tag-out policy but did not.

Nonserious item 10

Nonserious item 10 said:

> The employer did not post warning signs in each work area where the PEL was exceeded:
>
> a) A welder in the Ornamental building welding galvanized steel for gate production was exposed to airborne lead levels of 84.5 ug/m3...

The cited standard says a warning sign is required for each work area where the permissible exposure limit for lead is exceeded:

> **1910.1025 (m) (2)** *Signs*. **(i)** The employer shall post the following warning signs in each work area where the PEL is exceeded.
>
> (emphasis added)

Item 10 is different from the other lead citations in this case. The standard for nonserious item 10 requires a lead warning sign "in each work area" without linking the exposure to any employee. The standards for serious items 3, 5, 7, 8, 9 and 11, on the other hand, all require proof an employee was exposed to lead at or above the action level or above the PEL. For example, see 1910.1025 (d) (2) and (g) (1).

According to the cited standard, the sign must contain the following information in bold capital letters:

WARNING

LEAD WORK AREA

POISON

NO SMOKING OR EATING

Because the wording of the standard is not connected to the exposure of any particular employee, an employer must post a sign wherever the PEL for lead is exceeded.

The standard is designed to protect all employees whether they have been exposed to lead or not. Employees do not stay in one place. They go to and from their work stations. They leave their work areas to take breaks and eat lunch. This standard protects employees whether they work in the "area where the PEL is exceeded" or not. If we may posit an example which captures the intent of the standard, an employee, any employee whether he has had exposure to lead or not, may see the above sign and decide to avoid or to leave the "work area" if his presence is not required for some reason. A warning sign gives employees notice about the presence of lead. Then the employee in our example may use the information so conveyed to protect himself.

The lead standard applies because the compliance officers found occupational exposure to lead in the work place. The terms of the cited standard were not met: labor proved Stephens had a work area where the PEL was exceeded when the monitoring of welder B established he was exposed to 84.5 micrograms of lead per cubic meter of air. The CO said the warning signs should have been in the ornamental building where welder B worked while he was being monitored. II TE 147. Because welder B, at the time of the monitoring, worked in an area where a standard mandated warning sign was required to be, but was not, posted, the department of labor proved employee exposure. We have already found Stephens had constructive knowledge of the lead. Ormet, supra.

We reverse our hearing officer who dismissed nonserious item 10 because he said Stephens could not have known about the lead in the galvanizing material. RO 51. We affirm nonserious item 10 with no penalty.

Conclusion

The parties by stipulation agreed the complainant department of labor dismissed serious items 4a, 4b, 4c, 10a, 10b and 10c and the proposed penalties. Respondent agreed to withdraw its contest to nonserious items 1, 2, 3 and 4. Exhibit 1. We affirm our hearing officer's recommendation to dismiss serious items 4a, 4b, 4c, 10a, 10b and 10c and to affirm nonserious items 1, 2, 3 and 4.

We affirm serious item 1 with a penalty of $2,250.

We affirm instance b) of serious item 2a with a penalty of $2,250 but dismiss instances a) and c).

We affirm instance b) for serious item 2b but dismiss instances a) and c).

We affirm instance b) for serious item 2c but dismiss instances a) and c).

We affirm serious item 3b with a penalty of $4,500 but dismiss serious item 3a.

We dismiss serious citation 1, items 5, 6, 7, 8a, 8b and 9.

We affirm instance b) for serious item 11 with a penalty of $4,500 but dismiss instance a).

We dismiss nonserious items 5, 6, 7, 8 and 9.

We affirm nonserious item 10 with no penalty.

It is so ordered.[38]

January 5, 2010.

Faye Liebermann
Chair

[38] Commissioner Green took no part in this decision.

Michael L. Mullins
Commissioner

Certificate of Service

This is to certify a copy of this decision was served on the following in the manner indicated on January 5, 2010:

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