United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409 Fax: (303) 844-3759

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>TECHNO COATINGS,<br>Respondent. | OSHRC DOCKET NO. 03-0865 |

APPEARANCES:

For the Complainant:
Susan Seletsky, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California

For the Respondent:
Robert D. Peterson, Esq., Rocklin, California

Before: Administrative Law Judge: Robert A. Yetman

## DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Techno Coatings (Techno), at all times relevant to this action maintained a place of business at Paleta Creek Pier Naval Base, San Diego, California, where it was engaged in lead abatement. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

Between December 11, 2002 and March 27, 2003 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Techno's work site on the naval base. As a result of that inspection, Techno was issued a citation alleging violations of the lead standards at 29 C.F.R. §1926.62 of the Act. By filing a timely notice of contest Techno brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 18, 2003, a hearing was held in San Diego, California. At the hearing, Complainant moved to group items 3 and items 4a, 4b and 4c. The unopposed motion was granted, and items 4a, 4b

and 4c were renumbered as 3b, 3c, and 3d. A single penalty of $4,000.00 was proposed for those items (Tr. Vol. I, p. 15-17). Complainant further moved to group items 5, 6, and 7. That motion was also unopposed and was granted (Tr. Vol. I, p. 17.). Those items were renumbered 5a, 5b and 5c, respectively (Tr. Vol. I, p. 17). The parties have submitted briefs on the citations, as amended, and this matter is ready for disposition.

**Alleged Violations of §1926.62(d)**

**Serious citation 1, Item 1a** alleges:

29 CFR 1926.62(d)(1)(i): Each employer who has a workplace or operation covered by this standard did not initially determine if any employee may be exposed to lead at or above the action level.

a) Techno Coatings did not initially determine if any employee was exposed to lead at or above the action level at the Paleta Creek Pier lead paint removal project, Naval Base San Diego consistent with OSHA requirements. Techno Coatings utilized historical data obtained from a previous operation (San Bernardino) that did not meet the requirements for use of historical data. The previous operation did not have workplace conditions closely resembling the work practices, similar prevailing environmental conditions as the Paleta Creek Pier and did not demonstrate that under any expected conditions of use, the paint and activity involving lead could not result in employee exposure to lead at or above the action level. A Painter was exposed to an airborne concentration of lead of 61ug/m3 as an 8 hour time-weighted average during 392 minutes of sampling on December 12, 2002.

**Serious citation 1, item 1b** alleges:

29 CFR 1926.62(d)(3)(i): Except as provided under paragraphs (d)(3)(iii) of this section the employer did not monitor employee exposures and did not base determinations on employee exposure monitoring described in (d)(1)(i) through (iii).

a) Techno Coatings did not conduct personal sampling as a basis for initial determination of exposure to lead at the Paleta Creek Pier lead paint removal project, Naval Base San Diego when historical data obtained from a previous operation did not meet the requirements of (d)(3)(iii). The previous operation did not have workplace conditions closely resembling the work practices or similar prevailing environmental conditions as the Paleta Creek Pier; and did not demonstrate that under any expected conditions of use, the paint and activities involving lead could not result in employee exposure to lead at or above the action level. A Painter was exposed to an airborne concentration of lead 61ug/m3 as an 8 hour time-weighted average during 392 minutes of sampling on December 12, 2002.

*Facts*

Compliance Officer (CO) Tina Kulinovich, an industrial hygienist for OSHA, testified that she arrived on the Paleta Creek Pier at the San Diego Naval Base on December 11, 2002 (Tr. Vol. I, p. 22). Kulinovich met with representatives of the prime contractor, who told her that Techno Coatings was

conducting lead abatement on the site (Tr. Vol. I, p. 22-23). Kulinovich located Techno's two employees, Chris Radovich, the foreman and competent person for lead abatement on site, and John Pelletier, working from a floating platform (Tr. Vol. I, p. 24-27, 268). The two men were removing lead based paint from the edge of the pier with needle guns, *i.e.*, power tools that abrade a metal surface area to remove paint or other coatings (Tr. Vol. I, p. 24, 25, 27, 63, Vol. II, p. 55). Kulinovich testified that she observed a large amount of particulate matter in the air above the two men (Tr. Vol. I, p. 28, 30). She noted that no vacuum attachments (shrouds designed to collect particulate matter generated by the needle guns at its point of operation) were attached to the needle guns (Tr. Vol. I, p. 28-31). Moreover, the work area had not been delineated as a potential lead work area (Tr. Vol. I, p. 28). Radovich told the CO that Techno had determined that employees on this job would not be exposed to lead in excess of permissible exposure limits (50 ug/$m^3$), therefore, no air samples had been taken on this site (Tr. Vol. I, p. 24, 32-33). The following day, Kulinovich returned to Techno's work site to conduct air monitoring (Tr. Vol. I, p. 65).

On December 12, when CO Kulinovich returned to Techno's work site, she photographed the employees on the floating platform (Tr. Vol. I, p. 26, Exh. 42A). On that date both Radovich and Pelletier were using vacuum attachments (Tr. Vol. I, p. 29-31). Kulinovich placed pre-calibrated sampling pumps on Radovich and Pelletier (Tr. Vol. I, p. 77, 88, 152).[1] She ran the hoses over the worker's shoulders and attached the cassettes to their lapels so that the cassettes hung in their breathing zones (Tr. Vol. I, p. 77-78). She then removed the plugs, which insure that no particulate matter enters the cassette prior to sampling (Tr. Vol. I, p. 77). Kulinovich did not enter the lead area while the employees were working, but observed the employees periodically while they worked (Tr. Vol. I, p. 91-93). She observed nothing which would indicate that the pumps were not working properly and when the pumps were removed, there had been no "flow-fault" (Tr. Vol., p. 91-93). Kulinovich testified that she replaced the plugs and removed the pumps when the employees left the work site for lunch (Tr. Vol. I, p. 79). At the end of the day, the cassettes were post-calibrated (Tr. Vol. I, p. 80-81). Kulinovich calculated the volume of air collected, multiplying the air flow times the number of minutes sampled, and submitted her documentation to OSHA's Salt Lake Tech Lab along with the cassettes (Tr. Vol. I, p. 80-81). The lab analyses reveal a raw time sample of

[1]At the hearing, the CO testified that she had misplaced the calibration reports which were generated by the "Gilibrator," the equipment with which she calibrates the pumps. However, she stated, she had an independent recollection of the results, and had recorded the results of the calibration, *i.e.*, the highest of the average of the pre or post calibration flows, under Item #27 of the air sampling work sheets at the time the pre-calibration was performed, in accordance with OSHA practices (Tr. Vol. I, p. 137, 146-147, 150, 163; Exh. C-7, C-9; *See*, Kulinovich's detailed description of calibration procedures, performed at Tr. Vol. I, p. 154-155).

.0748 milligrams (or 74.8 micrograms) per cubic meter for Radovich, and .0230 milligrams per cubic meter for Pelletier (Tr. Vol. I, p. 83-84, 88, Vol. II, p. 32-33; Exh. C-8, C-10). Kulinovich calculated an eight-hour time weighted average, using zero exposure for the remainder of the eight hours, and found that Radovich was exposed to 61.25 micrograms per cubic meter ($ug/m^3$), 1.225 times OSHA's PEL of 50 micrograms per cubic meter (Tr. Vol. I, p. 85-86; Exh. C-7). Kulinovich did not calculate Pelletier's TWA as his raw data indicated exposure of less than 50 $ug/m^3$.

Mr. Pelletier testified during two separate days. When he took the stand on the second day of the hearing, Pelletier testified that, on the previous evening, he had remembered that on the morning of December 12, 2002, the air line came loose from Radovich's needle gun caused the sampling cassette to fall into a bucket they had been using to collect contaminants (Tr. Vol. I, p. 116-18, 122). Pelletier stated that he reattached the hose that went to the monitor (Tr. Vol. II, p. 118-19). Pelletier testified that he didn't think the incident would do any harm, and had forgotten it (Tr. Vol. II, p. 117, 121). He did not tell either CO Kulinovich or Respondent's safety director about the incident (Tr. Vol. II, p. 117, 121-122).

When he was recalled as a witness during the second day of the hearing, Radovich also testified that the sampling canister had come off, and was replaced by Pelletier (Tr. Vol. II, p. 126). Radovich testified that he did not tell CO Kulinovich that his sampling cassette had come off, though she asked him whether he had a normal work day (Tr. Vol. II, p. 127). According to Radovich, he did not realize it was of any importance (Tr. Vol. II, p. 127). Though Radovich was the foreman, had signed the pre job safety analysis for this job, and was the competent person for lead abatement on site, he claimed not to be aware of any of the requirements necessary to fulfill his duties in that position (Tr. Vol. II, p. 263-64, 268-69; Exh. R-3).

CO Kulinovich testified that it is difficult to take the sampling cassette off the hose, which, in this case, Kulinovich had secured with duct tape to Radovich's Tyvek overall (Tr. Vol. II, p. 130-31). Kulinovich stated that wind direction could have contributed to the variation in Radovich and Pelletier's results (Tr. Vol. I, p. 90). According to Kulinovich, Pelletier could have been standing downwind of Radovich, whose needle gun was generating aerosolized lead particulate; alternatively one of the vacuum attachments to the needle guns may not have been functioning properly (Tr. Vol. I, p. 193). These speculations were not verified by the compliance officer.

Ben Remley, Techno's director of safety, was present on December 12, 2002 (Tr. Vol. I, p. 43, 65). On that date, Remley told the CO that in creating his pre-job safety analysis he had relied on historical data

in lieu of actual monitoring (Tr. Vol. I, p. 43). Kulinovich testified that during the inspection, Remley told her that he had relied on data from an earlier job at a power plant (Tr. Vol. I, p. 43), however, since he did not have the documentation with him, he would mail it to her (Tr. Vol. I, p. 43). On December 17, 2002, Techno submitted to the Secretary a Pre Job Safety and Health Hazard Analysis for the instant worksite dated November 4, 2002 and signed by Remley and Radovich. The comment section of the analysis states only that "Lead exposure above the PEL is not expected while using vacuum attachments – However full PPE (Tyvek, HEPA Filters) will be required on this job." (Tr. Vol. I, p. 43, 179, Vol. II, p. 75; Exh. C-5; R-3). Because no supporting historical documentation accompanied the analysis, Kulinovich contacted Remley by phone (Tr. Vol. I, p. 43). At that time, Remley told Kulinovich that he had historical data from a bridge project that he would submit (Tr. Vol. I, p. 43). In March, 2003, Respondent submitted testing results obtained during Techno's work on the Waterman Avenue Bridge in San Bernardino (Tr. Vol. I, p. 45-49; Exh. 12, 13, 14).

At the hearing, Remley denied telling CO Kulinovich that he had relied on data from a power plant (Tr. Vol. II, p. 77), but agreed that he did not mention the San Bernardino project until she called him after he failed to submit adequate documentation for his pre-job analysis (Tr. Vol. II, p. 78). Remley had no explanation for his failure to document his decision to rely on the San Bernardino historical data as required by OSHA regulations, despite 30 years of experience in lead abatement (Tr. Vol. II, p. 51-54, 81).

Remley also testified that, prior to the start of the project at the San Diego Naval Base, he discussed the job with the superintendent who had been involved with the Waterman Bridge project (Tr. Vol. II, p. 58). Remley stated that, based on the paint chip analysis from both sites, they knew that the lead content had been higher in the paint removed in San Bernardino (Tr. Vol. II, p. 58-63). As part of the bid process for lead abatement at the San Diego Naval Base, Techno received an analysis of a paint chip from the Paleta Creek pier, indicating that concentrations of 54,400 parts per million (ppm) were present in the paint to be removed (Tr. Vol. I, p. 38, 40-42; Exh. C-6). The historical data from the Waterman Bridge consisted of a paint chip removed from pier 7 of the bridge, and air sampling conducted during the removal of paint from pier 10 of the same bridge on July 9, 2002 (Tr. Vol. I, p. 46-48, Exh. C-12, C-13, C-14). Analysis of the paint chip showed lead concentrations of 700,000 ppm, or milligrams per kilogram (Tr. Vol. I, Exh. C-14). The air sampling consisted of personal monitoring from one employee, and two area samples (Tr. Vol. I, p. 48, Exh. C-13). All three samples yielded non-detectable levels of lead (Tr. Vol. I, p. 49; Exh. C-13). Remley concluded that because they would be using the same tools and methods

as were used in San Bernardino, and because the air monitoring conducted there had been negative, there would be no exposure problem in San Diego, and that they would not need to do initial monitoring (Tr. Vol. II, P. 63-67, 75). Remley agreed, however, that if lead based paint containing concentrations of 54,400 ppm was removed with needle guns not outfitted with vacuum attachments, it was likely that employees would be exposed to lead exposure above the PEL (Tr. 100).

Remley stated that the San Bernardino paint sample was taken at pier 7 because a scaffold was set up in that location on the day an industrial hygienist was on the work site. Remley testified that he visually determined that the paint on pier 7 was representative of the whole bridge, but admitted he had no actual knowledge of the bridge's maintenance history (Tr. Vol. II., p. 86). Kulinovich testified that bridges are painted multiple times and one bridge at different locations may contain different lead levels (Tr. Vol. I, p. 185). Techno's project at the bridge involved the removal of paint only from specific identified locations where earthquake retrofit work was to be done (Tr. Vol. II, p. 55, 89). Remley admitted that there might have been different lead contents in the paint in different areas of the bridge (Tr. Vol. II, p. 87). According to CO Kulinovich, the air samples taken from pier 10 of the Waterman Bridge did not reflect any known concentration of lead (Tr. Vol. I, p. 185).

*Discussion*

The cited standards provide:

> (d) *Exposure assessment-(1) General.* (i) Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level.
>
> (ii) For the purpose of paragraph (d) of this section, employee exposure is that exposure which would occur if the employee were not using a respirator.
>
> (iii) . . . [T]he employer shall collect personal samples representative of a full shift including at least one sample for each job classification in each work area for each shift or for the shift with the highest exposure level.
>
> * * *
>
> (3) *Basis of initial determination.* (i) Except as provided under paragraphs (d)(3)(iii) and (d)(3)(iv) of this section the employer shall monitor employee exposures and shall base initial determinations on the employee exposure monitoring results . . .
>
> (iii) Where the employer has previously monitored for lead exposures, and the data were obtained within the past 12 months during work operations conducted under workplace conditions closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employer's current operations, the employer may rely on such earlier

> monitoring results to satisfy the requirements of paragraphs (d)(3)(i) and (d)(6) of this section *if the sampling and analytical methods meet the accuracy and confidence levels of* paragraph (d)(10) of this section. [emphasis added]

Paragraph (d)(10) of §1926.62 is missing from the published standard; however, OSHA in its Compliance Directive CPL 2-2.58 - 29 CFR 1926.62, Inspection and Compliance Procedures, has stated that the reference in paragraph (d)(3)(iii) refers to those criteria listed in the preamble to the interim final rule for the lead standard at 58 FR 26599 (Exh. C-43):

> 1) *The data upon which employee exposure assessments are based are scientifically sound and collected using methods that are sufficiently accurate and precise.* [emphasis added]
>
> 2) The processes and work practices in use when the historical data were obtained, including engineering controls and work practices used (e.g., work area dimensions, ventilation positioning and airflow, crew size, tools and application or removal methods, containment, wet methods, duration of the work shift) are essentially the same as those to be used during the job for which initial monitoring will not be performed.
>
> 3) The characteristics of the lead containing material being handled when the historical data were obtained are essentially the same as those on the job for which initial monitoring will not be performed.
>
> 4) Environmental conditions prevailing when the historical data were obtained are essentially the same as for the job which initial monitoring will not be performed.

If the state of such variable factors was not noted at the time the historic work data was collected, then it is unknown whether the data would reflect current exposures. The CPL states that such data may not be substituted for initial monitoring.

**Initial determination.** CO Kulinovich testified that on the day of the inspection Techno's safety director Remley told her that, in lieu of personal monitoring, he used historical data from a job Techno had previously performed at a power plant to make an initial exposure assessment. Only later, after failing to provide supporting documentation for his initial determination, did Remley mention the Waterman Bridge in San Bernardino. At the hearing, Remley denied making statements concerning the power plant to Kulinovich. Neither witnesses' testimony is either supported or contradicted by extrinsic

evidence as Techno could not produce the documentation required under 29 C.F.R. 1926.62(d)(5).[2] However, Kulinovich clearly and consistently recalled the details of her efforts to ascertain whether Remley actually relied on historical data, while Remley was equivocal, and could not recall the details of his conversations with the CO. This record supports the inference that no initial assessment was made in this matter.

Even assuming, arguendo, that Techno did rely on the monitoring information from the San Bernardino job in lieu of actual monitoring, the record does not justify such use of the historical data provided. The data from the Waterman Bridge project does not establish the exposures on that job with any degree of accuracy, and cannot, therefore, be used to predict exposures on this or any other job with any certainty. The paint chip samples at the Waterman Bridge were not obtained from the same location as the air samples. Respondent's conclusions that the air samples are demonstrative of the exposures produced by needle gunning paint with lead concentrations of 700,000 ppm requires that one assume that the lead concentrations in pier 7 and pier 10 were identical. Such assumption is unfounded. Respondent concluded that the paint on the two piers was identical based solely on Remley's visual observation of the bridge. Respondent neither sought, nor received any objective information establishing that the paint in the two locations was identical. Respondent's uninformed conclusion that the paint was identical was unreasonable given the nature of its own project, which involved stripping *only portions* of the bridge for retrofitting. After retrofitting, those portions of the bridge would be repaired, resulting in an uneven layering of paint on different piers. It is clear that air monitoring must be conducted where *known*

---

[2]29 C.F.R. 62(d)(5) reads as follows:

> (5) *Negative initial determination.*
> Where a determination, conducted under paragraphs (d)(1), (2), and 3 of this section is made that no employee is exposed to airborne concentrations of lead at or above the action level the employer shall make a written record of such determination. The record shall include at least the information specified in paragraph (d)(3)(i) of this section and shall also include the date of determination, location within the worksite, and the name and social security number of each employee monitored.

concentrations of lead are being removed for it to provide representative exposure levels with any degree of accuracy or confidence.

The evidence in this record establishes that Techno did not have a valid prior exposure assessment from which it could make an initial determination compliant with 29 C.F.R. §1926.62(d)(i) and (iii). Citation 1, items 1a and 1b are, therefore, affirmed.

*Penalty*

CO Kulinovich testified that the item was serious in that lead exposure can have serious adverse long term effects, specifically blood poisoning resulting in kidney damage (Tr. 127-28). As a result she assessed a $5,000.00 gravity based penalty based, in part, on the results of her air monitoring. She then calculated a 20% reduction in the penalty based on Techno's size. A penalty of $4,000.00 was proposed (Tr. 126).

Since the start of the project in early November, two employees were exposed to the possibility of exposure to lead in excess of the PEL as a result of Techno's failure to make a proper initial determination. It is unclear, however, to what levels the employees were actually exposed. Complainant failed to adequately explain the radical differences in the results of Pelletier and Radovich's monitoring. Because there is no trustworthy air sampling showing that employees were exposed in excess of the PEL, the gravity based penalty appears to be overstated. Nonetheless, the record establishes that Respondent was at best cavalier about OSHA's lead abatement requirements and the safety of its employees. The pre-job analysis Techno prepared for this job was not based on reliable historical data. Radovich, the foreman and competent person for lead abatement on the site, testified that he knew nothing of the requirements for competent persons, but, nonetheless, signed off on the pre-job safety analysis. Moreover the analysis was predicated on employee use of vacuum attachments. Safety Director Remley admitted that without the attachments, employees were likely to be exposed to lead above the PEL when removing paint containing lead in concentrations of 54,400 ppm. Yet no attachments were in use on December 11, 2002, when the OSHA CO arrived unannounced. The proposed penalty in the amount of $4,000.00 is assessed for the violations.

**Alleged Violations of the Lead Standard**

29 C.F.C. 1926.62(d)(i) provides that:

> . . . [u]ntil the employer performs an employee exposure assessment as required in paragraph (d) of this section and documents that the employee performing any of

> the listed tasks is not exposed above the PEL, the employer shall treat the employee as if the employee were exposed above the PEL . . . (emphasis added)
>
> * * *
>
> (iv) With respect to the tasks listed in paragraph (d)(2)(iv) of this section, where lead is present, until the employer performs an employee exposure assessment as required in paragraph (d) of this section and documents that the employee performing any of the listed tasks is not exposed to lead in excess of 2,500 ug/$m^3$ (50xPEL), the employer shall treat the employee as if the employee were exposed to lead in excess of 2,500 ug/$m^3$ (emphasis supplied) and shall implement employee protective measures as prescribed in paragraph (d)(2)(v) of this section. . . . Interim protection as described in this paragraph is required where lead containing coatings or paint are present on structures when performing:
>
> (A) Abrasive blasting. . . .

Paragraph (d)(2)(v) requires that employees performing the tasks described in (d)(2)(iv) be provided with:

> (A) Appropriate respiratory protection in accordance with paragraph (f) of this section.
>
> (B) Appropriate personal protective clothing and equipment in accordance with paragraph (g) of this section.
>
> (C) Change areas in accordance with paragraph (i)(2) of this section
>
> (D) Handwashing facilities in accordance with paragraph (i)(5) of this section.
>
> (E) Biological monitoring in accordance with paragraph (j)(1)(i) of this section, to consist of blood sampling and analysis for lead and zinc protoporphyrin levels, . . .

The record in this case supports the conclusion that the Secretary failed to establish by a preponderance of the evidence that Respondent's employees were exposed to lead in excess of the action level or the permissible exposure level on December 12, 2002. The disparity in the monitoring readout for the two employees who were working within a few feet of each other while engaged in the same work activity under virtually identical conditions has not been convincingly explained by Complainant particularly since the compliance officer misplaced the calibration sheets for the monitoring equipment. Moreover, the employees' testimony that the monitoring cassette for the overexposed employee fell in a bucket containing paint chips, although implausible, remains unrebutted or contradicted by a more plausible explanation for the wide variation in the readouts for the two employees, where one of the employees' exposure was below the action level. Thus, there is no credible evidence that either employee was exposed to lead levels above the permissible exposure level.

Nevertheless, the lead standard requires, in the absence of an initial determination of lead exposure as discussed, *supra*, that the employer must presume that employees are exposed to lead in excess of 2,500 ug/$m^3$ and provide the protections required by the standards pursuant to that presumption. In this case, the employees were engaged in abrasive blasting of paint containing lead with the knowledge of their employer. Accordingly, Respondent was required to comply with the provisions of §1926.62(d), *et seq.*, as discussed below.

**Alleged Violations of §1926.62(f)**

**Serious citation 1, item 2a** alleges

29 CFR 1926.62(f)(2)(i): The employer did not implement respiratory protection program in accordance with 29 CFR 1910.1349 (sic) (b) through (d) except for (d)(1)(iii), and (f) through (m).

Techno Coatings did not implement a respiratory protection program in accordance with 29CFR 1910.134(b) through (d):

a) Medical evaluations were not provided or obtained from the previous employer/labor union prior to fit testing, issuing and requiring two employee painters to wear MSA 1/2 mask respirators at the Paleta Creek Pier lead abatement project, Naval Base San Diego, as required in 1910.134(c)(1)(ii).

**Serious citation 1, item 2b** alleges

29 CFR 1910.134(e)(1): The employer did not provide a medical evaluation to determine the employee's ability to use a respirator, before the employee was fit tested or required to use the respirator in the workplace.

a) Techno Coatings did not provide a medical evaluation and/or ensure a medical evaluation had been conducted prior to fit testing, issuing and requiring two employee painters to wear MSA 1/2 mask respirator at the Paleta Creek Pier lead abatement project.

*Facts*

Both Radovich and Pelletier were MSA 1/2 mask respirators. CO Kulinovich testified that no licensed health care personnel had certified that Mr. Radovich was physically able to wear a fitted respirator (Tr. Vol. I, p. 96, 207-09). According to Kulinovich, safety director Remley maintained that it was the responsibility of the worker's union to provide the required exams (Tr. Vol. I, p. 96). Techno was able to locate records establishing that Pelletier had undergone a respiratory medical exam at the union's Apprenticeship Training Center (Tr. Vol. I, p. 96-97, Exh. C-29, R-7). Techno also produced evidence that

Mr. Remley fit tested Mr. Pelletier; however, no evidence was produced by Respondent that Mr. Radovich had been fit tested. (Tr. Vol. I, p. 97; Exh. C-29, R-7).

*Discussion*

Section 1926.62(f)(2)(i), the standard cited at **citation 1, item 2a** and serving as the basis for **item 2b**, provides that "[t]he employer must implement a respiratory protection program in accordance with 29 CFR 1910.134(b) through (d). . ."

§1910.134(c) requires:

(i) Medical evaluations of employees required to use respirators;
(iii) Fit testing procedures for tight-fitting respirators. . .

Techno contends that its employee's union was responsible for providing medical evaluations and fit testing. It is well settled that an employer may not contractually shift its responsibility for the health and safety of its employees to third parties. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). Though the workers' union may have agreed to provide the medical exams and fit testing required by OSHA, it is ultimately the responsibility of the workers' employer to assure that required safety precautions are taken.

As Techno did not have a respiratory protection program including both medical evaluation and fit testing for its employees, two violations of §1926.62(f)(2)(i) are established. Section 1926.134(e)(1) is improperly cited as a separate item at 2b and is amended *sua sponte* to conform the pleadings to the evidence pursuant to Rules 15(b) and (c), FRCP, because the issue of medical evaluations was tried by the implied consent of Respondent.

*Penalty*

A penalty of $4,000.00 was proposed for this item. The violation is serious as exposure to lead may result in blood poisoning and kidney damage. As noted above, however, no valid air sampling was produced by Complainant for this work site. Moreover, Techno was able to produce documentation indicating that Pelletier had a medical exam and fit test. Because the gravity of this item appears overstated, a penalty of $1,000.00 is deemed appropriate and will be assessed.

**Alleged Violations of §1926.62(g) and (i)**

**Serious citation 1, item 3a** alleges:

29 CFR 1926.62(g)(1)(i): The employer did not provide and assure that employees use appropriate protective clothing that prevented contamination of the employee and employee's garments such as, but not limited to (i) Coveralls or similar full-body work clothing.

a) Techno Coatings did not provide employee painters involved in lead abatement activities exceeding the PEL with non-disposable protective clothing that was not prone to ripping, or tearing under normal use and work activities at the Paleta Creek Project. An employee painter was exposed to an airborne lead concentration of 61ug/m3 8 hour Time-weighted average during 392 minutes of sampling on December 12, 2002. The OSHA PEL is 50 ug/m3.

**Serious citation 1, item 3b** alleges:

29 CFR 1926.62(g)(2)(iv): The employer did not assure that all protective clothing was removed at the completion of each work shift only in change areas provided for that purpose as prescribed in paragraph (i)(2) of this section.

a) Techno Coatings did not provide change areas for the removal of all protective clothing at the completion of each work shift as prescribed in paragraph (i)(2) of this section. An employee painter was exposed to an airborne concentration of lead of 61ug/m3 8-hour Time-weighted average during 392 minutes of sampling on December 12, 2002. The OSHA PEL is 50 ug/m3.

**Serious citation 1, item 3c** alleges:

29 CFR 1926.62(i)(2)(i): The employer did not provide clean change areas for employees whose airborne exposure to lead was above the PEL.

a) Techno Coatings did not provide clean change area for employee painters involved in lead paint removal activities with airborne exposure to lead above the 50ug/m3 PEL. An employee painter was exposed to an airborne concentration of lead of 61 ug/m3 8-hour Time-weighted average during 392 minutes of sampling on December 12, 2002.

**Serious citation 1, item 3d** alleges:

29 CFR 1926.62(i)(2)(ii): The employer did not assure that change areas were equipped with separate storage facilities for protective work clothing and equipment and for street clothes which prevent cross-contamination.

a) Techno Coatings did not provide change areas equipped with separate storage facilities to ensure protective work clothing and equipment were kept separate from street clothes to prevent cross-contamination. An employer painter was exposed to an airborne concentration of lead of 61 ug/m3 8-hour time-weighted average on December 12, 2002. The OSHA PEL for lead is 50 ug/m3.

*Facts*

Radovich and Pelletier wore disposable Tyvek overalls over their street clothes. Kulinovich did not believe that disposable overalls were appropriate, however, stating that the overalls must be durable (Tr. Vol. I, p. 97-98, 212-213). Kulinovich testified that she saw duct tape under the arm of one of the Tyvek suits. The CO speculated that the duct tape covered a tear (Tr. Vol. I, p. 99, 214). Kulinovich also

believed the employees reused the Tyvek coveralls for a number of days, rather than replacing them at the end of every work shift (Tr. Vol. I, p. 99, 103, 214). In addition, there was no changing area specifically provided for that changing (Tr. Vol. I, p. 104, 110; Exh. C-42B). A tarp was laid down, and there was a barrel for removing their Tyvek clothing (Tr. Vol. I, p. 104).

Pelletier and Radovich testified that they took off their Tyvek coveralls before leaving the site at lunch and at the end of the day, sealing them into a plastic trash bag. They further stated that each time they returned to the site they put on a fresh coverall (Tr. Vol. I, p. 279, Vol. II, p. 119-20). Pelletier testified that he never tore his Tyvek, but kept duct tape stuck to his suit so that if he needed it he wouldn't have to search for the roll (Tr. Vol. I, p. 281).

*Discussion*

> The standard cited at **citation 1, item 3a** requires:
> (g) *Protective work clothing and equipment – (1) Provision and use.* Where an employee is exposed to lead above the PEL without regard to the use of respirators, where employees are exposed to lead compounds which may cause skin or eye irritations (e.g. lead arsenate, lead azide), and as interim protection for employees performing tasks as specified in paragraph (d)(2) of this section, the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments such as, but not limited to:
> (i) Coveralls or similar full-body work clothing:

OSHA relies on OSHA CPL 2.258, which states, in relevant part, that protective work clothing must prevent lead from contacting employees' work or street clothes, undergarments, or skin, and that [d]isposable PWC which are frequently ripped or fall apart under normal use would not be considered "appropriate protective work clothing." The evidence does not establish that disposable Tyvek coveralls are disallowed in every circumstance. Nothing in the record establishes that Tyvek tears off or falls apart under normal conditions. The sole evidence that Tyvek was less than durable consisted of a piece of duct tape on the arm of one of the employees. There is no evidence that the coveralls were torn in this instance. Citation 1, item 3a is, therefore vacated.

The standards cited at **citation 1, items 3b, 3c, and 3d** require:

> (2) *Cleaning and replacement* . . . (iv) The employer shall assure that all protective clothing is removed at the completion of a work shift only in change areas provided for that purpose as prescribed in paragraph (i)(2) of this section.

* * *

> (i) *Hygiene facilities and practices . . . (2) Change areas* (i) The employer shall provide clean change areas . . . as interim protection for employees performing tasks as specified in paragraph (d)(2) of this section, without regard to the use of respirators. (ii) The employer shall assure that change areas are equipped with separate storage facilities for protect work clothing and equipment and for street clothes which prevent cross-contamination.

CO Kulinovich did not testify to seeing employees reuse disposable Tyvek. The scant evidence does establish, however, that protective clothing was removed without the benefit of a clean change area required under paragraph (i)(2) and (i)(2)(ii). Because no clean change area was provided, items 3b, 3c and 3d are established.

*Penalty*

It is clear that the employees, including the foreman, displayed a cavalier attitude about the serious nature of exposure to lead. Because of the lack of a good faith effort to comply with the aforesaid standards, a penalty in the amount of $2,000 is assessed for those violations.

**Alleged Violations of §1926.62(i)**

**Serious citation 1, item 5a** alleges:

29 CFR 1926.62(i)(3)(i): The employer did not provide shower facilities for use by employees whose airborne exposure to lead was above the PEL, when providing the shower facilities was feasible.

a) Techno Coatings did not provide shower facilities for use by employee painters who were exposed to lead above the PEL when providing the shower facilities were feasible. An employee painter was exposed to an airborne concentration of lead 61 ug/m3 8-hour time-weighted average during 392 minutes of sampling on December 12, 2002.

**Serious citation 1, item 5b** alleges:

29 CFR 1926.62(i)(4)(i): The employer did not provide lunchroom facilities or eating areas for employees whose airborne exposure to lead is above the PEL, without regard to use of respirators.

a) Techno coatings did not provide lunchroom facilities or eating areas for employees whose airborne exposure was above the 50ug/m3 PEL, without regard to the use of respirators. An employee painter was exposed to an airborne concentration of lead of 61 ug/m3 8-hour Time-weighted average during 392 minutes of sampling on December 12, 2002.

**Serious citation 1, item 5c** alleges:

29 CFR 1926.62(i)(5)(i): The employer did not provide adequate hand washing facilities for use by employees exposed to lead in accordance with 29CFR 1926.51(f).

a) Techno Coatings did not provide employee painters exposed to lead above the PEL with hand washing facilities with hot and cold water at the location of the lead area where employees could remove lead based paint without sharing contaminated water or washing in an area utilized by other contractors and persons. An employee painter was exposed to an airborne concentration of lead of 61 ug/m3 8-hour Time-weighted average during 392 minutes of sampling on December 12, 2002.

*Facts*

CO Kulinovich testified that there were no shower facilities available, though it would have been feasible for Techno to provide them, as Respondent owned a shower trailer (Tr. Vol. I, p. 113-14, Vol. II, p. 106). Both Pelletier and Remley testified that there was running water elsewhere on the work site, but that they used buckets of water that had been set out on a tarpaulin (Tr. Vol. I, p.115; Exh. C-42C). Both employees utilized the same two buckets, washing in the first and rinsing in the second (Tr. Vol. I, p. 116). According to the CO, the employees were not removing lead from their hands or faces, because they were using contaminated water (Tr. Vol. I, p. 117). After removing their coveralls and washing, employees left the work site for lunch (Tr. Vol. I, p. 115-16, 278).

*Discussion*

Citation Items 5(a) and 5(b) require employers to provide shower facilities, where feasible, and lunch room facilities to employees exposed to lead levels above the permissible exposure level. As discussed, *supra*, Complainant failed to establish that any employees at the worksite were exposed to lead levels exceeding the PEL. Moreover, although the employer failed to make an initial determination of employee exposure to lead and, thus, must presume an exposure of 2,500 ug/$m^3$ (see §1926.62(d)(2)(iv)) and comply with the provisions of subitem (v) of that section, there is no requirement that the employer must provide shower facilities or a lunch room. Accordingly, items 5(a) and 5(b) must be vacated.

Citation 1, item 5(c). Section 1926.62(i)(5)(i) requires employers to "provide handwashing facilities for use by employees exposed to lead in accordance with 29 C.F.R. 1926.51(f)." The standard does not require that employees be exposed to lead at the action level or the permissible exposure level or beyond. It merely requires employees to be exposed to lead. It is undisputed that Respondent's employees were removing lead based paint and were exposed thereto. Moreover, the standard at 1926.51(f)(3)(ii) provides that each lavatory be provided with hot and cold or tepid running water. The record establishes that this

standard applies to Respondent's employees and was not complied with at Respondent's worksite. Accordingly, item 5(c) is affirmed.

*Penalty*

In view of the employer's failure to make a good faith effort to comply with the lead standards, as stated above, a penalty of $1,000.00 is assessed for item 5(c).

**Alleged Violations of §1926.62(j)**[3]

**Serious citation 1, item 8a,** alleges:

29 C.F.R. 1926.62(j)(1)(i): The employer did not make available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level.

a) Techno Coatings did not make available initial medical surveillance to employee painters exposed to lead above the 50ug/m3 PEL during lead paint abatement activities at Paleta Creek Pier, Naval Base San Diego. An employee painter was exposed to an airborne concentration of lead of 61ug/m3 8-hour Time-Weighted Average during 392 minutes of sampling on December 12, 2002.

**Serious citation 1, item 8b,** alleges:

29 C.F.R. 1926.62(j)(1)(ii): The employer did not institute a medical surveillance program in accordance with paragraphs (j)(2) and (j)(3) of this section for all employees who are or may be exposed by the employer at or above the action level for more than 30 days in any consecutive 12 months.

a) Techno Coatings did not institute a medical surveillance program in accordance with paragraphs (j)(2), biological monitoring, and (j)(3), Medical Examinations and consultations, of this section for employee painters who were or may have been exposed by Techno Coatings at or above the action level for lead for more than 30 consecutive days at the Paleta Creek Pier lead abatement project. An employee painter was exposed to an airborne lead concentration of 61ug/m3 8-hour Time Weighted Average during 392 minutes of sampling on December 12, 2002.

[3]The cited standard provides:

> (j) *Medical surveillance–(1) General.* (i) The employer shall make available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level. Initial medical surveillance consists of biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels.
>
> (i) The employer shall institute a medical surveillance program i accordance with paragraphs (j)(2) and (j)(3) of this section for all employees who are or may be exposed by the employer at or above the action level for more than 30 days in any consecutive 12 months.

*Facts*

During the CO's inspection of the San Diego work site, Radovich and Pelletier told her that they had not had physicals prior to the OSHA inspection (Tr. Vol. I, p. 119). That evidence has not been rebutted by Respondent.

*Discussion*

That Techno did not institute a medical surveillance program prior to the commencement of the inspection in December 2002, is uncontested. Section 1926.62(d)(2)(iv), the section on which these violations are predicated, as discussed, *supra*, specifically requires that, in the absence of an adequate initial exposure determination, an employer provide biological monitoring in accordance with paragraph (j)(1)(i). As paragraph (j)(1)(ii) is not mentioned as a requirement at 62(d)(2)(iv) it is not a required interim measure and is inapplicable. Accordingly, item 8a is affirmed and item 8b is vacated.

*Penalty*

For the reasons given for the preceding affirmed violations, a penalty of $1,000 will be assessed for item 8(a).

**Serious citation 1, item 9** alleges:

29 C.F.R. 1926.62(m)(2)(i):[4] The employer did not post a warning sign, with the wording WARNING, LEAD WORK AREA, POISON, NO SMOKING OR EATING, in each work area where an employees exposure to lead was above the PEL.

a) Techno Coatings did not have a warning sign, posted at the Paleta Creek Pier lead abatement project on 12/11/02.
An employee painter was exposed to an airborne concentration of lead of 61ug/m3 8-hour Time-Weighted Average during 392 minutes of sampling on December 12, 2002.

---

[4](2) *Signs.* (i) The employer shall post the following warning signs in each work area where an employees exposure to lead is above the PEL.

WARNING
LEAD WORK AREA
POISON
NO SMOKING OR EATING

*Facts*

On December 11, 2002, CO Kulinovich saw no sign announcing the lead abatement area (Tr. Vol. I, p. 121). The next day, cones and tape delineated the lead abatement area and a sign was up. Radovich told the CO that it had been leaning against a fence the day before (Tr. Vol. I, p. 121-123; Exh. C-42D). Radovich testified that the tape and cones "should have been" around their work area every day (Tr. Vol. I, p. 268). However, Radovich stated, because the raft from which they worked was constantly moving, there could have been times when markers were not up (Tr. Vol. II, p. 114). The sign was not illuminated on December 12, 2002. (Tr. Vol. I, p. 121).

*Discussion*

As discussed, *supra*, there is no credible evidence that Respondent's employees were exposed to lead levels exceeding the permissible exposure level during either day of the OSHA inspection. Moreover, this standard is not listed as a compliance requirement pursuant to §1926.62(d)(2)(v) where, as in this case, the employer has not performed an initial employee exposure assessment. In the absence of any credible evidence that Respondent's employees were exposed to lead levels in excess of the permissible exposure level, this item must be vacated.

**Alleged Violations of §1926.62(n)**

**Serious citation 1, item 10** alleges:

29 C.F.R. 1926.62(n)(1)(ii)(A)-(E): The employer did not establish and maintain an accurate record of all monitoring and other data used in conducting employee exposure assessments as required in paragraph (d). The exposure monitoring records did not include the information required in sections A-E of this paragraph.

a) Techno Coatings Inc. did not establish the required exposure monitoring records described in sections (A) through (E) for the Paleta Creek Pier Lead Abatement Projects. An employee painter was exposed to an airborne concentration of lead 61ug/m3 8-hour Time-Weighted Average during 392 minutes of sampling on December 12, 2002. The OSHA PEL is 50ug/m3.

The employer did not establish an exposure monitoring record that documented the nature and relevancy of the historical data from the San Bernardino Lead abatement project to the Paleta Creek Project to make an initial determination of exposure. No record of determination stating:

(A) the date(s), number, durations location and results of each of the samples taken if any, including a description of the sampling procedure used to determine representative employee exposure where applicable;
(B) A description of the sampling and analytical methods used and evidence of their accuracy;
(C) The type of respiratory protective devices worn, if any;

(D) Name, social security number and job classification of the employee monitored and of all other employees whose exposure the measurement is intended to represent; and

(E) The environmental variables that could affect the measurement of employee exposure.

*Discussion*

It has been established, *supra*, that Techno failed to adequately document its alleged decision to rely on historical data in lieu of conducting personal monitoring on the San Diego site, and the data allegedly relied on was not accurate for purposes of being a substitution in lieu of initial personal monitoring. This item is subsumed by the violations cited at citation 1, items 1a and 1b, and warrants no additional discussion.

However, the Secretary has offered no evidence that Respondent's failure to comply with this standard is a "serious" violation within the meaning of section 17(k) of the Act; that is, there is no evidence that Respondent's employees were exposed to a substantial probability of death or physical harm because of Respondent's failure to keep records in accordance with the standard. Accordingly, the item is affirmed as an other than serious violation with a penalty of $100 assessed thereto.

*Serious Violations*

With respect to the alleged violations affirmed as violations, *supra*, the Secretary presented evidence that an employees' exposure to lead could have long term adverse affects upon the kidneys and could cause poisoning (Tr. Vol. I, p. 127, 128) with long term and permanent disabilities as a result (Tr. Vol. I, p. 129). This evidence is unrebutted by Respondent. On this basis, the affirmed items other than item 10, are affirmed as serious violations within the meaning of section 17(k) of the Act.

## Findings of Fact

Findings of fact relevant and necessary to a determination of all issues have been made above, Fed.R.Civ.P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

## Conclusions of Law

1. Respondent, Techno Coatings, is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Respondent, Techno Coatings, at all times material to this proceeding, was subject to requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of Respondent and the subject matter of this proceeding as it relates to said Respondent.

3. At the time and place alleged, Respondent was in violation of the standards set forth at 29 C.F.R. §1926.62(d)(1)(i) and (d)(3)(i). (Serious citation items 1(a) and 1(b)). Said violations were serious within the meaning of the Act.

4. At the time and place alleged, Respondent was in violation of the standard set forth at 29 C.F.R. §1926.62 (f)(2)(i). (Serious citations items 2(a) and 2(b)). Said violations are serious within the meaning of the Act.

5. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 C.F.R. §1926.62 (g)(1)(i). (Serious citation item 3(a)).

6. At the time and place alleged, Respondent was in violation of the standards set forth at 29 C.F.R. §1926.62(g)(2)(iv), (i)(2)(i), and (i)(2)(ii). (Serious citation items 3(b), 3(c), and 3(d)). Said violations were serious within the meaning of the Act.

7. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 C.F.R. §1926.62(i)(3)(i). (Serious citation item 5(a)).

8. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 C.F.R. §1926.62(i)(4)(i). (Serious citation item 5(b)).

9. At the time and place alleged, Respondent was in violation of the standard set forth at 29 C.F.R. §1926.62(i)(5)(i). (Serious citation item 5(c)). Said violation was serious within the meaning of the Act.

10. At the time and place alleged, Respondent was in violation of the standard set forth at 29 C.F.R. §1926.62(j)(1)(i). (Serious citation item 8(a)). Said violation was serious within the meaning of the Act.

11. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 C.F.R. §1926.62(j)(1)(ii). (Serious citation item 8(b)).

12. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 C.F.R. §1926.62(m)(2)(i). (Serious citation item 9).

13. At the time and place alleged, Respondent was in violation of the standard set forth at 29 C.F.R. §1926.62(n)(1)(ii). (Serious citation item 10). Said violation was other than serious within the meaning of the Act.

**ORDER**

1. Citation 1, items 1a, and 1b, alleging violations of 29 C.F.R. §1926.62(d)(1)(i) and (d)(3)(i) are AFFIRMED, and a penalty of $4,000 is ASSESSED.
2. Citation 1, items 2a and 2b, alleging violations of 29 C.F.R. §1926.62(f)(2)(i) are AFFIRMED, and a penalty of $1,000 is ASSESSED.
3. Citation 1, item 3a, alleging violation of 29 C.F.R. §1926.62(g)(1)(i) is VACATED.
4. Citation 1, items 3b, 3c, and 3d, alleging violations of 29 C.F.R. §1926.62(g)(2)(iv), (i)(2)(i), and (i)(2)(ii) are AFFIRMED, and a combined penalty f $2,000 is ASSESSED.
5. Citation 1, item 5a, alleging violation of 29 C.F.R. §1926.62(i)(3)(i) is VACATED.
6. Citation 1, item 5b, alleging violation of 29 C.F.R. §1926.62(i)(4)(i) is VACATED.
7. Citation 1, item 5c, alleging violation of 29 C.F.R. §1926.62(i)(5)(i) is AFFIRMED, and a penalty of $1,000 is ASSESSED.
8. Citation 1, item 8a, alleging violations of 29 C.F.R. §1926.62(j)(1)(i) is AFFIRMED, and a penalty of $1,000 is ASSESSED.
9. Citation 1, item 8b, alleging violation of 29 C.F.R. §1926.62(j)(1)(ii) is VACATED.
10. Citation 1, item 9, alleging violations of 29 C.F.R. §1926.62(m)(2)(i) is VACATED.
11. Citation 1, item 10, alleging violations of 29 C.F.R. §1926.62(n)(1)(ii) is AFFIRMED as an other than serious violation and penalty of $100 is ASSESSED.
12. The total assessed penalty is $9,100.

/s/_____
Robert A. Yetman
Judge, OSHRC

Dated: March 8, 2004