UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ARTICLE II GUN SHOP, INC., D/B/A GUN WORLD, Respondent.	OSHRC DOCKET NOS. 91–2146 & 91–3127

September 29, 1994

DECISION

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue in this case is whether Article II Gun Shop, Inc., d/b/a Gun World ("Gun World"), which sells firearms and ammunition and operates a firing range at its location in Bensenville, Illinois, failed to comply with the hazard communication and lead standards promulgated by the Occupational Safety and Health Administration ("OSHA"). The hazard communication citation items at issue allege failures to provide material safety data sheets ("MSDSs") and information and training on hazardous chemicals present in the workplace. The citation items at issue under the lead standard allege failures to properly remove lead dust and provide shower and lunchroom facilities. For the reasons that follow, we affirm the hazard communication items and lead removal item, vacate the shower facility item and affirm the lunchroom facility item.

I. Gun World's Submission of Evidence to the Commission

Gun World, which has proceeded pro se throughout this case, petitioned the Commission to consider as part of the record assertions of fact and documents which it submitted to the Commission after the judge's decision issued and after the case was directed for review by the Commission. Gun World claims that after reading the judge's decision and the Secretary's opening brief, it realized that it should have included additional "facts" in the stipulation of fact signed by

the Secretary's attorney and Gun World's representative, Jerome B. Soskin, who is also the manager and owner of the gun shop.[1]

In deciding whether to reopen the record, we take into account the character of the additional evidence, the effect of opening the record, and the time the motion was made. Our decision is made in the interest of fairness and substantial justice. *Chesapeake Operating Co*., 10 BNA OSHC 1790, 1793, 1982 CCH OSHD ¶ 26,142, p. 32,915 (No. 78–1353, 1982); See 6A *Moore's Federal Practice* ¶ 59.04[13] at pp. 59–33, 59–36 (2d ed. 1994). Applying those criteria here, we deny Gun World's request. Gun World appears to have had ample opportunity in the proceedings before the judge to put into evidence whatever it believed was relevant.[2] Yet it has not supplied in its briefs nor does there appear in the record any valid reason why it could not have introduced its additional "facts" through the testimony of a witness at the hearing and submitted its documents into the record during or after the hearing.[3] Contrary to its claims, Administrative Law Judge Sidney J. Goldstein gave Gun World an extended opportunity to supplement the record. At the hearing, the judge indicated to the parties that he would hold the record open for thirty days for the submission of additional documents and that after he received their information, he would "close the record and issue a decision." Both parties submitted additional documents during this period. Although some of the "evidence" that Gun World proffers to us may be exculpatory, it does not appear to completely resolve the matters at issue. See *Ross v. Kemp*, 785 F.2d 1467, 1475 (11th Cir.1986). It appears to us that to reopen the record at this stage would give Gun World a

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[1] Gun World also submitted in its brief additional issues for review. While we have authority to consider any issues raised in a case that was directed for review, we also have discretion to limit the scope of review. *Bay State Refining Co*., 15 BNA OSHC 1471, 1476, 1991–93 CCH OSHD ¶ 29,579, p. 40,025 (No. 88–1731, 1992). Review of this case was limited to those issues that were directed for review. This was reiterated in our December 15, 1993 order to the parties.

[2] Gun World complains that the Secretary's counsel knew that Gun World's representative was not an attorney and did not assist him. However, Review Commission proceedings are adversarial and the Secretary's counsel, as opposing counsel, does not have the duty of assisting an employer proceeding pro se. *Sealtite Corp*., 15 BNA OSHC 1130, 1133–34, 1991–93 CCH OSHD ¶ 29,398, p. 39,582 (No. 88–1431, 1991)

[3] Gun World also claims that it wanted to introduce evidence "possibly later than it should have" because it first became aware of the Commission's Rules of Procedure while preparing its reply brief. However, even assuming that such lack of awareness would excuse Gun World's late submission of evidence, Gun World does not specify how its alleged late receipt of the Commission's Rules of Procedure prejudiced its ability to submit its evidence on time.

"second bite at the apple" merely because it misjudged the weight of the evidence before the judge. This would severely impede the judicial process, *Wilkins v. Secretary, Dept. of Health & Human Services*, 925 F.2d 769, 775 (4th Cir.1991), and postpone the abatement of hazardous conditions. *Seattle Crescent*, 7 BNA OSHC 1895, 1899, 1979 CCH OSHD ¶ 24,002, p. 29,133 (No. 15242, 1979). We therefore limit the evidentiary record to those materials which were presented to the judge.

II. Alleged Serious Violations of 29 C.F.R. §§ 1910.1200(g)(1) and (h)

Item 3 of serious citation no. 1 alleges that Gun World failed to comply with section 1910.1200(g)(1)[4] because it did not provide material safety data sheets ("MSDSs") for lead and gunpowder. Item 4 of serious citation no. 1 alleges that Gun World failed to comply with section

[4] The standard provides:

> § 1910.1200 Hazard communication.
>
> ....
>
> (g) Material safety data sheets.
>
> (1).... Employers shall have a material safety data sheet for each hazardous chemical which they use. [Section 1910.1200(c) defines "use" as "to package, handle, react, or transfer."

1910.1200(h)(1) and (2)[5] because it failed to provide employees with information and training for exposure for these same substances. The judge affirmed both items.[6]

In order to establish a violation of an occupational safety and health standard, the Secretary must prove that (1) the standard applies, (2) the employer did not comply with the terms of the standard, (3) its employees had access to the violative condition, and (4) the employer had actual

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[5] The standard provides:

> § 1910.1200 Hazard communication.
>
> ....
>
> (h) Employee information and training. Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into the work area.
>
> (1) Information. Employees shall be informed of:
>
> (i) The requirements of this section;
>
> (ii) Any operations in their work area where hazardous chemicals are present; and,
>
> (iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.
>
> (2) Training. Employee training shall include at least:
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> (i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);
>
> (ii) The physical and health hazards of the chemicals in the work area;
>
> (iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and
>
> (iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

[6] Items 3 and 4 of serious citation no. 1 also alleged violations as to gun care products, i.e. cleaning solvents. The Secretary concedes below and on review that Gun World's use of these products come within the consumer product exception to the standard. See 29 C.F.R. § 1910.1200(b)(6)(vii). The judge below only vacated item 3 as to the gun care products. We therefore vacate both items 3 and 4 of serious citation no. 1 with respect to the gun care products.

or constructive knowledge of the violative condition. E.g., *Gary Concrete Prods., Inc*., 15 BNA OSHC 1051, 1052, 1991–93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86–1087, 1991). There is no dispute that the standards apply to the lead and gunpowder in Gun World's workplace. The hazard communication standard applies to "any chemical which is a physical hazard or a health hazard." 29 C.F.R. § 1910.1200(c). Explosives, such as gunpowder, are physical hazards.[7] *Id*. Lead is a health hazard. See 29 C.F.R. Part 1910, Subpart Z, Toxic and Hazardous Substances. 29 C.F.R. § 1910.1200(d)(3)(i). The record is clear that Gun World did not comply with the cited standards. It stipulated that it did not provide MSDSs for the lead and gunpowder and that it did not train its employees regarding lead and gunpowder. Gun World's failure to provide information is established through the testimony of Compliance Officer Cynthia Hanzlik, who testified that Gun World employees Andrew Nelson and Armando Martinez both told her that they did not know what MSDSs were and that they did not have any information about lead or gunpowder except for a brochure about lead hazards issued by the State of Illinois. The evidence also establishes that Gun World's employees were exposed to lead and gunpowder as part of their duties and that Gun World knew of these exposures.[8] Soskin assigned employees to sweep the ranges that contained lead and gunpowder. Two of these employees were clearly exposed to lead. James Brubaker handled lead 7 to 8 hours a day, while Armando Martinez was exposed to lead 22 times above the Permissible Exposure Limit ("PEL") while he swept the range. In an affidavit, former Gun World employee Collier MacCowan stated that employees who sweep the firing ranges are exposed to unburned gunpowder and lead dust from fired guns.

We find no merit in Gun World's other arguments. Gun World contends that its employees are not exposed to lead and gunpowder within the meaning of the standard when they work with sealed containers of lead and gunpowder. As noted above, however, the evidence establishes that employees are exposed to lead and gunpowder that is not sealed. Moreover, section

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[7] An explosive is defined as "a chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature." 29 C.F.R. § 1910.1200(c). Gunpowder meets these criteria.

[8] Gun World argues on review that it did not violate the standard because only Soskin loads cartridges and handles lead bullets and gunpowder and that the "employees" handle sealed packages of lead and gunpowder. However, Soskin testified at the hearing that he was a "salaried employee." The record also establishes that several of Gun World's employees were exposed to lead and gunpowder.

1910.1200(b)(4)(iii) requires employers to "ensure that employees are provided with information and training in accordance with paragraph (h) of this section ... to the extent necessary to protect them in the event of a spill or leak of a hazardous chemical from a sealed container."

We find no basis for Gun World's reliance on labels for lead and gunpowder required by the U.S. Department of Transportation as substitutes for MSDSs. MSDSs are clearly required by section 1910.1200(g)(1) and are distinct from the labels required by section 1910.1200(f). *General Carbon Co. v. OSHRC*, 860 F.2d 479, 481 (D.C.Cir.1988) (in promulgating the standard, OSHA envisioned an informational program consisting of three interrelated parts comprised of labels, MSDSs, and training). Moreover, MSDSs must be available in the workplace for possible use by emergency personnel. *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1316, 1991–93 CCH OSHD ¶ 29,498, p. 39,804 (No. 89–2253, 1991).

Gun World's reliance on Soskin's familiarity with "a great number" of the instructional manuals issued by lead and gunpowder manufacturers is misplaced. Gun World overlooks the purpose of the cited standards, which is to communicate information about hazards to employees. Soskin's knowledge would not help the other employees who might be exposed to the lead and gunpowder. In addition, section 1910.1200 also has a number of requirements that are not covered in the manufacturers' manuals.[9] Gun World's other complaints about the hazard communication standard merely challenge the standard's wisdom. We cannot invalidate a standard on such a ground. *Loomis Cabinet Co.,* 15 BNA OSHC 1635, 1640, 1991–93 CCH OSHD ¶ 29,689, p. 40,258 (No. 88–2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994). For the reasons stated above, we conclude that the Secretary has established violations of sections 1910.1200(g)(1) and (h).

We also find that the violations are serious as to both lead and gunpowder under section 17(k) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(k). [10]

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[9] For example, section 1910.1200(h)(1) requires that the employer tell employees about operations in their work areas where hazardous materials are present and about the location and availability of the written hazard communication program and MSDSs, section 1910.1200(h)(2)(iii) requires an employer to train employees about the specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, and section 1910.1200(h)(2)(iv) requires an employer to train employees about the details of its hazard communication program.

[10] Section 17(k) of the Act provides:

> [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, or from one or more practices, means, methods, operations,

Although the absence of an MSDS alone would not cause physical harm, it could result in an employee's being given inadequate or improper treatment for exposure to a hazardous substance. *Super Excavators*, 15 BNA OSHC at 1317, 1991–93 CCH OSHD at pp. 39,804–805. In determining the seriousness of a violation of a hazard communications standard, we look to the volatility of the material involved, the nature of the expected harm, and the adequacy of the employer's hazard communication program. *Ford Development Corp*., 15 BNA OSHC 2003, 2006, 1991–93 CCH OSHD ¶ 29,900, p. 40,798 (No. 90–1505, 1992), *aff'd without published opinion*, 16 F.3d 1219 (6th Cir.1994). While lead is not volatile, it is well settled that persistent exposure to excessive levels of airborne lead is substantially likely to result in serious physical harm. E.g., *Morrison–Knudsen Co./ Yonkers Contracting Co*., 16 BNA OSHC 1105, 1122, 1993 CCH OSHD ¶ 30,048, p. 41,279 (No. 88–572, 1993), *petition for review filed*, No. 93–1385 (D.C. Cir. June 15, 1993). See also Appendix A to the lead standard, 29 C.F.R. § 1910.1025. The volatile nature of gunpowder, the harm that could occur from its explosion, as well as Gun World's failure to have the MSDSs, information and training necessary for an effective communication program, also establish that the violation was properly classified as serious. See *Ford, supra*.

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that in determining an appropriate penalty we give due consideration to the gravity of the violation, the size of the employer, the employer's good faith, and its history of violations. The Secretary proposed a penalty of $450 for item 3 and $450 for item 4 of serious citation no. 1. The judge assessed a penalty of $150 for item 3 and $150 for item 4, and the Secretary requests that the Commission uphold the judge's penalty assessment. Gun World did not present any evidence at the hearing on the appropriateness of the penalties and there is nothing in this record which compels a reduction of the penalties. Accordingly, we assess a penalty of $150 for item 3 and $150 for item 4.

III. Alleged Serious Violation of 29 C.F.R. § 1910.1025(h)(2)(ii)

The Secretary cited Gun World for failing to comply with 29 C.F.R. § 1910.1025(h)(2)(ii)[11] because it permitted employees to sweep lead accumulations from the

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or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

[11] The standard provides:

§ 1910.1025 Lead.

firing ranges. At the hearing, Soskin testified that "at the suggestion of the people from OSHA" he purchased an Euroclean vacuum cleaner to vacuum lead from the range and that Gun World "just started" using the vacuum. His testimony was unrebutted that the vacuum was not effective in removing all the lead from the range. The judge vacated the citation based on this testimony. However, under the standard, sweeping is an exception to the requirement that vacuuming or other equally effective methods be used.[12] Thus, Gun World has the burden of proving that vacuuming or other equally effective methods had been tried before sweeping. The party claiming to fall under an exception has the burden of proof of its claim. *Conagra Flour Milling Co*., 15 BNA OSHC 1817, 1823, 1991–93 CCH OSHD ¶ 29,808, p. 40,593 (No. 88–2572, 1992). Gun World did not present evidence at the hearing that it had tried vacuuming or other equally effective methods before resorting to sweeping the ranges. We find that Gun World fell short of making out the exception and that it failed to comply with the standard.

The Secretary proposed a penalty of $1500 for this item. Gun World did not present any evidence at the hearing on the appropriateness of the penalty proposed by the Secretary. However, based on the penalty factors in section 17(j) of the Act noted above, we find Gun World exercised good faith in purchasing the $525 vacuum after it was suggested by the OSHA representative. We therefore reduce the proposed penalty, and assess a penalty of $975.

> ....
>
> (h) Housekeeping—(1) Surfaces. All surfaces shall be maintained as free as practicable of accumulations of lead.
>
> (2) Cleaning floors.
>
> ....
>
> (ii) Shoveling, dry or wet sweeping, and brushing may be used only where vacuuming or other equally effective methods have been tried and found not to be effective.

[12] Appendix B, Part VI of the standard requires as follows:

> Vacuuming is the preferred method of meeting this requirement, and the use of compressed air to clean floors and other surfaces is absolutely prohibited. Dry or wet sweeping, shoveling, or brushing may not be used except where vacuuming or other equally effective methods have been tried and do not work.

Statements made in a nonmandatory appendix to a standard may be used to shed light on the intent of that standard. E.g., *Peavey Grain Co*., 15 BNA OSHC 1354, 1359, 1991–93 CCH OSHD ¶ 29,533, p. 39,873 (No. 89–3046, 1991).

IV. Alleged Serious Violations of 29 C.F.R. §§ 1910.1025(i)(4)(i) and (i)(3)(ii)

Serious Citation no. 3 includes item 6c, which alleged that Gun World failed to provide shower facilities pursuant to section 1910.1025(i)(3)(ii), and item 6d, which alleged that Gun World failed to provide a lunchroom as required by section 1910.1025(i)(4)(i). The judge found that Gun World did not provide lunchroom facilities, but he vacated item 6d. However, item 6c was the citation regarding shower facilities; item 6d alleged a failure to provide lunchroom facilities. The Secretary concedes on review that Gun World provided shower facilities. Accordingly, we find the judge's error is merely an inadvertent one and vacate item 6c.

We affirm item 6d. Although Gun World argues that it effectively complied with the standard because a restaurant located in its building permitted Gun World's employees to eat there, the record does not show that the restaurant complied with section 1910.1025(i)(4)(ii), which requires that "lunchroom facilities have a temperature controlled, positive pressure, filtered air supply."

The Secretary had proposed a penalty of $1500 for the four sub-items of item 6. The judge assessed a total penalty of $600 for the three sub-items that he affirmed. The Secretary requests that we uphold the judge's penalty assessment. Based on the penalty factors in 17(j) of the Act noted above, we find that the record supports this penalty assessment. Accordingly, we assess a penalty of $600.

V. Order

For the reasons stated above, we affirm item 3 of serious citation no. 1 with respect to lead and gunpowder and assess a $150 penalty for that violation of section 1910.1200(g)(1). We affirm item 4 of serious citation no. 1 with respect to lead and gunpowder and assess a $150 penalty for that violation of section 1910.1200(h). We affirm item 5 of serious citation no. 3 and assess a $975 penalty for that violation of section 1910.1025(h)(2)(ii). We vacate item 6(c) of serious citation no. 3, which alleges a failure to provide a shower facilities pursuant to section 1910.1025(i)(3)(ii), affirm item 6(d) of serious citation no. 3, which alleges a failure to provide lunchroom facilities pursuant to section 1910.1025(i)(4)(i), and affirm a $600 total penalty for item 6 of serious citation no. 3.

It is so ordered.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

September 29, 1994

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ARTICLE II GUN SHOP, INC., D/B/A GUN WORLD, Respondent.	OSHRC DOCKET NOS. 91–2146 & 91–3127

Final Order February 16, 1993

APPEARANCES:

For the Complainant: Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent: Jerry B. Soskin, pro se, Gun World, Bensenville, Illinois

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action to enforce citations issued by the Occupational Safety and Health Administration to the Article II Gunshop, Inc., d/b/a Gun World, an employer engaged in the sale of firearms, production of ammunition, and operation of a firing range. The matter arose after representatives of the Administration inspected the company's workplace, concluded that there were violations of safety and health regulations adopted under the Occupational Safety and Health Act of 1970, and recommended that the citations be issued. One set of citations was issued at the conclusion of the initial inspection; the second group of citations ensued after lead test results were received from the Agency's laboratories in Salt Lake City. The Respondent disagreed with the citations and filed notices of contest. After complaints and answers were filed with the Commission, the cases were consolidated for the purpose of hearing and will be disposed of in this one report.

Item 2 of Serious Citation No. 1 charged that:

> Live parts of electric equipment operating at 50 volts or more were not guarded against accidental contact by approved cabinets or other forms of approved enclosures, or other means listed under this provision:
>
> Target motors and switches above each position in the three public firing ranges had 110 volt live connectors exposed.

in violation of the regulation found at 29 C.F.R. § 1910.303(g)(2)(i) which provides in material part:

> (2) Guarding of live parts. (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or by any of the following means:
>
> (C) By location on a suitable balcony, gallery, or platform so elevated and arranged as to exclude unqualified persons.

According to the Joint Stipulations of Fact, on the date of the inspection there were no guards covering the 110 volt connectors on or around the target motors above each of the public firing ranges at the Respondent's facility. Testimony at the hearing disclosed that no person ever received a shock as a result of this equipment. If a fuse blew, either an electrician or Mr. Soskin, the Respondent's manager, obtained a ladder and changed it. Since the equipment was guarded by location on a suitable gallery or platform so elevated and arranged to exclude unqualified personnel, the regulation was not violated. This portion of the citation is VACATED.

Item 3 of Serious Citation No. 1 alleged that:

> 29 CFR 1910.1200(g)(1): Employer did not have a material safety data sheet for each hazardous chemical used in the workplace:
> There were no material safety data sheets for chemicals such as lead, gunpowder, and cleaning solvents used in the firing range, reloading room and elsewhere in the gunshop.

in violation of the regulation at 29 C.F.R. § 1910.1200(g)(1) which provides:

> (g) Material safety data sheets. (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

Paragraphs 10 and 11 of the Joint Stipulations of Fact state that on the inspection date there were no material data safety sheets for lead, gun powder, soluble base smokeless propellant and

gun care products, including lubricating oil and bore cleaner, chemicals used at Respondent's workplace.

The Respondent introduced into the record a letter from Birchwood Casey Company to the effect that, according to the Federal Hazard Communications Standard, there was no need for MSHS's for its consumer gun care products. However, the citation covers other products, including lead, previously mentioned. Inasmuch as there were no MSHS's for the chemicals listed, this portion of the citation was therefore violated, and it is therefore AFFIRMED.

Item 4 of the Serious Citation No. 1 stated that:

> 29 CFR 1910.1200(h): Employees were not provided information and training as specified in 29 CFR 1910.1200(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area:
> There was no instruction and training for employees in the gunshop on the hazard communication program for chemicals such as lead, gunpowder, and cleaning solvents.

in violation of the regulation found at 29 C.F.R. § 1910.122(h) which reads in part as follows:

> (h) Employee information and training. Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.
>
> (1) Information. Employees shall be informed of:
> (i) The requirements of this section;
>
> (ii) Any operations in their work area where hazardous chemicals are present; and,
>
> (iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.
>
> (2) Training. Employee training shall include at least:
> (i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);
>
> (ii) The physical and health hazards of the chemicals in the work area;

(iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

Paragraph 12 of the Joint Statements of Fact is copied below:

12. Although the Respondent disputes that it is required to provide its employees the training outlined in 29 C.F.R. § 1200(h), the parties agree that the Respondent did not train its employees in: (a) the methods and observations that may be used to detect the presence or release of lead, gunpowder, and cleaning solvents used in the work area, (b) the physical and health hazards of lead, gunpowder, and cleaning solvents, (c) the measures that employees can take to protect themselves from hazards associated with lead, gunpowder, and cleaning solvents, including specific procedures the employer has implemented to protect employees from exposure to these materials, and (d) details of the Respondent's hazard communication program, including an explanation of the labeling system and the material safety data sheets and how employees can obtain and use the appropriate hazard information.

Thus, the Respondent stipulated that it did not conform to the regulation, and its employees confirmed that they did not receive the information and training required by the regulation. Although the Respondent disputed that it was required to abide by the regulation, there is nothing in the record to indicate that it was not subject to its provisions relating to information and training requirements. This portion of the citation is AFFIRMED.

Item 1a of the Serious Citation No. 3 alleged that:

29 CFR 1910.1025(c)(1): Employees were exposed to lead at concentrations greater than fifty micrograms per cubic meter of air averaged over an eight-hour period:
The range operator working in the shooting range was exposed to lead at an 8-hour time weighted average of 1130 ug/M3, approximately 22 times the limit of 50 ug/M3; this limit is established to prevent nervous system disorders. The samples were collected on 6/3/91 during a 126 minute sampling period. Exposure calculations include a zero increment for the 354 minutes not sampled.

in violation of the regulation found at 29 C.F.R. § 1910.1025(c)(1) which provides:

> (c) Permissible exposure limit (PEL). (1) The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 ug/m 3) averaged over an 8-hour period.

The record supports the position of the Secretary. Two representatives of the Administration, using high flow air pumps, measured employee exposure to air-borne lead dust, and at least one employee was exposed to a time weighted average concentration of lead measured at 1130 ug/m 3, considerably above the exposure levels established by regulation. The manner in which the tests was conducted was explained in detail in answers to Respondent's interrogatories and by testimony from inspectors and the supervising chemist at the OSHA laboratory in Salt Lake City. Indeed, the Respondent's witness did not challenge the computations of the chemist at the hearing.

Respondent's position is that excessive lead in the workplace does not pose a danger to adults, relying upon opinions of a physician. But the Administration considers excessive lead exposure to be a serious threat to health of employees, and a separate section of the regulations is devoted to this problem. Studies relating to inhalation of lead dust as well as testimony at the hearing agree that absorbed lead can damage the kidneys, peripheral and central nervous systems, and the blood forming organs. The National Institute of Safety and Health (NIOSH) supports OSHA recommendations that workers with excessive blood levels be removed from further lead exposure. Further, the National Safety Council in its Fundamentals of Industrial Hygiene (third edition) asserts "Lead dust and fumes can present a severe hazard to those who are overexposed to them." And in Patty's Industrial Hygiene and Toxology (third revised edition) Volume 2A the authors conclude that "... lead in all its forms is a cumulative poison...."

The Respondent contended that the measurements were taken outside of the respirator worn by the employee, and therefore there was not an accurate reading of the exposure to lead. In this connection paragraph (d) of the standard specifies that for the purpose of exposure monitoring, "employee exposure is that exposure which would occur if the employee were not using a respirator." Thus the PEL of 50 ug/m 3 is the highest concentration level of airborne lead in an employee's breathing zone to which he may permissibly be exposed.

The Respondent also argued that it should not be held responsible for any regulation infractions because there had been a previous inspection which was not followed by a citation. The same argument was presented as a defense to a citation in the case of *Donovan v. Daniel Marr &*

Son Co., 763 F.2d 477 (1985). There the company complained that the failure to provide exterior nets was not raised by the Secretary during previous inspections. The court held that "An employer cannot, however, rely on the Secretary's failure to issue citations."

Since the record discloses that at least one of the Respondent's employees was exposed to levels to lead greater than permitted; and since Respondent did not submit studies to indicate that the exposure was less than permitted, the regulation was violated, and this portion of the citation is AFFIRMED.

Item 1b of Serious Citation No. 3 refers to engineering and work practice controls, alleging that such controls were not implemented to reduce and maintain employee exposure to lead in accordance with the schedule. There is nothing in the record to indicate that engineering and work practice controls were provided to comply with the limitations in the regulation. This portion of the citation is AFFIRMED.

Item 2 of Serious Citation No. 3 charged that:

> A written compliance program was not established and/or implemented to reduce lead exposures to or below the permissible exposure limit, and interim levels were applicable, solely by means of engineering and work practice controls in accordance with the implementation schedule in paragraph (e)(1):

in violation of the regulation at 29 C.F.R. § 1910.1025(e)(3)(i) which provides:

> (3) Compliance program. (i) Each employer shall establish and implement a written compliance program to reduce exposures to or below the permissible exposure limit, and interim levels if applicable, solely by means of engineering and work practice controls in accordance with the implementation schedule in paragraph (e)(1).

In the Joint Stipulations of Fact the Respondent agreed that there was no written compliance program that was established and implemented to reduce lead exposure as required by 29 C.F.R. § 1910.1025(e)(3)(i). This stipulation was confirmed by the compliance officer who received the same information from employees of the Respondent. This portion of the citation is AFFIRMED.

Items 3a, 3b, and 3c of Serious Citation No. 3 alleged violations of regulations relating to respirators and charged that the Respondent did not select respirators for protection against lead from a specified table; that the Respondent did not assure that respirator protection against lead exhibited minimum facepiece leakage and were properly fitted; that Respondent did not perform

either quantitative or qualitative face fit tests at the time of initial fitting and at least every six months thereafter for each employee wearing negative pressure respirators; and that Respondent did not institute a respiratory protection program in accordance with regulations.

The testimony at the hearing indicated that during the inspection the compliance officer ascertained that the Respondent did not comply with the regulations. Her conclusions are confirmed by the Joint Statements of Fact wherein it was stipulated that the Respondent did not conform with these regulations. This portion of the citation is AFFIRMED.

Items 4a and 4b of Serious Citation No. 3 were concerned with protective clothing. Item 4a stated that employees in the firing range exposed to lead in excess of the permissible exposure limit were not provided with protective clothing in violation of the regulation at 29 C.F.R. § 1910.1025(g)(1) which mandates that in each such case "... the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment...." Types of clothing and equipment include coveralls, gloves, hats, shoes or other appropriate protective equipment.

Item 4b also related to protective equipment. That portion of the citation alleged that the Respondent did not provide clean protective work clothing daily for those employees whose lead exposure exceeded the specified eight hour time weighted average as required by the regulation at 29 C.F.R. § 1910.1025(g)(2)(i).

In both instances the compliance officer learned that the Respondent did not furnish and assure use of protective clothing and equipment despite the fact that the lead exposure readings were above the mentioned limit. Her findings were also confirmed in the Joint Statements of Fact wherein it was agreed and stipulated that protective clothing was not provided at no cost by Respondent for employees working with and around lead. These portions of the citations are also AFFIRMED.

Item 5a of Serious Citation No. 3 alleged that:

> Shoveling, sweeping or brushing methods were used to remove lead accumulations where vacuuming or other equally effective methods were available and feasible: Sweeping of range floors was conducted where other equally effective methods were both available and feasible.

in violation of the regulation found at 29 C.F.R. § 1910.1025(h)(2)(ii) which provides:

(ii) Shoveling, dry or wet sweeping, and brushing may be used only where vacuuming or other equally effective methods have been tried and found not to be effective.

At the hearing the Respondent's manager testified that in order to keep the premises as free from lead as possible, the Company attempted vacuuming as well as other means without success. Since vacuuming was not effective, the Respondent was not in violation of this regulation, and this portion of the citation is VACATED.

Items 6a, 6b, 6c, and 6d of Serious Citation No. 3 related to housekeeping matters. They alleged that the Respondent did not provide change rooms for employees; did not require employees to shower at the end of the workshift; did not provide shower facilities for employees; and did not provide lunchroom facilities, all of which failures were not in conformance with the regulations found at 29 C.F.R. § 1910.1025(i)(2)(i); § 1910.1025(i)(3)(i); § 1910.1025(i)(3)(ii); and § 1910.1025(i)(4)(i) respectively.

According to the Joint Statements of Fact, the Respondent stipulated that it did not provide the facilities required by regulation. At the hearing, however, the Respondent's manager corrected the shower portion of the agreement in that the Company did provide shower facilities to employees for their use. He also testified that it was not necessary to have a lunchroom since there was a restaurant nearby which permitted Company employees to utilize the eating facilities without a requirement that food be purchased on the premises. Inasmuch as the regulation requires that the employer furnish lunchroom facilities, eating privileges at a nearby restaurant cannot satisfy the regulation.

Items 6a, 6b, and 6c are AFFIRMED, but since shower facilities were available, item 6d is VACATED.

The final three items of Serious Citation No. 3, 7a, 7b, and 7c alleged violations of regulations related to a medical surveillance program, biological monitoring and medical examinations and consultations for lead. In paragraphs K, L, and M of the Joint Statements of Fact, (copied below), the Respondent agreed that:

K. There was no medical surveillance program instituted for employees that worked with, or around, lead.

L. Respondent did not offer blood sampling and analysis for employees every six months for employees that worked with, or around, lead.

M. Respondent did not offer medical examinations for employees prior worked to the time that they first worked with, or around, lead.

Since the parties stipulated that the Respondent did not comply with these regulations, these items of the citation are AFFIRMED.

Citation No. 4 was listed as other-than-serious and stated that:

> 29 CFR 1910.1025(1)(2)(i): A copy of 29 CFR 1910.1025 and its appendicies (sic) was not made readily available to all employees who had a potential exposure to aireborne (sic) lead at any level:
> Employees did not have access to the lead standard at the workplace.

in violation of the regulation at 29 C.F.R. § 1910.1025(1)(2)(i) which provides:

> The employer shall make readily available to all affected employees a copy of this standard and its appendices.

Again, in the Joint Statements of Fact, the parties stipulated that the Respondent did not make a copy of 29 C.F.R. § 1910.1025 and its appendices available to employees at its facility. This citation is therefore AFFIRMED.

There remains the question of penalties. Section 17(j) of the Act provides that the Commission shall have authority to assess all civil penalties, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

After a review of the evidence in this case the following penalties are assessed:

Serious Citation No. 1	Item 2	-	-0-	(Vacated)
	Item 3	-	$150.00	
	Item 4	-	150.00	
Other Citation No. 2	Item 1	-	100.00	

Serious Citation No. 3	Item 1a & 1b	-	800.00	
	Item 2	-	600.00	
	Item 3a, 3b, 3c, & 3d	-	600.00	
	Item 4a & 4b	-	600.00	
	Item 5	-	-0-	(Vacated)
	Item 6a, 6b, 6c & 6d	-	600.00	
	Item 7a, 7b, & 7c	-	800.00	
Other Citation No. 4	Item 1	-	100.00	

Sidney J. Goldstein
Judge, OSHRC
January 8, 1993