United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
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SECRETARY OF LABOR
Complainant,
v.
VELOTTA COMPANY
Respondent.

OSHRC DOCKET
NO. 94-3177

# NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on November 30, 1995. The decision of the Judge will become a final order of the Commission on January 2, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 20, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /SKA

Date: November 30, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-3177

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br><br>v.<br><br>THE VELOTTA COMPANY,<br>Respondent. | OSHRC Docket No. 94-3177 |

APPEARANCES:

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U. S. Department of Labor
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For Complainant

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Akron, Ohio
For Respondent

Before: Administrative Law Judge Paul L. Brady

## DECISION AND ORDER

The Velotta Company was the general contractor on a bridge rehabilitation project known as the Norwood Lateral. The Norwood Lateral is a road running east-west across the northern part of Cincinnati, Ohio (Tr. 12). On August 15, 1994, Occupational Safety and Health Administration (OSHA) Compliance Officer Mark Snyder began an inspection of the Norwood Lateral project. Snyder was conducting a followup inspection of United Painting Company, a sub-contractor on the project, and a complaint inspection of Velotta (Tr. 82). As a result of Snyder's inspection, the Secretary issued two citations to Velotta alleging violations of three sections of the hazard communication standard, §1926.59. Velotta contests the citations.

Velotta had begun work on the Norwood Lateral in March 1994 (Tr. 12). Velotta's employees were engaged in demolition and replacing of bridge parts and full-depth bridge work, including jackhammering and form work on the construction joints (Tr. 74, 167). Demolition and painting were performed in sections or bays of the bridge (Tr. 42).

United Painting Company and another subcontractor, Finishers, Inc., were responsible for blasting, priming, and painting. The subcontractors were responsible for constructing their own containments in the bays in which they blasted and painted (Tr. 166).

Velotta knew that the paint being removed from the bridges contained lead and directed its employees to stay away from all enclosures when blasting or painting operations were in progress (Tr. 168). However, there were times when Velotta's employees worked near the enclosures and in adjoining bays (Tr. 15, 42). An inspector from the State of Ohio Department of Transportation reported several containment breaks to Velotta (Tr. 189-190). Velotta received complaints of paint overspray that landed on cars parked near the bridges being painted (Tr. 194-195). Velotta's own employees complained to management that they were exposed at times to paint fumes (Tr. 38, 130).

On July 21, 1994, a containment broke near the bay where Velotta's employees were working. The employees were exposed to paint fumes for fifteen to twenty minutes (Tr. 18, 46, 48-49). Employee Bob Lewis developed a sore throat which he initially believed was caused by inhaling paint fumes (Tr. 44). After Lewis went home from work that day, he was admitted to the hospital for several days because his throat swelled shut (Tr. 69, 75). Lewis's doctor subsequently told him that his sore throat was caused by a bacterial infection and was unrelated to the inhalation of paint fumes (Tr. 44).

Citation No. 1

Item 1: Alleged Serious Violation of §1926.59(h)

The Secretary alleges that Velotta committed a serious violation of §1926.59(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 in the workplace for each hazardous chemical which they use.

Snyder asked to see Velotta's documents relating to the hazard communication standard. Velotta had a written hazard communication program. It also had some material safety data sheets (MSDSs) on the site, but no MSDSs for any of the paints and primers being used by United or Finishers (Tr. 90-91). Snyder stated, "I asked [Velotta supervisor Brian Zealey] if he had MSDSs from the contractors, particularly the paint and primers. And he did not have them for the paint and primers, but had requested them from the other contractors and did have two MSDSs from one of the other contractors that do the priming and blasting of the bridge" (Tr. 95). Neither of the MSDSs Zealey had from the other subcontractor related to painting or priming (Tr. 95).

Zealey testified that Velotta's carpenters and laborers were warned to avoid the containment areas: "They were told not to work around the containment areas. When there is any work going on, they know to avoid that area. I never did have them work anywhere close to that area." United and Finishers had posted signs warning that the paint being sandblasted from the bridges contained lead (Tr. 168). Velotta carpenters Jeff Sizemore, Robert Lewis, and Christopher Ruttig testified that they had been warned by their supervisors to avoid the containment areas (Tr. 17, 64, 226, 233).

Carpenters Sizemore and Lewis testified that, despite the warnings to avoid the containment areas, that was not always possible while they were performing their work. Sizemore stated (Tr. 16):

> We tried to stay away from them as much as we could, but there was certain times when they needed to progress on to keep everything on schedule and running smoothly right along the line. There was times we were working--you know, different times--right beside them.

Sizemore smelled fumes "every time they fired it up, every time they started spraying" (Tr. 16). He complained about the paint fumes to supervisor Bob Jackson. Sizemore also asserts that he complained to Zealey after Zealey replaced Jackson as supervisor, but Zealey denies ever receiving a complaint from any employee regarding paint fumes (Tr. 16, 180-181).

Lewis corroborates Sizemore's testimony that at times they were required to work next to the containment areas (Tr. 74-75):

> Q. Explain the process to me. You followed the painters?
>
> Lewis: No. We don't follow them. They come through and jackhammer out the bridge or do whatever has to be done to take out the old concrete. And we try to get

in there and form that up before the painters get in there to paint that because of just being in each other's way. And sometimes we intertwine with each other as far as working side by side or something like that.

Q. You mentioned that it was common sense to stay away from the containment zone?

Lewis: Yes.

Q. But because of your work, was that possible all the time?

Lewis: As far as being up there working? It wasn't possible all the time, no.

The Secretary has the burden of proof regarding the alleged violations.

> To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. See, e.g., *Walker TowingCorp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD 29,239, p. 39,157 (No. 87-1359, 1991).

*Seibel Manufacturing & Welding Corporation*, 15 BNA OSHC 1218, 1221-1222 (No. 88-821, 1991).

(1) The cited standard applies.

Velotta argues that the hazard communication standard does not apply to Velotta's employees with regard to the paints and primers of other contractors.

Section 1926.59(b)(2) provides:

> (2) This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

Section 1926.59(c) defines "employee" as "a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies. Workers such as office workers or bank tellers who encounter hazardous chemicals only in non-routine, isolated instances are not covered." Velotta contends that these quoted sections establish that Velotta's carpenters are not employees under the hazard communication standard as it applies to paints and primers on the Norwood Lateral project.

On the contrary, the quoted sections establish that Velotta's employees were exactly the types of employees contemplated by the standard. Carpenters required to work in proximity to sandblasting and painting operations are workers who may be exposed to paint and primer fumes under normal operating conditions. They are not analogous to "office workers or bank tellers" who would not routinely be exposed to hazardous chemicals. Carpenters routinely work with other subcontractors who use a variety of hazardous chemicals.

Velotta also argues that the hazard communication standard does not apply in the instant case because its employees were not in a "work area" as defined by the standard. Section 1926.59(c) provides: " 'Work area' means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present." Wherever Velotta's employees were working was their work area. They were exposed to paint and primer fumes while they were in their work area. Velotta's argument is without merit.

Velotta also argues that it was the subcontractors' duty to provide MSDSs for the paints and primers they were using to Velotta. While it is true that the subcontractors had this duty under §1926.59(e)(2), this does nothing to diminish Velotta's obligation under the cited section to have the MSDSs readily available for use by its employees.

The hazard communication standard is applicable to Velotta's employees in the present case. The fact that the paint and primer were used by subcontractors on the worksite and not by Velotta employees themselves does not excuse Velotta's noncompliance with the standard.

(2) The terms of the cited standard were not met.

It is undisputed that Velotta did not have MSDSs for the paints and primers at issue.

(3) Employees had access to the violative condition.

Velotta argues that its employees were not exposed to paint and primer fumes. This argument is refuted by the record. Velotta focuses only on the July 21, 1994, incident, arguing that Zealey testified that when he observed his work crew they were working 150 to 200 feet west of the nearest containment area (Tr. 174). Zealey admitted, however, that he was not aware of where his crew was working "[p]robably for a good part of the day because I was running around the whole job, and it is over two miles long. So, I only stopped to see--you know, stop there for a few minutes and go to the next group or stop at a subcontractors. So I was pretty much moving around all day" (Tr. 192).

Furthermore, the July 21, 1994, incident is not the only time the matter of exposure was an issue. Sizemore testified that he smelled paint every day (Tr. 15), and both Sizemore and Lewis testified that there were times when they were required to work adjacent to the containment areas. Sizemore lodged his complaint regarding the paint fumes with Velotta's management prior to the July 21, 1994, incident (Tr. 38).

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076 (No. 90-2148, 1995). Access to paint and primer fumes on a multi-employer worksite where crews were required to work adjacent to containment areas that had been known to break was reasonably predictable. The Secretary has established that Sizemore and Lewis were exposed to paint and primer fumes.

(4) The employer had knowledge of the violative condition.

Velotta argues that it had no knowledge that its employees were exposed to the paint and primer fumes. This argument is rejected. Velotta knew that there had been breaks in the containment area and that paint overspray had reached cars parked near the worksite (Tr. 189-190, 194-195). Sizemore had complained to at least one supervisor about the paint fumes. While Zealey denies having received a complaint from him, Sizemore's testimony that he complained to supervisor Jackson is unrefuted. Velotta contends that Sizemore's claim is suspect because he recanted other testimony regarding his training. A review of the record does not support Velotta's contention.

Velotta states that "on direct examination, [Sizemore] indicated that he had not received Hazcom training of any sort from the Velotta company (Tr. 20). In fact, this is patently not true" (Velotta's Brief, pg. 9). On the contrary, Sizemore indicated that he had received some hazard communication training from Velotta (Tr. 20):

> Q. On this job, did you receive any hazard communication training from Velotta?
>
> Sizemore: I signed some papers on something. I'm pretty sure it was something to the fact of the hazardous stuff.

The Secretary has established that Velotta had knowledge that its employees were exposed to paint and primer fumes. It was aware that there had been breaks in the containment areas, and it had

received at least one complaint regarding paint fumes from at least one of its employees. The Secretary has established a violation of §1926.59(g)(1).

The Secretary alleged that the violation was serious. The MSDSs for the paints and primers being used by United and Finishers detail the hazards of overexposure to the hazardous chemicals. Carbothane 134 HS Part A is "harmful if inhaled, may affect the brain or nervous system, causing dizziness, headache or nausea . . . . Contains SILICA which can cause cancer . . . . Reports have associated repeated and prolonged occupational overexposure to solvents with permanent brain and nervous system damage" (Exh. C-5). Urethane Converter 900 (Exh. C-6), Zinc Filler (Exh. C-7), Carboline 858 Part A (Exh. C-8), and Carboline 858 Part B (Exh. C-9) present the same or similar risks.

The hazard created by the failure to have MSDSs readily available for chemicals to which employees may be exposed is that the employees may not know precautions to take before working around the chemicals, or treatment to give once overexposure occurs. The violation is properly classified as serious.

Unpreventable Employee Misconduct Defense

Velotta contends that any violation of the cited standard was the result of unpreventable employee misconduct.

> In order to establish the affirmative defense of unpreventable employee misconduct under Commission case law, an employer bears the burden of proving (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered. See *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶23,664, p. 28,695 (No. 76-1538, 1979).

*Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1994).

Velotta's affirmative defense is rejected. The record establishes that Velotta had a work rule in effect warning employees to avoid the containment areas, and that it had adequately communicated these rules to its employees. Velotta has met the first two requirements of the unpreventable employee misconduct defense. It fails to meet the remaining two requirements.

Velotta presents no evidence that it attempted to discover violations of its rule. In fact, Sizemore and Lewis's testimony establish that in order to complete their work assignments, it was necessary for them to work at times next to the containment areas. When Sizemore complained to Jackson about the paint fumes, Jackson told Sizemore, "You just try to avoid them as best you can, but we were working right down there with them. He said, 'When they're spraying in that area, try to stay back out of that area' " (Tr. 17). Despite telling his supervisor that he was working next to the containment area, Sizemore was never disciplined for working near the containment areas (Tr. 39). Velotta offers no evidence on the element of enforcement of its work rule.

Velotta has failed to establish the affirmative defense of unpreventable employee misconduct.

Item 2: Alleged Serious Violation of §1926.59(h)

Section 1926.59(h) provides:

> (h) "Employee information and training." (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever anew physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical - specific information must always be available through labels and material safety data sheets.

Velotta did have a written hazard communication program, and its employees received a booklet on the hazard communication standard when they were hired (Exh. R-3). The booklet is general in nature, instructing employees in the use of MSDSs and the reading of warning labels. There is no specific information of the hazards of inhaling paint and primer fumes. Upon interviewing Velotta's employees, Snyder learned that they had not been trained in the hazards of the paints and primers to which they were exposed (Tr. 102). Section 1926.59(h) requires the employer to train its employees "whenever a new physical or health hazard the employees have not been previously trained about is introduced into their work area."

The Secretary has established that Velotta failed to train its employees in the hazards of the paint and primer fumes. The violation is serious.

Citation No. 2: Alleged "Other" Violation of §1926.59(e)(1)(I)

The Secretary alleges that Velotta committed an "other" violation of §1926.59(e)(1)(I), which provides:

> (e) "Written hazard communication program." (1) Employers shall develop, implement, and maintain at each workplace a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
>
> > (I) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas)[.]

Velotta did not have a list of the hazardous chemicals known to be present at its worksite. Snyder found an inventory list that was blank in the booklet with the hazard communication program (Tr. 102).

The Secretary has established an "other" violation of §1926.59(e)(1)(I).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under §17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

The only evidence adduced regarding the penalty was Snyder's testimony that "[t]he penalty amount is usually determined by my supervisor" (Tr. 104). The size of the employer's business and the history of previous violations are unknown. Therefore, the penalty determination must be based on the remaining factors--the employer's good faith and the gravity of the violation. There was no evidence that Velotta demonstrated anything less than good faith. The gravity of items 1 and 2 of Citation No. 1 was moderate. The employees' exposure was sporadic. Velotta did have a work rule instructing the employees to avoid the containment areas. The failure to have MSDSs and to provide training regarding the paints and primers created a moderate risk of injury.

It is determined that the appropriate penalty for item 1 of Citation No. 1 is $1,000.00. The appropriate penalty for item 2 of Citation No. 1 is $1,000.00. No penalty is assessed for item 1 of Citation No. 2.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

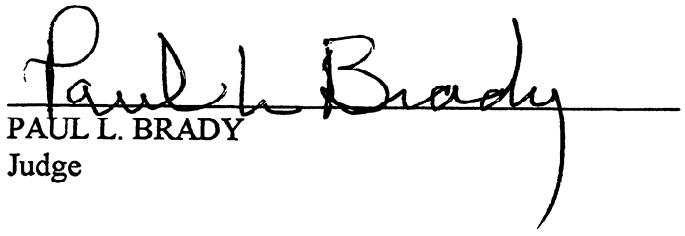
## ORDER

Based upon the foregoing decision, it is hereby ORDERED:

(1) Item 1 of Citation No. 1, alleging a violation of § 1926.59(g)(1), is affirmed and a penalty of $1,000.00 is assessed;

(2) Item 2 of Citation No. 1, alleging a violation of § 1926.59(h), is affirmed and a penalty of $1,000.00 is assessed; and

(3) Item 1 of Citation No. 2, alleging a violation of § 1926.59(e)(1)(I), is affirmed and no penalty is assessed.



PAUL L. BRADY
Judge

Date: November 13, 1995