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SECRETARY OF LABOR
Complainant,
v.
TTX COMPANY, ACORN DIVISION
Respondent.

OSHRC DOCKET
NO. 93-0033

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 18, 1993. The decision of the Judge will become a final order of the Commission on December 20, 1993 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 8, 1993 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.

Date: November 18, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0033

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SECRETARY OF LABOR, Complainant, v. TTX COMPANY, ACORN DIVISION, Respondent.	OSHRC Docket No. 93-33

APPEARANCES:

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For Complainant

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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

TTX Company, Acorn Division (TTX), located in Jacksonville, Florida, repairs and maintains railroad cars. On October 15 and 16, 1992, Daniel F. Dehart, an industrial hygienist for the Occupational Safety and Health Administration (OSHA), inspected TTX's facility. On December 9, 1992, the Secretary issued two citations to TTX alleging violations of the Occupational Safety and Health Act of 1970 (Act). TTX contested the citations. A hearing was held in this matter on April 23, 1993.

At the beginning of the hearing, the parties stipulated that TTX would withdraw its notice of contest for items 1, 2 and 3 of Citation No. 1, and that the Secretary would assess penalties of $850 for item 1, $700 for item 2, and $850 for item 3. The Secretary allowed an additional thirty days for abatement regarding item 2a (Tr. 6). The parties also agreed that TTX would withdraw its notice of contest to items 1a, 1b and 1c of Citation No. 2 (Tr. 8).

Left for consideration is item 4 of Citation No. 1. Item 4 contains five sub-items which allege violations of separate provisions of § 1910.1025, the lead standard. The parties stipulated that, should the Secretary establish the violations alleged in item 4, a penalty of $950 would be assessed (Tr. 7-8).

TTX's employees work on one of four production lines performing various repair and maintenance tasks on the railroad cars. Each production line specializes in a specific car or cars. Line 1 employees work on articulated cars, which are newer, permanently linked railroad cars (Tr. 21). Line 2 employees work on box and flat cars, cushioning units, ladders and gears (Tr. 21, 41, 77, 82). Line 3 employees work above and underneath hitch and container cars, inspect car bodies for cracks or bends in the frame and repair them, maintain cushioning units, and replace worn hitch pins (Tr. 21-22, 53, 57-59, 62-64). Line 4 employees work on bulkhead and flat cars (Tr. 22). Prior to January 1993, TTX employees worked five eight-hour days a week. Since January 1993, employees have worked four ten-hour days a week (Tr. 22-23, 65, 79-80).

TTX's repair and maintenance work includes burning and cutting steel, welding and grinding. Repairing a car by welding involves a four-step process. First, the maintenance mechanics remove the paint on the car with a torch or paint chipper. Next, the mechanics use a torch to melt through the steel to make it pliable so that it can be straightened back to its original shape. Third, the mechanics prepare the metal using a grinder to remove paint so that a clean, flat surface is available for the weld. Finally, the mechanics weld the new metal into place to repair fractures or cracks (Tr. 17-20, 24-25, 32-33, 41-42, 54-58, 62, 78).

The Consumer Product Safety Commission set standards for lead-based paint in 1978 (Tr. 217). TTX wrote specifications for lead-free paints in October 1979 (Tr. 231). Railroad cars manufactured before 1979, which had not been repainted, were possibly coated with lead-based paint (Tr. 169).

In October 1992, Dehart's supervisor assigned Dehart to conduct a program health assignment inspection of TTX's facility (Tr. 111). Dehart explained OSHA's program health assignment policy (Tr. 112):

> Washington puts out a listing of industries by standard industrial classifications which have a history of high serious violations and they rate them by their standard industrial classification to the ratio of serious violations per inspection.
>
> And, when we're not doing complaint type inspections and things with higher priorities, we work from that program inspection listing.

On October 15, 1992, Dehart visited TTX's facility and held an opening conference with John Gray, TTX's personnel director and safety manager (Tr. 114). Dehart asked Gray if TTX had conducted any initial monitoring for lead levels in the work area. Gray responded by presenting Dehart with copies of reports of two sampling tests (Tr. 115). The first test was conducted by Steven Skipper of Azimuth, Inc. (Exh. C-1), and the follow-up was conducted by William Hopkins, an industrial hygienist (Exh. C-2). Skipper conducted an exposure assessment survey from March 23 to March 25, 1992. Skipper took air samples on sixteen employees, testing for a number of chemicals including lead. Fifteen of the employees showed lead exposure levels ranging from 6.8 to 18 $\mu g/m^3$, well within OSHA's permissible exposure limit (PEL) of 50 $\mu g/m^3$ and action level of 30 $\mu g/m^3$. Mechanic Paul Smith, however, who worked on the "wreck" line, showed a lead exposure of 330 $\mu g/m^3$ (Exh. C-1; Tr. 115-116). Skipper's report concluded that "[t]he wreck line overexposures were probably due primarily to the presence of lead in paint removed during welding, cutting, or grinding work" (Exh. C-1, pg. 3). Hopkins retested Smith on June 3, 1993, and found that his lead exposure level did not exceed the action level of 30 $\mu g/m^3$ (Exh. C-2).

Dehart returned on October 16, 1993, to conduct sampling for OSHA. Dehart completed full shift air samples on mechanics Ricky Petty, Norman Belson and Paul Smith (Tr. 121). The pumps were pre-calibrated and placed on the employees by clipping the pumps to the employees' belts. A hose ran up the employees' backs, and the filter cassette was clipped at the end of the employees' shirt collars (Tr. 122). Dehart's results showed a lead exposure level for Petty of 66 $\mu g/m^3$, a lead exposure level for Belson below the PEL, and no lead exposure for Smith (Exhs. C-4, C-5, C-6). The Secretary relies on the Skipper and Dehart air samples data.[1]

Item 4a: Alleged Violation of § 1910.1025(c)(1)

The Secretary alleges that TTX violated the following standard:

> The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 $\mu g/m^3$) averaged over an 8-hour period.

The Secretary contends that he established the violation of this standard by demonstrating that Ricky Petty's lead exposure level was 66 $\mu g/m^3$. TTX stipulated that Dehart's lead level result is accurate (Tr. 9). TTX argues, however, that the sampling procedure used by Dehart was flawed, rendering the test results invalid. Without valid test results, the Secretary cannot establish lead standard violations.

When standards focus on airborne contaminants, air from the employees' breathing zones is generally sampled for fumes and gases. In specific instances, the actual breathing zone is not the area sampled or other qualifications may apply. For example, certain OSHA standards specify that samples must not be taken from inside respirators.

The sampling procedures used by OSHA personnel are set out in the *Industrial Hygiene Technical Manual (IHTM)* (Tr. 156). The *IHTM* provides a description of general sampling procedures, as well as special sampling procedures for use in sampling for welding fumes. When sampling for welding fumes, the *IHTM* specifies that the filter cassette must be placed inside the welding helmet "to achieve an accurate characterization of the

[1] Respondent's motion to supplement the evidence with additional air samples is denied. Good cause was not shown to explain respondent's failure to secure the evidence prior to the trial.

employee's exposure" (Exh. R-1, pgs. 1-8, item 2(a)). A survey from the *American Industrial Hygiene Association Journal* indicates that the concentration of welding fumes at the actual breathing zone inside a welding helmet is reduced 36 percent to 71 percent from concentrations outside of the helmet (Exh. R-4). TTX contends that cassettes should have been placed inside the helmets to reflect accurate exposure. As previously noted, Dehart placed the filter cassettes on the employees' shirt collars, outside of the welding helmets.

The Secretary argues that TTX's contention is misplaced because "OSHA did not sample for lead welding fumes, but tested for airborne concentrations of lead" (Secretary's Brief, pg. 9). Dehart testified that he was concerned with lead dust generated by cutting and grinding, as well as by welding (Tr. 139). Mechanics Richard Hatfield and Orth Jeffrey testified that dust may be created by grinding (Tr. 25-26, 32-33). The Secretary's argument is inconsistent with the citation he issued to TTX on December 9, 1992. Item 4a of Citation No. 1, which was incorporated into the Secretary's complaint, alleges:

> On October 16, 1992, employees, working in the maintenance building on line 3 *cutting and welding* on railroad cars, were exposed to *lead fumes* at 66 micrograms per cubic meter of air averaged over an 8-hour period, which is 1.32 times the permissible exposure limit of 50 micrograms per cubic meter of air, exposing employees to the hazards of lead. (Emphasis added)

The Secretary's citation is narrowly drawn and indicates that his concern is with the employees' exposure to lead fumes while cutting and welding, not lead dust generated by grinding.

The Secretary argues that TTX's contention that the filter cassette should have been placed inside the welding helmet is comparable to contending that the filter cassette be placed inside a respirator. The Secretary points to two sections of the lead standard to bolster his argument that the filter cassette was properly positioned on the employees' shirt collars. Section 1910.1025(b) defines "action level" as "employee exposure, without regard to the use of respirators, to an airborne concentration of lead of 30 micrograms per cubic meter of air (30 $\mu g/m^3$) averaged over an 8-hour period." Section 1910.1025(d)(1)(i) provides that for the purposes of the exposure monitoring paragraph, "employee exposure is that exposure that would occur if the employee were not using a respirator."

The provision at issue, however, does not qualify the PEL by the phrase "without regard to the use of respirators." Furthermore, § 1910.1025(c)(3) provides that when respirators are used to supplement engineering and work practice controls, employee exposure "may be considered to be at the level provided by the protection factor of the respirator for those periods the respirator is worn." Whether use of a respirator can be considered in arriving at employee exposure levels is a provision-specific factor. Otherwise, the lead standard would state at the outset that employee exposure is to be determined without regard to the use of respirators, which it does not. Thus, the Secretary's analogy comparing sampling inside of a welding helmet to sampling inside of a respirator is not dispositive of this issue.

TTX cites *Equitable Shipyards, Inc.*, 13 BNA OSHC 1177, 1987 CCH OSHD ¶ 27,859 (Nos. 81-1685, 81-1762 & 81-2089, 1987), in support of its position that welding fumes must be sampled with the filter cassette placed inside the helmet. *Equitable* involves two standards regulating ventilation while welding and respiratory protection. In order to prove his case, the Secretary sought to establish employee exposure to welding fumes. The OSHA industrial hygienist took samples by clipping the filter cassettes to the employees' shirt collars. Equitable argued that the filter cassettes should have been placed inside the employees' welding helmets. *Id.*, 1987 CCH OSHD at p. 36,466. The Review Commission reversed the administrative law judge's decision which affirmed the citations, finding that the industrial hygienist "followed the general rule for air contaminants rather than the specific rule for welding fumes." *Id.* at p. 36,467.

The Review Commission looked at the OSHA's *IHTM* and the *Industrial Hygiene Field Operations Manual (IHFOM)* in considering the case. Although the Commission acknowledged that OSHA's failure to follow its own guidelines does not automatically invalidate a citation, the Commission noted that such guidelines could be "accorded significance." *Id.* at p. 36,468, quoting from *FMC Corp.*, 5 BNA OSHC 1707, 1710 n.10, 1977-78 CCH OSHD ¶ 22,060 (No. 13155, 1977). The Commission found the requirement that the filter cassette be placed inside the helmet "when testing for welding fumes is probative evidence of what the proper sampling technique is." *Id.* The Commission also

looked at standards issued by the American Conference of Governmental Industrial Hygienists (ACGIH), the American National Standards Institute (ANSI) and the American Welding Society (AWS), all of which provided that welding fumes be sampled inside of the welder's helmet. The ACGIH discussed welding fumes, stating, "[m]ost welding, even with primitive ventilation, does not produce exposures inside the welding helmet above 5 mg/M^3." *Id.* The Commission agreed with Equitable that "the Secretary must prove that sampling cassettes for welding fumes were placed inside the welding hood." *Id.* at p. 36,469.

In the present case, the Secretary is concerned with lead exposure. But, as the Secretary's citation makes clear, it is specifically lead exposure resulting from fumes generated while cutting and welding that is at issue. As *Equitable* establishes, filter cassettes for the sampling of welding fumes must be placed inside the welding helmet. Welding may generate various types of airborne particulates in addition to welding fumes, such as iron oxide (Exh. R-4). There is no persuasive rationale for testing airborne particulates generated only when employees weld differently from testing for welding fumes. Because Dehart placed the filter cassettes on the employees' shirt collars when sampling for lead fumes generated by welding, the sampling results are flawed. The Secretary has failed to establish a violation of § 1910.1025(c)(1).

Items 4b and 4e: §§ 1910.1025(e)(3)(i) and (j)(1)(i)

Section 1910.1025(e)(3)(i) 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).

Section 1910.1025(e)(1)(i) makes clear that the above-quoted standard applies only if "any employee is exposed to lead above the permissible exposure limit for more than 30 days per year."

Section 1910.1025(j)(1)(i) provides:

> (j) *Medical surveillance*--(1) *General.* (i) The employer shall institute a medical surveillance program for all employees who are or may be exposed above the action level for more than 30 days per year.

In order for the Secretary to establish the violations of the standards cited in items 4b and 4e, the Secretary must prove that TTX employees were exposed to lead above the PEL for more than thirty days a year. TTX contends that the Secretary failed to do this.

Dehart believes that TTX employees were exposed to lead above the PEL for more than thirty days a year based (Tr. 175):

> [O]n the fact that the same work procedures are being conducted on a daily basis by a number of the employees in the establishment, such as the welding, grinding and cutting of the older cars which have lead base paint on them, much more so than 30 days out of the year, and also based on the fact that at least two occasions, monitoring results showed exposure levels were above the permitted exposure limit.

On the last point, that on "at least two occasions, monitoring results showed exposure levels were above" the PEL, Dehart is wrong that this presents any reasonable basis for finding that TTX employees were exposed to lead above the PEL for more than thirty days. First, one of the two times to which Dehart is referring is his result of 66 $\mu g/m^3$ of lead for Ricky Petty. That result is not credited, as discussed above, because the sample was not properly taken of Petty's breathing zone. That leaves the sampling result for Paul Smith taken by Steven Skipper on March 25, 1992, as the only result that shows lead exposure above the PEL. TTX maintenance mechanics Hatfield, Petty and Smith testified that they averaged one and a half to two hours of welding per day (Tr. 55, 79, 90-91). On some days, some of the welding would be done on pre-1979 cars coated with lead-based paint. As Dehart conceded, "employee exposures were infrequent and random, depending on the trailer's age" (Tr. 183).

Dehart reached his opinion that TTX employees were exposed to lead above the PEL for more than thirty days a year without performing any numerical analysis or mathematical interpolation of the lead samples (Tr. 176-177). When asked if, in concluding that there were more than thirty days' exposure, he had "just kind of pulled this out of the air," Dehart replied, "Yes, the potential for lead exposure varies, depending on the cars that were going through at that time" (Tr. 178). The Secretary failed to introduce evidence showing, or even

indicating, how many pre-1979 painted cars passed through the lines during a representative period. Since exposure-producing work was random, one over-exposure on one day is insufficient to support an inference that exposure to excessive lead fumes occurred twenty-nine additional days. The alleged violations are vacated.

Items 4c and 4d: §§ 1910.1025(l)(1)(i) and (l)(2)(i)

Section 1910.1025(l)(1)(i) provides:

> (i) Each employer who has a workplace in which there is a potential exposure to airborne lead at any level shall inform employees of the content of Appendices A and B of this regulation.

Section 1910.1025(l)(2)(i) provides:

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

TTX does not dispute that its employees were exposed to airborne lead in the form of welding fumes. Therefore, TTX was required to inform its employees of the content of Appendices A and B of the lead standard and to make a copy of the standard and its appendices available to its employees. Gray told Dehart that he did not have either a copy of the standard or the appendices available (Tr. 150). The Secretary has established violations of § 1910.1025(l)(1)(i) (item 4c) and § 1910.1025(l)(2)(i) (item 4d).

Penalty

The parties stipulated that, should item 4 be affirmed, a penalty of $950 would be assessed. Five sub-items comprise item 4. Of these, three are vacated with this decision and two are affirmed. A total penalty of $380 is assessed for the two affirmed sub-items, items 4c and 4d.

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 ORDERED:

1. As stipulated, items 1, 2a, 2b and 3 of Citation No. 1 are affirmed and penalties of $850, $700 and $850 are assessed, respectively;

2. As stipulated, items 1a, 1b and 1c of Citation No. 2 are affirmed;

3. Items 4a, 4b and 4e of Citation No. 1 are vacated; and

4. Items 4c and 4d of Citation No. 1 are affirmed and a total penalty of $380 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: November 8, 1993