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VOSHA Review Board

STATE OF VERMONT

OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

DOCKET NO. RB 897

COMMISSIONER OF VERMONT DEPARTMENT OF LABOR,
Complainant

v.

MINE SAFETY APPLIANCE COMPANY,
Respondent

Decision

Background

This is a proceeding under Chapter 3 of Title 21 of the Vermont Statutes Annotated to review ten citations related to lead exposure and proposed penalties issued by the Commissioner of The Vermont Department of Labor (hereinafter referred to as "Complainant") pursuant to 21 V.S.A. 225. The citations were issued on May 1, 2012 based upon the results of an inspection conducted on December 7, 2011. Citation 1, Item 1 alleges a violation of 29 CFR 1910.1025 (d)(3)(i): Monitoring. Citation 1, Item 2 alleges a violation of 29 CFR 1910.1025 (d)(7): Additional Monitoring. Citation 1, Item 3 alleges a violation of 29 CFR 1910.1025 (e)(4)(i): Ventilation. Citation 1, Item 4 alleges a violation of 29 CFR 1910.1025 (g)(1): Provision and Use. Citation 1, Item 5 alleges a violation of 29 CFR 1910.1025 (g)(2)(iv): Protective Clothing. Citation 1, Item 6 alleges a violation of 29 CFR 1910.1025 (h)(1): Surfaces. Citation 1, Item 7 alleges a violation of 29 CFR 1910.1025 (i)(2)(i): Change Rooms. Citation 1, Item 8 alleges a violation of 29 CFR 1910.1025 (i)(3)(i): Respirators. Citation 1, Item 9 alleges a

violation of 29 CFR 1910.1025 (i)(3)(iii): Change of Clothes. Citation 1, Item 10 alleges a violation of 29 CFR 1910.1025 (m)(2)(i): Signage.

Pursuant to the enforcement provisions set forth in 21 V.S.A. 226, a penalty of $4,500 was assessed with respect to each violation. In a letter dated May 23, 2012, Rudy Chase, Plant Manager of Mine Safety Appliances Company. (hereinafter referred to as "Respondent") contested the citations. On July 2, 2012, Complainant requested that this matter proceed as a simplified proceeding pursuant to subpart M of the VOSHA Review Board Rules of Procedure. No objection having been made, this matter proceeded to hearing on May 7, 2013 as a simplified proceeding. Complainant was represented by Stephan Monahan, Esq. Respondent was represented by Pietro Lynn, Esq.

Findings of Fact

1. On December 7, 2011, Senior Occupational Health Compliance Officer, Camille Erwin, inspected the workplace of Mine Safety Appliance Company ("Respondent") after having received a referral from the Vermont Department of Health.
2. An employee, Keith Greaves, had undergone a routine blood test on October 18, 2011 and was found to have a blood lead level of 49 ug/dl.
3. A blood level below 20 ug/dl is considered safe.
4. A test conducted of another ballistics lab employee on October 18, 2011 revealed a blood lead level of only 7 ug/dl. ("Exhibit M").
5. On January 21, 2011, one other ballistics employee tested at 23 ug/dl for lead.
6. Otherwise, no other employees were shown to have blood lead levels over 20 ug/dl. (See Exhibit M).

7. Respondent manufactures helmets for the military at its Newport, VT facility.
8. One out of every one hundred helmets manufactured is subject to ballistics testing.
9. Mr. Greaves was one of the personnel responsible for conducting ballistics test.
10. The testing occurs in a small trailer used solely for that purpose.
11. Within the trailer, there is a lab and control room which are separated by safety glass.
12. When conducting a ballistics test, the employee stands on one side of the glass and is able to fire the bullet from that side.
13. The bullet launches from the other side of the glass and flies through a device which contains a ventilation unit designed to direct lead contaminated fumes from the initial puff of smoke out of the lab.
14. The employee then needs to enter the portion of the lab from which the bullet fired to reset the ammunition and helmet for the next test.
15. Respondent has a Job Safety Analyses ("JSA") which stated that the employee is to wait sixty seconds before entering the lab after a ballistics test.
16. Randy Chase, on behalf of Respondent, testified that employees are verbally instructed to wait two minutes before entering the lab, notwithstanding the language of the JSA.
17. Respondent's theory as to how Mr. Greaves came to have an elevated blood lead level is that he must have habitually entered the lab prior to the lapse of two minutes.
18. During the inspection on December 7, 2011, Inspector Erwin conducted wipe tests of three surfaces – the counter where bullets are prepared by the ballistics technician, the shirt front of the employee working in the lab on the date of the inspection, and the reused helmet chin straps.

19. A surface is considered clean for the purposes of lead testing if the results show 200 ug/ft2 (micrograms per square foot) or less. ("Exhibit 4")
20. The wipe was sent to a lab in Salt Lake City for testing.
21. The results showed that the shirt front was lead free but the chin straps had a lead level of 1087.0 ug/ft2 and the bullet preparation counter had a lead level of 1313.0 ug/ft2. (See Exhibit 4).
22. These results are generally consistent with those of wipe tests conducted on behalf of Respondent by industrial hygienist Wright-Way Enterprises, Inc. on December 22, 2010 ("Exhibit P").
23. Respondent is required to assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter (50 ug/m3) averaged over an eight hour period, also known as the permissible exposure limit ("PEL"). 29 CFR 1910.1025(c)(1).
24. PEL tests conducted by Wright-Way Enterprises, Inc. on December 22, 2010 do not show concentrations of lead greater than 50 ug/m3.
25. A PEL test was not conducted on the December 7, 2011 inspection.

Conclusions of Law

I. Permissible Exposure Limit ("PEL")

PEL is an action level which places additional burdens upon the employer. Public Citizen Health Research Group v. United States Dept. of Labor, 557 F.3d 165, 174 (3rd Cir. 2009) (Explaining PEL in the context of hexavelent chromium exposure). Of the ten citations, six are only enforceable when the work environment exceeds the PEL. Specifically:

(1) Citation 1, Item 4 cites a violation of 29 CFR 1910.1025(g)(1) which provides "If an employee is exposed to lead above the PEL, without regard to the use of respirators or where the possibility of skin or eye irritation exists, the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment such as, but not limited to: 1910.1025(g)(1)(i) Coveralls or similar full-body work clothing; 1910.1025(g)(1)(ii) Gloves, hats, and shoes or disposable shoe coverlets"

(2) Citation 1, Item 7 cites a violation of 29 CFR 1910.1025(i)(2)(i) which provides the employer shall provide clean change rooms for employees who work in areas where their airborne exposure to lead is above the PEL, without regard to the use of respirators.

(3) Citation 1, Item 5 cites a violation of 29 CFR 1910.1025(g)(2)(iv) which provides the employer shall assure that all protective clothing is removed at the completion of a work shift only in change rooms provided for that purpose as prescribed in paragraph (i)(2) of this section.

(4) Citation 1, Item 8 cites a violation of 29 CFR 1910.1025(i)(3)(i) which provides the employer shall assure that employees who work in areas where their airborne exposure to lead is above the PEL, without regard to the use of respirators, shower at the end of the work shift

(5) Citation 1, Item 9 cites a violation of 29 CFR 1910.1025(i)(3)(iii) which provides that the employer shall assure that employees who are required to shower pursuant to paragraph (i)(3)(i) do not leave the workplace wearing any clothing or equipment worn during the work shift.

(6) Citation 1, Item 10 cites a violation of 29 CFR 1910.1025(m)(2)(i) which provides 1910.1025(m)(2)(i) the employer shall post specific warning signs in each work area where the PEL is exceeded.

Thus, each of these items requires that the PEL be exceeded, either explicitly or by reference to a prior section. Because no evidence exists that the PEL was exceeded, these citations must be vacated because the additional burdens upon Respondent had not been triggered.

II. Ventilation

Respondent was cited for a violation of 29 CFR 1910.1025(e)(4)(i) which provides "When ventilation is used to control exposure, measurements which demonstrate the effectiveness of the system in controlling exposure, such as capture velocity, duct velocity, or static pressure shall be made at least every 3 months. Measurements of the system's effectiveness in controlling exposure shall be made within 5 days of any change in production, process, or control which might result in a change in employee exposure to lead." (See Citation 1, Item 3). The most recent test was conducted on November 7, 2011, one month before the inspection. ("Exhibit 8"). Thus, there is no basis to find that regular measurements of the ventilation system were not conducted.

III. Monitoring

Respondent was cited for two violations related to monitoring. Citation 1, Item 1 alleges a violation of 29 CFR 1910.1025 (d)(3)(i) which provides the employer shall monitor employee exposures and shall base initial determinations on the employee exposure monitoring results and

any of the following, relevant considerations: any information, observations, or calculations which would indicate employee exposure to lead. In this case, Keith Grieve's elevated blood levels were discovered through routine monitoring. The employee had not complained of any symptoms that would suggest lead exposure. The lead exposure was only discovered because Respondent had monitored employee exposure. There is no basis to find that the employer had failed to monitor employee exposure.

Citation 1, Item 2 alleges a violation of 29 CFR 1910.1025 (d)(7) which provides additional monitoring is required whenever there has been a production, process, control or personnel change which may result in new or additional exposure to lead, or whenever the employer has any other reason to suspect a change which may result in new or additional exposures to lead, additional monitoring shall be conducted. As set forth in Exhibit L, a prior ballistics lab employee averaged 12,517 ballistic tests monthly while Keith Grieves averaged 10,043 ballistics tests monthly. Further, a test conducted of another ballistics lab employee on October 18, 2011 (the same day Mr. Grieves was tested) revealed a blood lead level of only 7 ug/dl. Until Mr. Grieves' test results came back, there was no reason to suspect employees might be exposed to additional lead, triggering the requirement for additional monitoring. After the elevated blood lead level was reported, Mr. Grieves was removed from the ballistics lab. The other lab employee was again tested for elevated blood levels on November 21, 2011, with a result of 12 ug/dl which is below the threshold of 20 ug/dl. Evidence exists that Respondent did conduct additional monitoring after it suspected its employees may have had increased exposure to lead. In light of the evidence of additional monitoring, there is no basis to find that Respondent failed to conduct additional monitoring.

IV. Surfaces

Respondent was cited for a violation of 29 CFR 1910.1025 (h)(1): Surfaces. (See Citation 1, Item 6). This section provides that all surfaces shall be maintained as free as practicable of accumulations of lead. Inspector Erwin testified that a surface is considered free of lead if a wipe test finds less that 200 ug/ft2 of lead. In this case, on December 7, 2011, a wipe test of the reusable helmet chin straps detected 1087.0 ug/ft2 and a wipe test of the bullet preparation counter detected 1313.0 ug/ft2 of lead. ("Exhibit 4"). This is consistent with the results of wipe tests conducted by a private industrial hygienist for the benefit of Respondent almost one year earlier. On December 22, 2010, Wright-Way Enterprises conducted, among others, wipe tests to detect lead in the lab. While it is unclear from the results as to which surfaces were wiped, some surfaces had lead levels of 1100 ug and 1300 ug. ("Exhibit P"). Thus, Respondent knew or should have known that its surface were not being maintained as free as practicable of accumulations of lead. Ample evidence exists that surface lead levels in the lab exceeded levels deemed "clean". Citation 1, Item 6 is hereby affirmed.

Conclusion

Based upon the foregoing, Citation 1, Items 1, 2, 3, 4, 5, 7, 8, 9, and 10 are hereby vacated. Citation 1, Item 6 is hereby affirmed.

Dated this 12th day of May, 2013.

Elizabeth H. MaGill, Hearing Officer

cc: Stephen Monahan, Esq.
Pietro Lynn, Esq.