

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

Oregon Occupational Safety & Health Division	)	Docket No. 16-00014SH
	)	
Plaintiff,	)	
	)	
vs.	)	Citation No.: Z7575-021-15
	)	
A & B SHEET METAL WORKS LLC,	)	
	)	
Defendant.	)	OPINION AND ORDER

Pursuant to notice, a hearing was held in Portland, Oregon, on May 25, 2017, before Administrative Law Judge (ALJ) Fisher. Plaintiff, OR-OSHA, was represented by Senior Assistant Attorney General Kyle Martin. Defendant, A & B Sheet Metal Works LLC, was represented by attorney George Goodman. Steve McInnis, an employer representative, was also present.

Exhibits 1 through 19 were submitted and admitted into evidence.

The record closed on May 25, 2017.

ISSUES

The employer appeals the propriety of a citation issued September 24, 2015, containing an alleged violation with a proposed penalty of \$0.

FINDINGS OF FACT

Defendant is a specialty metal fabrication shop that, among other things, makes lead roof jacks used on tile roofs. The current owner, Mr. McInnis, purchased the business “a couple of years ago,” keeping on all the existing

employees, and renaming the business A & B Sheet Metal Works, LLC.<sup>1</sup> At the time of the purchase, Mr. McInnis had some concerns about lead outgassing resulting from soldering. Nonetheless, he did not make arrangements for air sampling or exposure studies to be performed. Rather, he relied on smoke testing performed by the manufacturer of the shop's exhaust systems and assurances from the prior owner that lead monitoring had been performed to allay his concerns.

On August 4, 2015, Senior Health Compliance Officer (SHCO) Davis opened an inspection at Defendant's place of business (5410 NE 109<sup>th</sup> Ave., Portland, Oregon) pursuant to OR-OHSA's comprehensive health inspection list. SHCO Davis presented her credentials, and met with Defendant's shop manager Robert Earls. SHCO Davis conducted a walk around inspection of the work site escorted by Mr. Earls. SHCO Davis was impressed with the level of cleanliness and organization in the shop area. Among other things, SHCO Davis noted there was a designated welding station with its own local exhaust and that the same was true for the booth where lead based soldering was performed. SHCO Davis arranged a time to return to get a baseline of the potential lead exposures to employees when soldering was being performed. In doing so, SHCO Davis indicated that, at that time, she would like to review any air sampling or employee exposure studies that the employer may possess.

SHCO Davis returned to the employer on August 26, 2015, to conduct air sampling and perform employee interviews. SHCO Davis took photos of employee Steve Earls performing lead soldering during the air sampling.<sup>2</sup> No prior air sampling or employee exposure studies were produced by the employer.

On September 24, 2015, OR-OSHA issued the following Citation and Notification of Penalties:

Citation 1 Item 1: A violation of 29 CFR 1910.1025(d)(2) requiring an initial determination be made to determine if any employee may be exposed to lead at or above the action level. OR-OSHA proposed a penalty of \$0.

The employer challenged the citation.

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<sup>1</sup> Prior to the purchase by Mr. McInnis, the business had been known as A & B Sheet Metal Works, Inc.

<sup>2</sup> The 8-hour time weighted average of lead exposure determined by SHCO Davis' air sampling was 8.3 microns per cubic meter. The permissible limit is 50 micron per cubic meter.

## CONCLUSIONS OF LAW AND OPINION

Because the employer timely appealed the citation under ORS 654.078, OR-OSHA has the burden to not only establish a denied violation, but also the reasonableness of any proposed penalty. OAR 438-085-0820(1).

Here, OR-OSHA alleges that the employer failed to make an initial determination, as required by 29 CFR 1910.1025(d)(2), whether any of its employees may be exposed to lead at or above the action level. The employer acknowledges that it did not perform an air sampling study similar to the one performed by SHCO Davis. Nonetheless, noting that it did have smoke testing performed by the manufacturer of the shop's exhaust system and that he had discussions with the prior owner about lead monitoring that he (the prior owner) had performed, the employer asserts it did perform the initial determination required by 29 CFR 1910.1025(d)(2), and thus the citation should be dismissed.

Alternatively, citing *OR-OSHA v. Moore Excavation, Inc.*, 257 Or App 567 (2013), the employer asserts that even if it did violate 29 CFR 1910.1025(d)(2), the violation did not expose any of its employees to a hazardous condition, and therefore, the citation should be dismissed.

I begin by determining whether OR-OSHA established the alleged violation. The issue of whether there has been a violation of 29 CFR 1910.1025(d)(2), boils down to whether the employer's actions were sufficient to constitute "an initial determination." As explained below, I conclude they were not.

29 CFR 1910.1025(d)(2) provides:

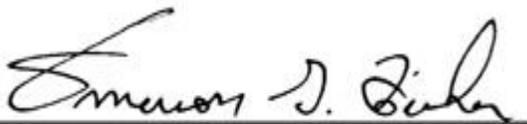
**"Initial determination.** Each employer who has a workplace or work operation covered by this standard shall determine if any employee may be exposed to lead at or above the action level."

Although 29 CFR 1910.1025 does not define the term "initial determination," it does set the permissible exposure limit (action level) at 50 microns per cubic meter averaged over an 8-hour period. 29 CFR 1910.1025(c). It therefore follows, that an "initial determination" must include sufficient quantitative testing from which it can be determined whether exposure is at or above 50 microns per cubic meter. Neither the smoke testing nor the assurances from the prior owner are sufficiently quantitative to make that determination. Accordingly, I conclude that OR-OSHA has established the alleged violation.



Entered at Portland, Oregon, **June 26, 2017** with copies mailed to:

Workers' Compensation Board

A handwritten signature in black ink, appearing to read "Emerson G. Fisher". The signature is written in a cursive style with a horizontal line underneath it.

Emerson G. Fisher

Administrative Law Judge