UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. ARTICLE II GUN SHOP, INC., D/B/A GUN WORLD, Respondent.	:	Docket Nos. 91-2146 & 91-3127

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 29, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 29, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket Nos. 91-2146 & 91-3127

NOTICE IS GIVEN TO THE FOLLOWING:

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Sidney J. Goldstein
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Occupational Safety and Health
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SECRETARY OF LABOR
Complainant,
v.

ARTICLE II GUN SHOP, INC.,
D/B/A GUN WORLD,
Respondent.

OSHRC DOCKET
NOS. 91-2146
91-3127

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 January 14, 1993. The decision of the Judge will become a final order of the Commission on February 16, 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 February 3, 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
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: January 14, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NOS. 91-2146 & 91-3127

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. ARTICLE II GUN SHOP, INC., d/b/a GUN WORLD, Respondent.	OSHRC Docket Nos. 91-2146 and 91-3127

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 work-place, 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 ($50ug/m^3$) 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

Dated: January 8, 1993