United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 98-0758
	:	
SIERRA RESOURCES, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

Leonard Borden, Esquire
Chicago, Illinois
For the Complainant.

Evedoxia Veroukas, Esquire
Chicago, Illinois
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent Sierra Resources ("Sierra") during February and March of 1998; Sierra, a contractor on a bridge renovation project, was removing and replacing bearing assemblies on the Western Avenue Bridge in Blue Island, Illinois. As a result of the inspection, Sierra was issued a nine-item serious citation alleging violations of the OSHA standard addressing lead in construction work. Sierra contested the citation, and a hearing was held in Chicago, Illinois, on November 5, 1998. Both parties have submitted post-hearing briefs.

The OSHA Inspection

Tim Gainer, the OSHA compliance officer ("CO") who conducted the inspection, testified that he first went to the site on February 6, 1998, pursuant to a complaint that the employees working on the bridge were exposed to lead. Upon arrival, he met with Sierra's vice-president Robert Sutphen and told him about the complaint his office had received and that he was there to conduct an

inspection. No employees were on the bridge then, but Sutphen informed him that ironworkers Ed Hawkinson and Gary Orszulak had been descaling rust from the bolts on the bearing assemblies and cutting the bolts with a torch so that the assemblies could be removed and replaced.[1] The CO asked if he knew whether there was lead on the bridge, and Sutphen replied that if there was it was "minimal." The CO then asked if any air monitoring had been done. Sutphen responded in the negative, but stated that he had seen testing results from a similar job and that what he was doing was "okay." Gainer showed Sutphen his sampling equipment and asked if any more torch cutting would be done that day because he wanted to monitor the air in the employees' breathing zones. Sutphen again responded in the negative, but he agreed to advise the CO the next time they would be doing cutting work. Before leaving, Gainer took a sample of the paint from an area where the removal work had already been done; he put the sample in a vial, closed and sealed the vial, and took it with him for analysis. The results revealed the paint contained 50 percent lead.[2] (Tr. 10-25; 81-82).

CO Gainer further testified that, not having heard from him, he tried to contact Sutphen on February 10 but could not reach him. He went back to the site unannounced on Friday, February 13, and saw Hawkinson and Orszulak working on the bridge without respirators. He told Sutphen he wanted to do sampling, but Sutphen replied that it would not be a good day as they would be cutting out only one bearing and then doing "prep" work for Monday, February 16. CO Gainer told Sutphen he would return on the 16th and did so, at which time he put sampling pumps on Hawkinson and Orszulak. He spent the rest of the day watching them work on the bridge and reviewing the company lead program Sutphen had given him. The CO noted that only Orszulak wore a respirator, that both employees wore street clothes, and that there was no clothes-changing or hand-washing facility at the site. When the CO asked about these matters, Sutphen repeated that he had testing results and that the work was being done safely; however, Sutphen never provided the test results, even though the

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[1]Hawkinson, who did the descaling work, and Orszulak, who performed the torch cutting and burning, were the two Sierra employees on the site besides Sutphen. Orszulak testified he was the foreman on the job. However, when the CO first went to the site and asked for the foreman, Hawkinson referred him to Sutphen, and Sutphen told the CO he was the foreman. The CO later learned Sutphen was Sierra's vice-president. (Tr. 13-15; 31; 38-40; 81-82; 148; 152; 159; 214-15).

[2]The record indicates the CO received the analysis results in early March. *See* C-4.

CO requested them on each of his five visits to the site. At the end of the workday, Gainer took the sampling equipment off the employees and left. (Tr. 25-37; 93; 116-17).

On March 17, Gainer received the sampling results and learned Orszulak had been exposed to lead over the permissible limit and that Hawkinson's exposure exceeded the action level.[3] Gainer phoned Orszulak on March 19 to give him the results and then asked him if he had had any training in lead or respirators; Orszulak said that he had not. On March 20, the CO went back to the job site, where he saw Orszulak torch cutting and a different employee, Frank Mulcrone, descaling; both wore respirators and coveralls, but the coveralls had rips and tears in them and the feet were cut off. The CO interviewed Mulcrone, who said that he had had no training in lead or respirators; the CO also learned that Mulcrone and Orszulak had had blood tests for lead, and both gave him authorization to obtain the results.[4] The CO met with Sutphen, pointing out the condition of the coveralls and asking about a change area and a washing facility. Sutphen replied that a change area was not feasible, and that he did not need one, and that there was a bucket that employees could use for washing up; when Gainer looked in the bucket, it was empty. Gainer also met with Craig Satalic, the business agent for the employees' union, who was at the site that day. Satalic told Gainer that he had visited the job several times to ask for respirators, coveralls, blood tests and change and wash facilities; however, Sutphen had refused his requests. (Tr. 37-52; 65; 94-96; 115-16).

CO Gainer testified that when he obtained the blood test results, he learned the blood lead levels for Hawkinson, Mulcrone and Orszulak were 50.5, 7.5 and 23.9 micrograms per deciliter of blood ("Fg/dl"), respectively. Gainer also testified that as his blood lead level was over 50 Fg/dl, the medical removal protection provisions of the lead standard applied to Hawkinson. The CO's last visit to the site was March 23, 1998. He held a closing conference with Sutphen and discussed the conditions he had concluded were violations. (Tr. 53-56). The citation was issued on April 2, 1998.

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[3]The lead standard's permissible exposure level ("PEL") and action level are 50 and 30 micrograms per cubic meter of air ("Fg/m³"), respectively. *See* 29 C.F.R. 1926.62(b). The parties stipulated that the air monitoring results showed Orszulak's exposure to be 119.7 Fg/m³ and that of Hawkinson to be 43.4 Fg/m³. The parties also agreed that although the citation reflected that the violations occurred on March 15, the actual air monitoring date was February 16. (Tr. 5-7).

[4]Later that day, the CO obtained authorization to obtain the blood test results of Hawkinson, who had been fired and no longer worked for Sierra. (Tr. 52-55).

Sierra's Preliminary Contentions

Sierra contends that its due process rights were violated because it was not given a copy of the complaint made against it, was not given the opportunity to accompany the CO and was excluded from employee interviews, and was not interviewed by the CO as to any of the alleged violations. Sierra asserts that because of the lack of due process in this matter, it was prejudiced in presenting its defense and the alleged violations should be dismissed. *See* Sierra's post-hearing brief, pp. 6-10. I have considered Sierra's arguments in this regard, and I conclude that they are not supported by the record. Sierra also contends that it complied with all the cited standards and that the high lead level reflected in the CO's air monitoring results was due to Gary Orszulak's unpreventable employee misconduct; in particular, Sierra claims that the results were not representative of the work at the site because Orszulak had performed torch cutting and burning he should not have, which inflated the monitoring results. While the specific evidence in this regard is discussed below, I agree with the Secretary that Sierra has not shown any of the elements required to prove unpreventable employee misconduct; accordingly, I need not address Sierra's asserted defense.

Item 1

This item alleges a violation of 29 C.F.R. 1926.62(c)(1), which requires the employer to "assure that no employee is exposed to lead at concentrations greater than ... 50 Fg/m³ ... averaged over an 8-hour period." It is undisputed that the results from the CO's air monitoring on February 16, 1998, showed that Gary Orszulak was exposed to lead at a concentration level of 119.7 Fg/m³. (Tr. 6; 56-58). Sierra contends it was not in violation of the standard, based on the testimony of Robert Sutphen, a licensed engineer with many years of experience in steel work. Sutphen testified he knew from the specifications there would be lead on the job but that the amount was minimal. He said the bridge had only two coats of paint, that it was corroded and much of the paint had come off, and that descaling removed more paint; he also said the job involved only about 90 bearings, and that torch contact with paint was minimal. Sutphen stated that test results from a similar project had had lead levels under the threshold number. He further stated that Orszulak's torch cutting on February 16 was not representative of the usual work and that he told the CO this at the time. Sutphen opined employee exposure to lead was minimal, noting that the job was done in the open air and that Orszulak had worn a respirator from "day one." (Tr. 209-15; 221-26; 230-33; 241-58; 266-68).

Sierra contends that the results from the CO's February 16 air monitoring did not reflect the typical work at the site. I disagree. Sutphen testified that during the air monitoring, he told the CO that Orszulak was cutting several bearings in a row instead of one at a time, that he was also cutting in areas where he should not have, and that he was contacting more paint than normal; Sutphen also testified that he told Orszulak to stop the work. (Tr. 224-26; 243-46; 294-96). However, the CO testified that Sutphen and the employees told him that the work that day was representative of the ordinary work on the job; the CO also testified that Sutphen saw the employees working, that he at no time stopped them, and that the first time Sutphen mentioned improper cutting was later, in an informal conference with the OSHA area director. (Tr. 108-112). Orszulak agreed that his work that day was the usual work done at the site, and Sutphen's testimony was further undermined by his admission that although he had believed at the time that the additional torch cutting work would affect the monitoring results, he did not ask the CO to stop the sampling or to take another sample. (Tr. 165-66; 293-97). Based on the record, Sierra's contention is rejected.

Sierra next contends that despite the monitoring results it was not in violation of the standard in view of Sutphen's testimony that Orszulak wore a respirator from "day one." (Tr. 215; 222; 253; 268). The record shows that the CO saw Orszulak torch cutting on February 13, February 16, and March 20. (Tr. 26-27; 30-31; 38-40; 152; 159; 215). The CO testified that he did not see Orszulak wearing a respirator until February 16 and that the respirator Orszulak wore on March 20 did not have the required guard on its exhale valve.[5] The CO identified C-10 as his photograph of the respirator showing the missing guard. He noted that the exhale valve keeps the mask closed and that if the guard is missing it is possible for the valve to be left open or for the employee to breathe from the valve itself, such that lead can be inhaled. (Tr. 27; 30; 38-39; 48-50; 91-93).

The CO's testimony indicating that Orszulak did not wear a respirator before February 16 is supported by the testimony of Orszulak and Craig Satalic, the union business agent. (Tr. 122-27; 140; 198). Moreover, I observed the demeanors of the witnesses and found the testimony of the CO, Orszulak and Satalic convincing and credible. The testimony of Sutphen, on the other hand, in addition to being contrary to that of the other witnesses, was simply unpersuasive. I find as fact,

[5]The respirators the CO saw were approved for the lead levels at the site. (Tr. 87-89; 113-15).

therefore, that Orszulak did not wear a respirator at the site until February 16. I further find, in view of the monitoring results showing that Orszulak was exposed to lead at a concentration level of 119.7 Fg/m³ on February 16, that Sierra was in violation of the standard. My reasons follow.

The record does not establish that Orszulak was exposed to lead over the limit set out in the standard on the days the CO saw him working. As noted above, Sutphen told the CO on February 13 they would be cutting out only one bearing that day, and the CO verified this with the employees before leaving the site. (Tr. 26). On February 16, Orszulak was wearing a respirator, and there is no evidence to show the guard was missing then. (Tr. 164-65; 202). On March 20, the CO observed that the guard was missing; however, the CO testified only that this made it "possible" to breathe in lead. (Tr. 48-50). Regardless, Sutphen himself testified that the actual work at the site began on February 3 and that he and his crew were there for 32 days. (Tr. 211; 288). Moreover, based on my findings *supra*, Orszulak did not wear a respirator until February 16 and his torch cutting that day was typical of his usual work on the project. Accordingly, it is reasonable to infer that on one or more days from February 3 to February 13, Orszulak was exposed to lead at concentrations above 50 Fg/m³, particularly since the February 16 air monitoring revealed a lead concentration of 119.7 Fg/m³, which is 2.3 times the permissible level set out in the standard. (Tr. 38; 57).

As to knowledge, the record shows that Sutphen, Sierra's vice-president, knew there was lead on the bridge from the job specifications, was familiar with the requirements of the standard, and was on the job directing the work every day. (Tr. 60-71; 75; 148-49; 212-13; 251; 271; 289; 293-94). The record also shows that Sierra had a lead program containing the information necessary to be in compliance with the standard. (Tr. 35; C-6). Finally, the record shows that employees at the site and Satalic had requested respirators, blood tests and other requirements in the standard on various occasions. (Tr. 51; 56; 69-70; 124-33; 184; 198). In light of the record, it is clear that Sierra had the requisite knowledge to establish the alleged violation. It is also clear that overexposure to lead presents serious health hazards. (Tr. 55; 76). This item is therefore affirmed as a serious violation.

The Secretary has proposed a penalty of $2,100.00 for this item. CO Gainer testified that the penalty was based on the high severity of the violation and the greater probability of an injury. He further testified that the gravity-based penalty was significantly reduced due to the small size of the

company and its lack of history of previous violations. (Tr. 56-58). I conclude that the proposed penalty for this item is appropriate. The penalty as proposed is consequently assessed.

Item 2

Item 2a alleges a violation of 29 C.F.R. 1926.62(d)(1)(i), which requires an employer with a workplace covered by the lead standard to "initially determine if any employee may be exposed to lead at or above the action level." Item 2b alleges a violation of 29 C.F.R. 1926.62(d)(1)(iii), which requires the employer to "collect personal samples representative of a full shift...."

CO Gainer testified that the basis of these items was Sierra's failure to conduct air monitoring at the site. (Tr. 59-60). However, Sutphen testified that he read the standard to not require initial testing if objective data demonstrated that the specific operation would not result in exposure to lead at or above the action level set out in the standard. He said that test results from a similar project showed employees were not overexposed to lead, even though the torch cutting and contact with paint on that job was more extensive than that on his job. He also said that he had gone to the subject site before the job started to determine the conditions and the equipment he would need. Sutphen had noted that the bridge had only two coats of paint, that the bridge and bearings were severely corroded, and that much of the paint had already come off; he had also noted that descaling would remove additional paint and determined that 90 percent of the paint would be gone when the torch cutting was done. Sutphen had examined the specifications and found that the job involved only about 90 bearings, and he had calculated the surface area that would be cut to be just under 20 square inches. He had concluded that torch contact with paint would be minimal and well under that of the project he had used for comparison, particularly since there had been no descaling on that job prior to torch cutting. (Tr. 211-12; 221; 230-31; 235; 242-43; 250-58; 266-68).

Based on the foregoing, Sierra contends it did not violate the standard. I do not agree. First, John Maronic, a former CO whose current job in OSHA's Chicago regional office involves assisting both OSHA and the private sector in standard interpretation, testified that the standard precludes the use of objective data when performing torch burning and requires an initial determination of exposure to lead, and his testimony is clearly in accord with the standard.[6] (Tr. 304-06; 315). *See* 29 C.F.R.

[6]Maronic, a certified industrial hygienist and safety specialist, has inspected numerous (continued...)

§§ 1926.62(d)(2)(iv) and 1926.62(d)(3)(iv)(B). Second, both Maronic and CO Gainer testified that it is not possible to look at metal parts and determine what employee exposure will be and that burning even minimal amounts of paint can produce an overexposure; Maronic also testified that Sutphen's calculation had no relation to predicting employee exposure because it addressed only surface area and not other factors such as paint thickness and lead concentration. (Tr. 76; 99-102; 117-18; 310-13). Finally, Maronic testified that the only objective data that might be acceptable would have to show either that the material did not contain or could not release lead or that monitoring under nearly identical conditions had resulted in no overexposure. (Tr. 308-09). Although Sutphen testified about the test results from a similar project, CO Gainer and Craig Satalic both stated that they had requested the results several times and Sutphen had never provided them. (Tr. 36-37; 51; 60; 116-17; 125-28; 133; 254-55). Moreover, Sierra failed to offer the results in support of its position, and Sutphen's testimony about his misplacing the results and his inability to secure another copy from the company that had them was unconvincing. (Tr. 280-84). Sierra's contention is rejected, and items 2a and 2b are affirmed as serious violations.

The Secretary grouped items 2a and 2b for penalty purposes and has proposed a total penalty of $750.00 for these items. CO Gainer testified that this penalty reflected a high severity and lesser probability as well as a reduction for the small size of the company and its lack of history of previous violations.[7] (Tr. 60). The proposed penalty is appropriate and is accordingly assessed.

Item 3

Item 3a alleges a violation of 29 C.F.R. 1926.62(d)(2)(v)(A), which requires the employer, until an assessment of employee exposure to lead is performed, to provide "[a]ppropriate respiratory protection in accordance with paragraph (f) of this section." Item 3b alleges a violation of 29 C.F.R. 1926.62(f)(4), which requires the employer to "institute a respiratory protection program in accordance with 29 CFR 1910.134 (b), (d), (e) and (f)."

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[6](...continued)
construction sites involving lead. (Tr. 306).

[7]These same considerations also apply to the penalties for items 3 through 9, *infra*.

The basis of this item was Sierra's failure to provide respirators and its further failure, under 29 C.F.R. 1910.134, to fit test, medically evaluate and train its employees in respirator use, care and maintenance. (Tr. 61-62). The CO testified that neither Hawkinson nor Orszulak wore a respirator on February 13, that only Orszulak used one on February 16, and that both Orszulak and Mulcrone wore respirators on March 20; the CO also testified that the respirators were appropriate for the work at the site. (Tr. 26-30; 38-39; 87-93; 112-15). Orszulak and Satalic testified they had asked Sutphen for respirators various times before he provided them, and Satalic indicated that February 16 was the first time he saw a respirator used, when Orszulak wore one; Satalic also indicated that Fernando Casaris, who replaced Hawkinson until Mulcrone was hired, was not initially given a respirator but later received one. Orszulak said he had had a respirator in his truck that Sutphen had given him on a prior job but that it was not appropriate for lead; Orszulak also said he had wanted a respirator as he had been "leaded" on the prior job but that Hawkinson had not worn one because Sutphen told them they did not need to.[8] (Tr. 122-32; 140; 159-60; 182-85; 198; 203). Based on the record, and for the reasons set out in item 1, Sutphen's testimony that respirators were provided from "day one" is not credited. (Tr. 215; 222; 253; 268). Sierra was in violation of 29 C.F.R. 1926.62(d)(2)(v)(A).

As to the second basis of this item, Sutphen testified that the employees at the site had been fit tested, medically evaluated and trained in respirators. (Tr. 215-18; 268-69; 277). However, the CO testified that Sutphen told him he had not done any respirator training but that there was a manual for the respirators on the site if the employees needed it; the CO also testified that Hawkinson, Orszulak and Mulcrone told him that they had not been fit tested or medically evaluated and that they had had no training in respirator use, care or maintenance. (Tr. 37-41; 84-86). The testimony of Orszulak was consistent with that of the CO. (Tr. 157; 180-82). In view of the record, Sierra was in violation of 29 C.F.R. 1926.62(f)(4). Items 3a and 3b are accordingly affirmed as serious violations, and the proposed penalty of $750.00 for item 3 is assessed.

Item 4

Item 4a alleges a violation of 29 C.F.R. 1926.62(d)(2)(v)(B), which requires the employer, until an assessment of employee exposure to lead is performed, to provide "[a]ppropriate personal

[8]Hawkinson had also not worn a respirator because he had a beard. (Tr. 90).

protective clothing and equipment in accordance with paragraph (g) of this section." Item 4b alleges a violation of 29 C.F.R. 1926.62(g)(1)(i), which requires the employer to provide, as interim protection, "[c]overalls or similar full-body work clothing...."

The record shows that employees worked in their street clothes and that no coveralls were furnished until after February 16; in addition, the coveralls Orszulak and Mulcrone wore on March 20 had rips and tears in them and the feet were cut or torn off. (Tr. 27-30; 35-36; 39-41; 46-47; 65; 94-97; 115-16; 124-32; 140-41; 158; 161-63). The record also shows that Orszulak and Satalic had asked Sutphen various times to provide coveralls before he did so. (Tr. 51; 124-32; 140-41; 198). Orszulak testified that the coveralls Sutphen furnished were too small for anyone on the site, that his boots tore the feet when he put them on, and that the seams pulled apart when he wore them; he also testified that Sutphen furnished only one set of coveralls per day for each employee. (Tr. 161-64; 198-202). Sutphen's testimony that he did not provide coveralls initially because he did not believe they were required does not justify Sierra's failure to comply with the cited standards. (Tr. 258-59). Sutphen's further testimony, that he purchased the largest size available and that new coveralls were given out every morning, every afternoon, and whenever they had ripped, is not credited in light of the contrary testimony of the CO, Orszulak and Satalic. (Tr. 259-60). Items 4a and 4b are affirmed as serious violations, and the proposed penalty of $750.00 for item 4 is assessed.

Item 5

Item 5a alleges a violation of 29 C.F.R. 1926.62(d)(2)(v)(C), which requires the employer, until an assessment of employee exposure to lead is performed, to provide "[c]hange areas in accordance with paragraph (i)(2) of this section." Item 5b alleges a violation of 29 C.F.R. 1926.62(i)(2)(i), which requires the employer to "provide clean change areas for employees whose airborne exposure to lead is above the PEL, and as interim protection for employees performing tasks as specified in paragraph (d)(2) of this section, without regard to the use of respirators."

The CO, Orszulak and Satalic all testified that there was no change area at the site, and the CO specifically testified that Sutphen told him a change area was not feasible and that he did not need one. (Tr. 35; 41; 66; 126; 158). In light of this testimony, Sutphen's testimony that the change area was behind the service truck is not credited. (Tr. 261; 277-78). Sutphen also indicated it was not possible to have a fixed change area as the work location moved daily and that the employees simply

put the coveralls over their street clothes near their work area. (Tr. 260-61; 298-99). However, the CO testified that a trailer could have been used, and he explained how employees should change from their street clothes into protective clothing and then store their street clothes in covered containers in the change area to prevent contamination. (Tr. 67). Moreover, Sierra's own lead safety program is consistent with the CO's testimony. *See* C-6, §§ 6.2, 7.1. Items 5a and 5b are affirmed as serious violations, and the proposed penalty of $750.00 for item 5 is assessed.

Item 6

Item 6a alleges a violation of 29 C.F.R. 1926.62(d)(2)(v)(D), which requires the employer, until an assessment of employee exposure to lead is performed, to provide "[h]and washing facilities in accordance with paragraph (i)(5) of this section." Item 6b alleges a violation of 29 C.F.R. 1926.62(i)(5)(i), which requires the employer to "[p]rovide adequate hand washing facilities for use by employees exposed to lead in accordance with 29 CFR 1926.51(f)."

The CO, Orszulak and Satalic all testified that there were no hand-washing facilities at the site. (Tr. 35-36; 41; 51; 68; 126; 131; 140-41; 158). The CO also testified that when he asked about this matter, Sutphen showed him a bucket and told him employees could use it to wash up; however, when the CO looked in the bucket it was empty, and the water cooler he saw did not meet the standard. (Tr. 41-44; 68; 106-07). Further, Orszulak testified that Sutphen had not provided the bucket before the CO's visit, that he himself provided the cooler, which contained ice water for drinking, and that there was no other water container at the site. (Tr. 162; 197-98). Based on this testimony, Sutphen's testimony that the bucket served as a washing facility is not credited. (Tr. 261). Regardless, even if the bucket had been used for this purpose, the CO's testimony that a washing facility must have a basin and running hot and cold water is supported by the terms of 29 C.F.R. 1926.51(f). (Tr. 106-07). I find that Sierra was in violation of the cited standards. Items 6a and 6b are affirmed as serious violations, and the proposed penalty of $750.00 for item 6 is assessed.

Item 7

Item 7a alleges a violation of 29 C.F.R. 1926.62(d)(2)(v)(E), which requires the employer, until an assessment of employee exposure to lead is performed, to provide "[b]iological monitoring in accordance with paragraph (j)(1)(i) of this section, to consist of blood sampling and analysis for lead...." Item 7b alleges a violation of 29 C.F.R. 1926.62(j)(1)(i), which requires the employer to

"[m]ake available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level. Initial medical surveillance consists of biological monitoring in the form of blood sampling and analysis for lead...."

Based on Sierra's failure to assess employee exposure and the February 16 air monitoring, which revealed that both Hawkinson and Orszulak were exposed to lead over the action level, Sierra was required to comply with the cited standards. The testimony of the CO, Satalic and Orszulak shows that Satalic and Orszulak requested blood tests for the employees at the site several times during February 1998 and that Sutphen did not comply with their requests until March 1998.[9] (Tr. 41; 51; 70; 89-90; 122-35; 160; 198; 207). Sutphen testified that Satalic was the only person who asked for testing and that he agreed to provide it on Satalic's second visit to the site; Sutphen also testified he agreed to the tests before the CO's air monitoring, that Orszulak and Mulcrone also had tests at the end of the job, and that "all tests at all times were under the limits." (Tr. 228-29; 258-62; 302). Sutphen's testimony about who asked for tests and when he agreed to provide them is not credited, in view of the other witnesses' testimony and C-11, the test results. Sutphen's testimony about the tests at the end of the job is supported by Orszulak's testimony. (Tr. 205-08). However, Sutphen's testimony about the results is belied by C-11. C-11 showed that Hawkinson's blood lead level was 50.5 Fg/dl, which is above the level requiring medical removal. Items 7a and 7b are affirmed as serious violations, and the proposed penalty of $750.00 for item 7 is assessed.

Item 8

Item 8a alleges a violation of 29 C.F.R. 1926.62(d)(2)(v)(F), which requires the employer, until an assessment of employee exposure to lead is performed, to provide "[t]raining as required under paragraph (l)(1)(i) ... [and] paragraph (l)(2)(ii)(C) of this section ... and training in accordance with 29 CFR 1926.21...." Item 8b alleges a violation of 29 C.F.R. 1926.21(b)(2), which requires the employer to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." Item 8c alleges a violation of 29 C.F.R. 1926.62(l)(2), which requires the employer to "[a]ssure that each employee is trained in [items (i)-(viii) of this section]."

[9]Hawkinson and Orszulak were tested March 3; Mulcrone was tested March 9. *See* C-11.

CO Gainer testified that when he asked Hawkinson, Orszulak and Mulcrone if they had been informed of the hazards associated with lead and of the proper procedures to take to protect themselves from lead, all three told him they had received no such information; the CO further testified that Orszulak told him that he had been working for Sierra for several months and had done several bridge jobs with the company, and that the same procedures were followed on all the jobs. (Tr. 37-41; 71-73; 84-86). Orszulak's testimony was consistent with that of the CO, and the record as set out in item 3, *supra*, also supports a conclusion that Sierra did not train its employees as required. (Tr. 146-47; 157; 205). Sierra was in violation of the cited standards, items 8a, 8b and 8c are affirmed as serious violations, and the proposed penalty of $750.00 for item 8 is assessed.[10]

Item 9

Item 9 alleges a violation of 29 C.F.R. 1926.62(e)(2)(i), which states that "[p]rior to commencement of the job each employer shall establish and implement a written compliance program to achieve compliance with paragraph (c) of this section."

The basis of this item was Sierra's failure to have a compliance program to ensure employees would not be overexposed to lead. The CO said that while he received C-6, Sierra's lead program, during the inspection, Sutphen did not submit C-12, his compliance program, until the informal conference held after the inspection with the OSHA area director; he also said that while C-6 had the general information necessary to be in compliance with the OSHA lead standard, C-12, a one-page hand-written document, did not address many items relating to the subject site, such as a site description and the work to be done, work practices and technical data to ensure overexposure would not occur, and a statement of who was responsible for the program and the work at the site. (Tr. 35; 73-75). Sutphen testified about why he believed he was in compliance with the lead standard, and he indicated that C-6 was Sierra's lead safety program as well as the compliance plan for the subject site. (Tr. 250-69; 269-73). However, based on my findings above, Sierra did not comply with the lead standard provisions cited in this case. Moreover, Sutphen conceded on cross-examination that he did not follow the provisions of C-6 at the subject site. (Tr. 271-78). I conclude that Sierra did not

[10]In affirming item 8c, I have noted the specific requirements set out in 29 C.F.R. 1926.62(l)(2)(i)-(viii). Based on the record, it is clear that Sierra did not meet those requirements.

comply with the terms of the cited standard and that it violated 29 C.F.R. 1926.62(e)(2)(i). This item is affirmed as a serious violation, and the proposed penalty of $750.00 is assessed.

Conclusions of Law

1. Respondent, Sierra Resources, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of the standards set out in citation 1.

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1 through 9 of citation 1 are affirmed as serious violations. A penalty of $2,100.00 is assessed for item 1, and a penalty of $750.00 each is assessed for items 2 through 9.

Irving Sommer
Chief Judge

Date: