UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. GIPSON-RICKETTS LLC and its successors, Respondent.	OSHRC DOCKET NO. 11-2401

Appearances:

Josh Bernstein, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

John Renick, Esq., McMahon Berger, P.C., St. Louis, Missouri
For Respondent

Before: Administrative Law Judge John H. Schumacher

DECISION AND ORDER

I. Procedural history

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) 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") conducted an inspection of a Gipson-Ricketts LLC ("Respondent") worksite in San Antonio, Texas on April 14–19, 2011.[1] As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging four (4) violations of the Act and proposed a total penalty of $5,400.00.[2] Respondent filed a timely notice of contest, bringing this

1. The original inspection was to begin on April 14, 2011; however, a fatality—unrelated to the present case—at the same worksite was reported the day prior to the scheduled inspection. Compliance Safety and Health Officer ("CSHO") Arlene Lamont-Cubitt's physical inspection of Respondent began on April 18, 2011. (Tr. 276).
2. This total is based upon the numbers provided in the Citation. According to Complainant, Citation 1, Item 1 was not initially assessed a penalty due to "the mistaken belief that an appropriations rider precluded the issuance of a penalty for this safety violation to a small employer such as G-R (Respondent)." Complainant states that it supplemented its discovery responses in August of 2012 to expressly state that a penalty should have been assessed

matter before the Court. A hearing was held on November 14–15, 2012, in San Antonio, Texas. Both parties have filed post-trial briefs.

II. Jurisdiction

Respondent provides lead recovery services to gun clubs and shooting ranges across the country. (Tr. 124, Ex. C-4). Based upon the record, the Court finds that Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. The Court also finds that the Occupational Safety and Health Review Commission has jurisdiction over the parties and subject matter in this case pursuant to Section 10(c) of the Act.

III. Findings of Fact[3]

Respondent was hired by the National Shooting Complex ("NSC") to perform lead reclamation services at NSC's shooting range in San Antonio, Texas. (Tr. 23). This project lasted approximately three months. (Tr. 26). During that period of time, Respondent's employees occasionally worked at night in order to avoid impacting NSC events. (Tr. 52–53).

Respondent's primary business is the recovery of lead shot from various shooting ranges and gun clubs throughout the country. (Ex. C-4). This process involves what Respondent refers to as the "dry method" of lead reclamation. (Ex. C-4). The dry method consists of removing the vegetation from the area where the lead shot lands ("shot fall area") and scraping approximately four inches of topsoil. (Tr. 62, Ex. C-4). Respondent then uses a series of high frequency screens and high velocity fans to remove the lead shot from the scraped material. (Tr. 63–65, Ex. C-4). Once the lead shot is removed and collected, the topsoil is returned to the shot fall area. (Ex. C-4). Respondent contracts with the shooting range to divide the proceeds of the sale

for Citation 1, Item 1 in light of the Act's mandate that all serious violations have an assessed penalty. Complainant did not file an amended Complaint. Nevertheless, the Court shall address this issue in Section V of this Decision.

3. These findings of fact relate generally to all of the Citation items and do not represent all of the Court's findings of fact. To the extent that additional facts are necessary to resolve a particular citation item, such facts will be included in the discussion regarding that citation item.

of the collected lead shot based upon the total weight collected. (Ex. C-4).

The specific process by which the lead is collected involves a series of screens, conveyor belts, and fans. Once the topsoil is removed, piles are placed next to the screening plant. (Tr. 63). A front-end loader than feeds buckets of topsoil into a feeder that contains a circling drum, which separates out rocks, sticks, and anything larger than about three-quarters of an inch. (Tr. 64). The larger debris is dumped, and the remainder of the dirt, including the shot, falls onto a conveyor belt, which leads to another feeder and a set of two screens. (Tr. 64). These screens separate the lead shot from the fine dirt/dust onto two separate belts. (Tr. 65). At the end of the lead shot belt, Respondent's plant is equipped with two industrial fans that blow away any remaining dirt from the lead shot, which is deposited into barrels. (Tr. 65). The top soil and debris that is separated from the shot is then returned, untreated, to the area from which it was removed. (Tr. 65).

According to Lloyd Tucker, Respondent's foreman, working around the screen plant was particularly dusty. (Tr. 67). This was due, in part, to the dry method of reclamation, the high velocity fans, and the fact that the area was in the middle of a drought. (Tr. 67). In light of the dust, Respondent provided half-mask respirators and dust masks. (Tr. 67–68). Although respirators were provided by Respondent, both Tucker and Respondent's co-owner, Lynn Gipson, stated that the use of the respirators was optional. (Tr. 69, 151). Conversely, CSHO Lamont-Cubitt testified that, during the inspection, Tucker and other employees had told her that respirators were required when working around the screen plant, which CSHO Lamont-Cubitt observed during her inspection. (Tr. 232–33, 289). The Court finds that the use of respirators was at the option of the employees. Though CSHO Lamont-Cubitt's testimony was generally credible, the Court finds that the testimony of Gipson and Tucker is entitled to greater weight. First, Respondent provided both respirators and dust masks to its employees, which likely meant

they had the option of choosing either one. (Tr. 66). Second, CSHO Lamont-Cubitt's conclusion regarding the requirement was based, in part, on unsworn, hearsay statements provided by Respondent's employees. (Tr. 289). Finally, Tucker was able to recall the events and inspection—including whether the CSHO was wearing a respirator during her inspection—much better than CSHO Lamont-Cubitt, who repeatedly referred to her notes or could not recall specific events. (Tr. 84, 282–83).

Regardless of whether Respondent required the use of respirators or whether their use was voluntary, it is undisputed that Respondent did not have a respiratory protection program in place, nor did it provide training or education with respect to the hazards of lead exposure. This was confirmed by both Tucker and Gipson. (Tr. 32–33, 36, 113). The only training provided by Respondent was when Tucker showed Respondent's employees how to don the respirators and ensure that no air leakage was occurring. (Tr. 43, 152).

During her inspection, CSHO Lamont-Cubitt conducted air sampling at the worksite. (Tr. 218, 234). Four of Respondent's employees were fitted with air monitors, which tested for the presence of lead particulates over an eight-hour period. (Tr. 235). The samples were sent to Complainant's lab in Salt Lake City, and the sampling results revealed lead particulates in three out of the four employees tested. (Tr. 236–37, C-14). Although lead was detected in these samples, none of the samples revealed that the employees were exposed at or above the Permissible Exposure Limit (PEL) or the Action Level.[4] Following Complainant's inspection, Respondent provided lead blood level readings, which indicated some level of lead in the employees' blood, including one employee who had a reading of 38 micrograms per deciliter, or just 2 micrograms below the action level. *See* 29 C.F.R. § 1910.1025(j).

4. According to 29 C.F.R. § 1910.1025(b), the "Action Level" is defined as "employee exposure, without regard to the use of respirators, to an airborne concentration of lead of 30 micrograms per cubic meter of air averaged over an 8-hour period." According to 29 C.F.R. § 1910.1025(c)(1), the PEL is defined as 50 micrograms per cubic meter of air averaged over an 8-hour period.

As noted above, Respondent performed some of its work at night. (Tr. 52, 122–24, 362–63). In light of this fact, CSHO Lamont-Cubitt inquired as to whether a medically trained person was available at the worksite to respond in the event of an emergency. The executive director of the NSC, Michael Hampton, represented that someone trained in first aid would be available during working hours as well as during events. (Ex. C-1). Based on her research, CSHO Lamont-Cubitt determined that the closest hospital or clinic was located about 5 miles from the worksite and that it would take approximately 11–14 minutes to travel that distance. (Tr. 227–28). This was more or less confirmed by Respondent's safety and health consultant, Robert Lockett, who independently researched emergency response times. (Tr. 416). In addition to the foregoing, CSHO Lamont-Cubitt also inquired as to whether any of Respondent's employees had received training in first aid. Tucker testified that he had received first aid training for many years in his previous job as a construction superintendent; however, he was not certified as of the date of the inspection. (Tr. 60, 88). Further, one of Respondent's employees, Craig Fisher, indicated to CSHO Lamont-Cubitt that he also had first aid training; however, he could not locate his certification and no certification was produced during discovery.[5] (Tr. 67). The NSC has an on-site operations manager, Pete Masch, who not only works at the NSC, but also lives on the grounds. (Tr. 361, 363). According to Masch, he represented to Tucker that he was first aid certified and that he was available to Respondent 24-hours a day via cell phone. (Tr. 365–66). Masch testified that he showed Tucker where the primary first aid station was, as well as where first aid kits could be found throughout the facility. (Tr. 365).

As a result of the inspection, Complainant issued a Citation indicating four violations of the Act: (1) Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1910.151(b);[6] (2)

5. Respondent indicated that it did not produce first aid certifications during discovery because it claims that Complainant's request was unclear as to whether it was requesting first aid training certificates provided by the company or by an independent provider. Respondent did not provide any first aid certificates at trial.

6. As noted above, there was no penalty proposed in the Citation and Complaint; however, at trial, CSHO Lamont-

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1910.1025(f)(2) with a proposed penalty of $2,400; (3) Citation 1, Item 3 alleges a serious violation of 29 C.F.R. § 1910.146(l)(1)(i) with a proposed penalty of $3000; and (4) Citation 2, Item 1 alleges an other-than-serious violation of 29 C.F.R. § 1910.1025(d)(2). Each of these items is addressed below.

IV. Applicable Law

To establish a *prima facie* violation of Section 5(a)(2) of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

V. Conclusions of Law

A. General Industry versus Construction

Respondent's primary defense is that the cited standards do not apply because it is engaged in construction work, which is governed by the 29 C.F.R. Part 1926 standards.

Cubitt testified that the gravity-based penalty for this citation item is $2,400.

Specifically, Respondent contends that: (1) it uses heavy equipment, such as a front-end loader, which is typically associated with construction; and (2) its primary activities are properly referenced in the NAICS code for non-building construction and site preparation activities. Complainant contends that Respondent did nothing more than process dirt and reclaim lead from the ground. These, Complainant argues, are not construction activities, regardless of Respondent's use of heavy equipment. Further, Complainant disputes that the NAICS code for land reclamation, heavy construction, or site preparation are not applicable to Respondent's work.

Construction work is defined as "work for construction, alteration, and/or repair, including painting or decorating." 29 C.F.R. 1910.12(b). However, it should be noted that construction work is limited to "actual construction work. Activities that could be regarded as construction work should not be so regarded when they are performed solely as part of a nonconstruction operation." *B.J. Hughes*, 10 BNA OSHC 1545, 1547 (No. 76-2615, 1982) (citing *Royal Logging Co.*, 7 BNA OSHC 1744 (No. 15169, 1979) *aff'd* 645 F.2d 822 (9th Cir. 1981)).

Respondent contends that the type of work it performs is properly coded under NAICS Code 238910, entitled "Site Preparation Contractors", which includes "excavating and grading, demolition of buildings, and other structures, and septic system installation" and "[e]arth moving and land clearing for all types of sites (e.g., building, nonbuilding, mining)." (Ex. C-9). In support of this, Respondent received a letter from the U.S. Census Bureau, which indicated that the Census Bureau classified Respondent under 238910. The letter noted, however, that "[e]ach agency assigns codes to establishments for their own purposes, using their own methods." (Ex. C-11). Complainant, on the other hand, contends that Respondent's work should be coded under NAICS code 562910, entitled "Remediation Services", which includes remediation and cleanup

of contaminated buildings, mine sites, soil, or ground water, integrated mine reclamation activities, and asbestos, lead paint, and other toxic material abatement.[7] (Ex. C-8).

It is interesting to note that the NAICS codes proffered by both parties include cross-references to one another. (Ex. C-8, C-9). These cross-references indicate that it is the primary activity, not individual activities viewed in isolation, that determines the proper NAICS Code. (Ex. C-8, C-9). Both parties provided testimony in support of this concept in that both Robert Ranck, OSHA Safety and Health Manager, and Robert Lockett, Respondent's Safety and Health Consultant, suggested that Respondent's activities could not be categorized merely on the basis of heavy equipment use or the fact that Respondent was not building or constructing something. (Tr. 196–98, 426–28). The key to this dispute, therefore, is the characterization of Respondent's *primary* work activity rather than any particular aspect of it.

In *B.J. Hughes*, the Secretary cited a cement contractor, who was working at an oil well drilling site, under the construction standards because (1) the contractor used equipment typically used in construction, and (2) cement work is typically regarded as construction. *B.J. Hughes*, 10 BNA OSHC 1545. The Commission disagreed and found that the primary activity of oil drilling defines whether the contractor's activities should be governed under the construction standards. *Id.* With respect to (2), the Commission found that oil drilling and related activities, viewed in isolation, are not governed by any specific construction standards. With respect to (1), the Commission found that "for many of the Part 1926 standards that regulate equipment used in construction work, there are corresponding general industry standards in Part 1910 regulating the same type of equipment." *Id.* Likewise, in *Royal Logging*, the Commission found that a tree cutting company that constructed roads and used heavy equipment associated with construction

7. The on-duty officer that received the complaint that lead to the inspection at issue originally coded Respondent's business under NAICS Code 541990 (other scientific and technical services); however, Complainant later determined that this code was inaccurate.

was still engaged in general industry because "such . . . activities, rather than being the purpose of Respondent's work, are ancillary and in aid of its primary nonconstruction function to cut and deliver logs." *Royal Logging*, 7 BNA OSHC 1744.

Viewed in isolation, there are aspects of Respondent's operation that are construction-related; however, as in the cases referenced above, the Court finds that Respondent's primary activity of lead shot reclamation is not construction. The use of heavy equipment to scrape the topsoil is merely ancillary to gathering lead shot. The process implemented by Respondent belies any argument to the contrary—Respondent scraped the land, separated out the lead shot, and returned the soil back to the shooting range. Respondent did not prepare or clear the site for any purpose other than gathering the shot and returning the site to its original condition. It did not use chemicals to remove lead from the soil nor did it treat the soil that it removed and replaced. Characterized in this way, gathering lead shot from a shooting range and then selling the reclaimed lead is more similar to remediation and clean-up than to excavation, earth moving, or land clearing, which implies a permanent change to the landscape.[8] Further, Respondent's stated goal is to return to the NSC in the future to harvest lead in the same manner and in the same area. (Tr. 125). Based on the foregoing, the Court finds that Respondent's primary work activity is properly characterized as general industry rather than construction.

B. Citation 1, Item 1

Complainant alleges in Citation 1, Item 1 that:

> There was neither an infirmary, clinic, or hospital used for the treatment of all injured employees in near proximity to the workplace nor a person or persons adequately trained to render first aid:

8. In that regard, Respondent's primary activity is more akin to reclamation and remediation activities listed under NAICS Code 562910 than site clearing and land moving listed under NAICS Code 238910. Although this fact is not determinative of the dispute, the Court finds that Complainant's interpretation of the standard defining construction such that Respondent's activities are not included is reasonable and therefore entitled to deference. *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) ("[W]hen embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress.").

> National Shooting Complex, on or about 4/18/2011, and at times prior thereto, the employees were exposed to inadequate medical attention during evening and night work performing lead removal.

The cited standard provides:

> In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available.

29 C.F.R. § 1910.151(b).

As noted above, the Court finds that the general industry standards are applicable to Respondent. The cited standard is generally applicable to all general industry worksites and therefore applies to Respondent. The Court does not find, however, that the terms of the standard were violated.

The cited standard requires one of two things—an infirmary, clinic, or hospital in near proximity to the workplace, or a person adequately trained to render first aid with first aid supplies readily available. Complainant and the Commission have interpreted the "near proximity" requirement to mean that first aid must be administered within three minutes of a serious injury. *See, e.g., Love Box Co.*, 4 BNA OSHC 1138 (No. 6286, 1976). There is no dispute that there was not a hospital, clinic, or infirmary that could be reached in that period of time, nor was it clear that emergency responders could get to NSC within that timeframe on a consistent basis.[9] Thus, the question remains as to whether a person at the worksite was adequately trained to render first aid.

Complainant contends that Respondent violated the standard because it was unable to produce any evidence that any of its employees had first aid certification. According to Commission precedent, however, a person can be adequately trained to render first aid even if his certification has expired. *See Savina Home Industries, Inc.*, 4 BNA OSHC 1956 (No. 12298,

9. Evidence was introduced that an Acadian Ambulance was sometimes parked on a corner nearby; however, there was no testimony or evidence to suggest that this was always the case. (Tr. 415).

1977) ("[T]he standard requires only that an individual 'be adequately trained to render first aid' and not that he hold first aid training certification."). This construction is supported by a comparison between the cited standard and its equivalent in Part 1926. *See* 29 C.F.R. § 1926.50(c). Section 1926.50(c) states, "In the absence of an infirmary, clinic, hospital, or physician that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, *a person who has a valid certificate in first-aid training* . . . , shall be available at the worksite to render first aid." 29 C.F.R. § 1926.50(c) (emphasis added). The two standards are virtually identical with the exception that the construction standard explicitly requires certification, whereas the general industry standard does not. *See Snyder Well Servicing, Inc.*, 10 BNA OSHC 1371 (No. 77-1334, 1982) (affirming ALJ's decision that "the evidence showed that no Snyder employee had the certificate required by the standard in Part 1926, but that did not necessarily prove that no employee was 'adequately trained to render first aid,' which is all section 1910.151(b) requires").

Lloyd Tucker testified that "for a period of ten to twelve years . . . I was certified in first aid, CPR, and emergency breathing." (Tr. 60). Tucker also testified that, during that period of ten to twelve years, very little had changed and that he had not forgotten the training that he had received. (Tr. 86–87). Although Complainant established that Tucker did not have a current certification, Complainant did not introduce any evidence or testimony to suggest that Tucker's training was inadequate for the purposes of rendering first aid.[10] Tucker also showed CSHO Lamont-Cubitt the location of their first aid supplies, which were immediately available. (Tr. 88).

Furthermore, NSC's operations manager, Pete Masch, testified that he was first aid

10. Respondent also introduced evidence that another of its employees, Craig Fisher, received first aid training and certification. (Tr. 118). Fisher did not testify at hearing, nor did Respondent introduce his first aid certification into evidence. Accordingly, the Court accords this evidence little weight.

trained and certified, and that he apprised Tucker of this fact. (Tr. 366). Masch also testified that he was onsite and available to Respondent by cell phone 24 hours a day. (Tr. 363, 367). Even though he stated that he was onsite working for 10–14 hours a day, he also indicated that he lived on the NSC grounds and that he did not leave the complex until the reclamation project was done. (Tr. 367). Masch also showed Tucker the main NSC infirmary, as well as various buildings around the complex, all of which were supplied with first aid kits. (Tr. 365). As noted above in Section III, the NSC complex also had an emergency responder available during normal business hours and during shooting events.

Based on the foregoing, the Court finds that Complainant failed to prove a violation of 29 C.F.R. § 1910.151(b). Accordingly, Citation 1, Item 1 shall be VACATED.

C. Citation 1, Item 2

Complainant alleges in Citation 1, Item 1 that:

> The employer did not implement a respiratory protection program in accordance with 29 C.F.R. 1910.134(c) through (m) which covers each employer required by this section to use a respirator:
>
> National Shooting Complex, on or about 4/18/2011, the employer required employees to wear half face tight fitting respirators without medical clearance, training, or fit testing potentially placing physiological burden on the respiratory system of employees.

The cited standard provides:

> The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

29 C.F.R. § 1910.1025(f)(2)(i).

The scope and application paragraph of 29 C.F.R. § 1910.1025 states that "[t]his section applies to all occupational exposure to lead, except as provided in paragraph (a)(2)." 29 C.F.R. § 1910.1025(a)(1). Paragraph (a)(2) exempts the construction and agricultural industries from

coverage under this section; however, the Court has already found that Respondent was not engaged in construction. Respondent's primary business is harvesting lead shot from shooting ranges. Thus, the Court finds that the standard applies.

The Court also finds that the standard was violated. Both parties spent a significant amount of time arguing whether Respondent required the use of respirators at its worksite. As noted above, the Court found that the use of respirators was voluntary. That said, the standard does not say "each employee required *by his employer* to wear a respirator"; rather, it states "required *by this section*." 29 C.F.R. § 1910.1025(f)(2)(i) (emphasis added). Thus, in order to determine whether Respondent violated the terms of the standard, the Court must determine whether the standard required the use of a respirator. It is undisputed that Respondent failed to implement a respiratory protection program.

According to 29 C.F.R. § 1910.1025(f)(1), there are three instances when respirator use is required: (1) when necessary to install or implement engineering or work-practice controls; (2) operations for which engineering or work-practice controls are not sufficient to reduce employee exposure to or below the PEL; and (3) when an employee requests a respirator. *See also* Occupational Exposure to Lead, 43 Fed. Reg. 52,952, 52,992 (Nov. 14, 1978). Each of these instances immediately triggers an employer's responsibility to provide medical clearance, training, and fit testing. Respondent provided respirators for use, and, as is clear from the testimony and photographic evidence, its employees opted to use them. (Tr. 66–67, Ex. C-2). Although there was no direct testimony to suggest that Respondent's employees specifically requested the respirators, the Court does not see a meaningful distinction between making a specific request and opting to use what has been provided. In either case, Respondent had an obligation to implement a respiratory protection program to ensure that the respirators were being properly used, that they fit, and that employees would not be adversely affected by

wearing a respirator. *See generally* 29 C.F.R. § 1910.134(c). Respondent's failure to implement a respiratory protection program in this instance constitutes a violation of the standard.

Respondent's employees were also exposed to the hazard. There was ample testimony and photographic evidence to show the Respondent's employees were wearing respirators while working at NSC. Further, it is undisputed that, other than Tucker showing the employees how to don the respirator, the employees did not receive training, fit testing, or medical clearance to use the respirators.

Respondent also knew, or could have known, about the violative condition. Although Respondent claims it was ignorant of the law governing lead exposure and the respiratory protection program requirement, it is well settled that ignorance of the law is not a valid defense. *See Froedtert Mem. Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1509 (No. 97-1839, 2004) (rejecting employer defense of ignorance that standards applied). It is not necessary to prove that the employer knew the requirements of the standard; rather, "knowledge" refers to the employer's awareness of the existence of the conditions that are not in compliance with a standard. *See N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000). Respondent, through its worksite foreman, Tucker, was aware that its employees wore respirators. *See Revoli Const. Co.*, 19 OSHC 1682 (No. 00-0315, 2001) (holding that actions and knowledge of supervisory personnel is generally imputed to their employers). Further, as testified to by Respondent's president, Lynn Gipson, Respondent was also aware that it did not have a respiratory protection program in place. (Tr. 152).

The Court also finds that the violation was serious. A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. CSHO Lamont-Cubitt testified that if an employee is not medically cleared to wear a respirator, serious physical harm could result if the employee had an underlying health condition

such as high blood pressure or breathing problems. (Tr. 252). These problems could be exacerbated by a tight-fitting respirator, which increases the effort required to breathe in oxygen. *See* 43 Fed. Reg. at 52,992. As noted above, Complainant need not show that there is a substantial probability that an accident would occur; rather, he need only show that if an accident occurred, serious physical harm could result. Viewed in that light, the Court finds that, if an accident were to occur as a result of an improperly fitted respirator or as a result of an individual not being medically cleared to wear a respirator, such an accident would cause serious physical harm requiring medical treatment.

Based on the foregoing, the Court finds that Complainant established a violation of the standard and that it was serious. Accordingly, Citation 1, Item 2 shall be AFFIRMED. Because the Court affirms on this basis, it need not address Complainant's post-hearing amendment.

D. Citation 1, Item 3

Complainant alleges in Citation 1, Item 1 that:

> Employee(s) working in an area where there is potential exposure to airborne lead at any level were not informed of the content of Appendices A and B of this regulation.
>
> a) National Shooting Complex: On or about 4/18/2011, an employee was exposed to lead at an 8-hour TWA of 25.3 µg/m^3, approximately 0.506 of the PEL. The exposure was derived from one sample collected over a 434 minute period. An 8-hour sample period was measured. Zero exposure was assumed for the unsampled period of 46 minutes. The employees were removing expended lead shot without any training on the health hazards of lead.
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> b) National Shooting Complex: On or about 4/18/2011, an employee was exposed to lead at an 8-hour TWA of 12.4 µg/m^3, approximately 0.248 of the PEL. The exposure was derived from one sample collected over a 430 minute period. An 8-hour sample period was measured. Zero exposure was assumed for the unsampled period of 50 minutes. The employees were removing expended lead shot without any training on the health hazards of lead.
>
> c) National Shooting Complex: On or about 4/18/2011, an employee was exposed to lead at an 8-hour TWA of 6.9 µg/m^3, approximately 0.138

> of the PEL. The exposure was derived from one sample collected over a 438 minute period. An 8-hour sample period was measured. Zero exposure was assumed for the unsampled period of 42 minutes. The employees were removing expended lead shot without any training on the health hazards of lead.

The cited standard provides:

> 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.

29 C.F.R. § 1910.1025(l)(1)(i).

Respondent's business involves harvesting lead shot from shooting ranges under dry and dusty conditions. Thus, for the same reasons mentioned with respect to Citation 1, Item 2, the Court finds that the standard applies. The Court also finds that the terms of the standard were violated. The potential for lead exposure was readily apparent—and recognized by Respondent—given the volume of lead expected to be harvested and based upon the method of extraction.[11] (Tr. 67, 158 Ex. C-4). Further, Respondent admitted that it had not provided its employees the information contained in Appendices A and B of 1910.1025. (Tr. 155–56).

Respondent's employees were also exposed to the hazardous condition. As noted above, three of Respondent's employees had some level of exposure to airborne lead, and yet none of them had received training or education other than how to don a respirator. Respondent was also aware of the hazardous condition. Respondent was aware that the harvesting of lead shot from a dry and dusty shooting range had the potential for exposing employees to airborne lead at some level. (Tr. 158). Further, Respondent was aware that, other than the rudimentary fit-test provided by Tucker, no other training regarding the use of respirators or the hazards of lead exposure was provided.

The Court finds that the violation was serious. The standard requires that, whenever

11. In addition, the monitoring results confirm the presence of airborne lead "at any level."

there is a potential for exposure to airborne lead, an employer must provide its employees with the information contained in Appendices A and B of 1910.1025. These appendices provide important information regarding the proper way to fit-test a respirator, the harmful effects of lead exposure, symptomology, and employee rights to exposure monitoring and medical surveillance. 29 C.F.R. § 1910.1025, App. A, B. Taking into consideration that Respondent's employees were exposed to airborne lead; Respondent failed to have a respiratory protection program, which includes monitoring requirements; and that Respondent's employees were not equipped with the knowledge to properly prevent lead exposure or identify the harmful effects stemming therefrom, the Court finds that Respondent's employees were exposed to the potential for serious injury. Although Respondent argues that none of the monitoring samples showed exposure at or above the PEL, this only speaks to the level of airborne exposure on a single day. Respondent's employees perform the same type of activities for months at a time in locations throughout the nation and are exposed to both the potential for breathing airborne lead as well as ingesting lead that has settled on their clothes and hands. (Tr. 377–78). Subsequent blood tests showed that one employee had a blood level count of 38 micrograms per deciliter, or just 2 micrograms below the action level. The failure to inform employees on how to prevent and identify the symptoms of lead exposure, coupled with the failure to have a respiratory protection program in place, could result in Respondent's employees being exposed to the harmful effects of lead poisoning.

Based on the foregoing, the Court finds that Complainant has established a violation of 29 C.F.R. § 1910.1025(l)(1)(i). Accordingly, Citation 1, Item 3 shall be AFFIRMED.

E. Citation 2, Item 1

Complainant alleges in Citation 1, Item 1 that:

> An initial determination was not made to determine if any employee may be exposed to lead at or above the action level:

The cited standard 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.

29 C.F.R. § 1910.1025(d)(2)

For the same reasons discussed with respect to Citation 1, Item 2, the Court finds that the standard applies and was violated. Due to the potential for lead exposure referenced in the Court's discussion in Citation 1, Item 3, Respondent had an obligation to make an initial determination as to the respiratory and lead hazards to which its employees were potentially exposed. Respondent's president, Lynn Gipson, admitted that Respondent failed to perform an initial determination pursuant to the standard. (Tr. 115). Further, as discussed in Citation 1, Items 2 and 3, the Court finds that Respondent's employees were exposed to the condition and that Respondent had knowledge of the condition.

Based on the foregoing, the Court finds that Complainant proved a violation of 29 C.F.R. § 1910.1025(d)(2). Accordingly, Citation 2, Item 1 shall be AFFIRMED.

VI. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995);

Allied Structural Steel, 2 BNA OSHC 1457 (No. 1681, 1975).

Respondent is a small company that has no prior history of violations because it has never been inspected before. (Tr. 251). With respect to Citation 1, Item 2, Complainant assessed a gravity-based penalty of $2,400. The Court finds that the penalty is proper—all of Respondent's employees wore respirators without proper fit-testing or medical clearance and the respirators were worn throughout the shift. Although none of Respondent's employees were exposed at or above the PEL, which reduces the probability of injury stemming from exposure to lead, the Court finds that Respondent's failure to perform any monitoring or provide any training to its employees regarding respirator use increased the likelihood that is employees could be seriously injured. With respect to Citation 1, Item 3, Complainant assessed a gravity-based penalty of $3,000. Again, Respondent failed to provide the proper training and information to each of its employees, which exposed them to the potential for serious injuries stemming from exposure to lead. Accordingly, the Court finds that Complainant's proposed penalty is proper.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.
2. Citation 1, Item 2 is AFFIRMED and a penalty of $2,400 is ASSESSED.
3. Citation 1, Item 3 is AFFIRMED and a penalty of $3,000 is ASSESSED.
4. Citation 2, Item 1 is AFFIRMED.

/s/ John H. Schumacher
John H. Schumacher
Judge, OSHRC

Date: May 13, 2013
Denver, Colorado