



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

L&L PAINTING COMPANY, INC.,

Respondent.

OSHRC Docket No. 05-0055

BRIEFING NOTICE

The issues that follow have been identified by the Review Commission as of particular interest on review.

1. With respect to Citation 1, Item 2, did the judge err in holding that because L&L relied exclusively on historical data that did not include monitoring of the “work that J.G. was performing,” L&L Painting Company, Inc. (“L&L”) failed to establish the historical monitoring exception under 29 C.F.R. § 1926.62(d)(3)(iii) and, therefore, did not comply with § 1926.62(d)(1)?

Given the language in § 1926.62(d)(1)(iii), which prescribes the lead exposure monitoring methodology for paragraph (d), but specifically “except[s] [initial determination] . . . monitoring under paragraph (d)(3),” the parties are asked to discuss: (a) whether the standard requires that historical monitoring data relied upon for an “initial determination” must have included personal samples “for each job classification,” as outlined in § 1926.62(d)(1)(iii), or (b) whether, in making an “initial determination,” the standard permits reliance on historical data that is limited to “a representative sample of the exposed employees who the employer reasonably believes are exposed to the greatest airborne concentrations of lead in the workplace,” as outlined in § 1926.62(d)(3)(ii).

2. With respect to Citation 1, Items 3, 8, 10 and 11, did the judge err in affirming violations of the cited lead standard provisions relating to hygiene and personal protective equipment? In addressing these items, the parties are asked to discuss whether L&L knew or could have

known of the cited conditions, with particular reference to all of its monitoring obligations under the standard, including the monitoring requirements under § 1926.62(d)(4).

3. With respect to the remaining citation items, which were not the subject of the Commission's September 29, 2008 Remand Order, we will rely exclusively on the parties' prior submissions.

The parties are advised that when the merits or characterization of an item are before the Commission for review, the appropriateness of the penalty is also subject to review. Accordingly, the parties may address the amount of the penalty if they so choose.

All briefs are to be filed in accordance with Commission Rule 93.¹ The first brief is to be filed within 40 days of this notice. A party who does not intend to file a brief must notify the Commission in writing setting forth the reason therefore within the applicable time for filing briefs, and shall serve a copy on all other parties. The time for filing briefs (or similar notices of intent) of opposing parties shall commence on the date of service.

BY DIRECTION OF THE COMMISSION

Dated: February 2, 2010

/s/

Ray H. Darling, Jr.
Executive Secretary

¹ The Commission requests that all briefs include an alphabetical table of authorities with references to the pages on which they are cited, and that an asterisk be placed in the left-hand margin of the table to indicate those authorities on which the brief principally relies. The Commission also requests that copies of cited authority, other than statutes, case law, law journal articles and legal treatises, be provided to the Commission and to the opposing party. Parties should be cautioned that these materials will be considered only if appropriate.

05-0055

NOTICE IS GIVEN TO THE FOLLOWING:

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