STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Nicole Blissenbach, Commissioner, Minnesota Department of Labor and Industry, Complainant, v. Acoustics Associates, Inc., Respondent.	**ORDER ON MOTION FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Kimberly Middendorf pursuant to Complainant's motion for summary disposition (Motion).

Scott Grosskreutz, Assistant Attorney General, appeared on behalf of Minnesota Department of Labor and Industry (Complainant or Department). Aaron A. Dean, Moss & Barnett, appeared on behalf of Acoustics Associates, Inc. (AAI or Respondent).

On October 21, 2022, Complainant filed its Motion. AAI filed a memorandum in opposition to the Motion on November 14, 2022. Oral argument was heard on December 6, 2022, and the Motion record closed that day.

Based on the submissions of counsel and the prehearing record, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge issues the following:

ORDER:

1. Complainant's Motion for Summary Disposition is **GRANTED**.

2. OAH Docket Number 21-1901-38138 is **DISMISSED**.

Dated: February 23, 2023

KIMBERLY MIDDEDORF
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3 (2022), this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3; .664, subd. 5 (2022), the employer, employee, their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

I. Undisputed Facts

On March 18, 2021, a Minnesota Department of Labor and Industry, Occupational Safety and Health Division (MNOSHA) safety investigator Ron Wallace conducted an inspection of a worksite in Minneapolis, Minnesota (Worksite).[1] AAI was subcontracted to perform tile work on a remodeling project of a more than 250,000 square foot commercial building.[2] At the time of the inspection, AAI employees were engaged in tile work.[3] AAI's crew at the Worksite included a foreman (Jason Hennen), three tile layers (Wayne Risher, Joshua Deangelis, and Erik Windom), and a tile finisher (Luis Luna).[4] During the inspection, Wallace observed AAI's employees using a mortar called ARDEX X5 while setting tile.[5]

ARDEX X5 is a dry powder mixed with water in a bucket and then troweled onto the floor prior to setting the tile.[6] ARDEX X5 contains portland cement, crystalline silica quartz, VA/E copolymer, and amorphous fumed silica.[7] Each of these is a hazardous chemical subject to the OSHA hazard communication standard.[8] Health hazards associated with these chemicals include silicosis, severe skin burns or corrosion, eye damage, allergic reaction, carcinogenicity, organ toxicity, chronic obstructive pulmonary disease, kidney disease, autoimmune disease, inhalation, and ingestion.[9] The safety data sheet (SDS) for ARDEX X5 describes the Global Hazard System (GHS) Classification of hazard categories as follows:

- Skin corrosion/irritation, Category 1
- Serious eye damage/eye irritation, Category 1
- Carcinogenicity, Category 1
- Specific target organ toxicity, repeated exposure, Category 1.[10]

[1] Declaration (Decl.) of Ron Wallace (Wallace Decl.) Exhibit (Ex.) 1 at 2-3.
[2] Decl. of Jason Hennen (Hennen Decl.) ¶¶ 29, 31; Wallace Decl. Ex. 1 at 2.
[3] Wallace Decl. Ex. 1; Hennen Decl. ¶¶ 2-3.
[4] Decl. of Scott A. Grosskreutz (Grosskreutz Decl.) Ex. 1.
[5] Wallace Decl. ¶ 3; Ex. 1 at 7; Ex. 2 at 54-55.
[6] Wallace Decl. ¶ 3.
[7] Wallace Decl. ¶ 4; Ex. 3 at 14.
[8] 29 C.F.R. § 1910.1200.
[9] Wallace Decl. ¶¶ 5-6; Exs. 3-5.
[10] Wallace Decl. Ex. 3.

Category 1 is the most severe hazard within the hazard class.[11]

The use of hazardous chemicals is specific to each employer and each worksite.[12] It is the employer's responsibility to identify the hazardous chemicals that its employees may be exposed to in the work area and then provide its employees with effective information and training on the chemical hazards at the worksite.[13] Only the employer has the relevant knowledge of the hazardous chemicals its employee would be exposed to at each of its worksites.[14]

Towards this end, AAI has a safety manual and an AWAIR program.[15] AAI's AWAIR program addresses hazard communication.[16] It states:

> A written hazard communication program shall be developed, implemented and maintained at each ACOUSTICS ASSOCIATES INC workplace. The program will describe how labels and other forms of warning, material safety data sheets and employee information will be kept, maintained, and disseminated.[17]

AAI's AWAIR program provides:

> Employees will be advised of all special instructions, PPE, and the hazards associated with chemicals-including chemicals contained in unlabeled pipes-in their work areas. The Manager will inform employees of the hazards of non-routine tasks by presenting a copy of the site-specific hazardous materials list, ensuring that the employee is aware of their presence should a non-routine task with unfamiliar materials present itself.[18]

AAI's policy requires documentation of all employee training. AAI's AWAIR program requires its documented hazard communication training to include:

- Requirements, details, and rights of the employee as contained in the Hazard Communication regulation,
- Operations and work areas where hazardous chemicals are present,
- Location of the written Hazard Communication Program, SDS's and the Chemical Inventory List,
- How to access SDS's or SDS information,
- How to read labels and Material Safety Data Sheets for pertinent hazard information,

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[11] *See* 29 C.F.R. § 1910.1200(c).
[12] Wallace Decl. ¶ 10; *see* Alme Decl. Ex. B at 74.
[13] Wallace Decl. ¶ 10.
[14] Wallace Decl. ¶ 10; Alme Decl. Ex. B at 71-2.
[15] Alme Decl. Exs. A-B; Wallace Decl. Ex. 1.
[16] Alme Decl. Ex. B at 71-75.
[17] Alme Decl. Ex. B at 71.
[18] Alme Decl. Ex. B at 72.

- How employees can obtain and use the appropriate hazard information,
- Methods and observations that may be used to detect the presence or release of hazardous chemicals by use of monitoring devices, visual appearance or odor,
- The physical & health hazards of chemicals in the immediate work area,
- Protection measures utilized for the prevention of hazards related to exposure,
- Appropriate work practices,
- Emergency procedures, [and]
- The use of proper PPE.[19]

AAI's employees receive hazard communication training through annual training, onboard training, weekly toolbox talks, and daily safety meetings.[20] Annual safety trainings hosted by AAI include "courses on silica and hazard communication training."[21] AAI's training records document that in 2018, it conducted silica training, which was attended by Hennen and Windom.[22]

AAI's crew at the Worksite were union employees experienced in tile work. As union employees, they have received some hazard communication training on the use of thin-set mortars like ARDEX X5 and all five have completed OSHA-10 training.[23] Deangelis, Risher and Windom have completed OSHA-30 training.[24] While general hazard communication requirements may be discussed during the OSHA 10- and 30-hour courses, the training would not pertain to specific hazardous chemicals because the use of hazardous chemicals is specific to each employer and each worksite.[25]

AAI employees had been at the Worksite for approximately one month prior to MNOSHA's inspection.[26] The general contractor held site safety meetings at least once every two weeks at the Worksite.[27] These lasted approximately 15 minutes and were attended by AAI crew members.[28]

AAI also has daily morning meetings led by project foreman or supervisors before work commences on a project site. Safety discussions are part of the morning meetings. These safety meetings include safety discussions about the hazards associated with the

[19] Alme Decl. Ex. B at 74.
[20] *See* Hennen Decl. ¶ 24, 26; Windom Decl.
[21] Windom Decl. ¶ 15.
[22] Grosskreutz Decl. Ex. 3; Alme Decl. Ex. C.
[23] Hennen Decl. ¶¶ 13, 39; Windom Decl. ¶ 10; Alme Decl. ¶ 24.
[24] Alme Decl. Ex. F.
[25] Wallace Decl. ¶ 10.
[26] Windom Decl. ¶ 31.
[27] Hennen Decl. ¶ 32.
[28] Windom Decl. ¶ 27.

use of thin set products, how to detect and protect against those hazards, and discussions about the hazards associated with any new product introduced on a project site.[29]

During MNOSHA's inspection on March 18, 2021, Wallace spoke with Hennen, Deangelis, and Risher.[30] Deangelis and Risher informed Wallace that hazard communication had not been conducted with them at the Worksite.[31] Upon completion of the inspection, MNOSHA concluded that AAI had failed to provide adequate hazard communication to its crew and issued a citation for a serious violation based upon its rating of D5 under the Field Compliance Manual guidelines.

AAI challenged the citation, contending it did not commit the violation and that it was incorrectly determined to be a serious violation.[32] This contested case ensued.

II. Legal Standard

Summary disposition is the administrative law equivalent of summary judgment.[33] A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.[34] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.[35] The Administrative Law Judge does not weigh the evidence;[36] instead, the judge views the facts and evidence in a light most favorable to the non-moving party.[37]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[38] A fact is material if its resolution will affect the outcome of the case.[39] If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[40] A genuine issue is not a "sham or frivolous" one,[41] and it cannot rely on mere allegations or

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[29] Windom Decl. ¶ 20.
[30] Wallace Decl. Ex. 1 at 5.
[31] *Id.*
[32] AAI also argues the Department undertook the March 18, 2021 inspection solely in retaliation for losing an earlier contested case involving a fatality to AAI. The record does not support this claim.
[33] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2021).
[34] *Sauter v. Sauter*, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[35] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[36] *Id.*
[37] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[38] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[39] *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).
[40] *Thiele,* 425 N.W.2d at 583.
[41] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

denials.[42] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[43]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[44] Thus, summary disposition is only proper when no fact issues need to be resolved.[45]

III. Legal Analysis

To establish that an employer violated an OSHA standard, the Department must prove that: (1) the cited standard applies; (2) the requirements of the cited standard were not met; (3) an employee had access to or was exposed to the violative condition; and (4) the employer knew, or with the existence of reasonable diligence, could have known of the violative condition.[46]

In this case, the Department issued a serious citation to Acoustics for violating 29 C.F.R. § 1910.1200(h)(1) (the hazard communication standard) by failing to provide its employees with information and training as required under the standard on the hazardous chemicals in their work area on March 18, 2021. The hazard communication standard mandates that an employer provide "effective information and training" on hazardous chemicals in their "work area at the time of their initial assignment[.]" The standard is satisfied where information and training covers "categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals" in the work area.[47]

Information employers must give their employees includes "any operations in their work area where hazardous chemicals are present" and the "location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and safety data sheets[.][48] The minimum training requirements under the hazard communication standard are:

> 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.).
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> The physical, health, simple asphyxiant, combustible dust, and pyrophoric gas hazards, as well as hazards not otherwise classified, of the chemicals in the work area;

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[42] *DLH*, 566 N.W.2d at 71.
[43] *See* Minn. R. Civ. P. 56.05, *Nicollet Restoration Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).
[44] *Sauter*, 244 Minn. at 485, 70 N.W.2d at 353.
[45] *Id*.
[46] *Ken B. Peterson, Comm'r, Minn. Dep't of Labor & Indus. v. Dirt Merchant, Inc.*, OAH Docket No. 68-1901-32482, 2016 WL 1399599, at *10 (Minn. Off. Admin. Hrgs. Mar. 3, 2016)
[47] 29 C.F.R. 1910.1200(h)(1).
[48] 29 C.F.R. 1910.1200(h)(2).

> 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,
>
> The details of the hazard communication program developed by the employer, including an explanation of the labels received on shipped containers and the workplace labeling system used by their employer; the safety data sheet, including the order of information and how employees can obtain and use the appropriate hazard information.[49]

Summary disposition is appropriate if there is no genuine issue of material fact in dispute that any AAI employee at the Worksite was not given hazardous communication training on the use of ARDEX X5 that contained the minimum content requirements.

1. 29 C.F.R. § 1910.1200(h)(1) Applied to AAI's Activities on March 18, 2021.

The Department argues it is undisputed that five AAI employees were exposed to ARDEX X5 at the Worksite on March 18, 2021. Likewise, based on the SDS for ARDEX X5, the Department argues there is no dispute that ARDEX X5 contains hazardous chemicals, including portland cement, crystalline silica quartz, and amorphous fumed silica. The SDS for ARDEX X5 lists four hazard categories: skin corrosion/irritation; serious eye damage/eye irritation; carcinogenicity; and specific target organ toxicity, repeated exposure. Each of these is designated "Category 1" to indicate the most severe of hazards within the hazard class.[50]

Portland cement, crystalline silica quartz, and amorphous fumed silica are each specifically identified as a hazardous substance.[51] AAI was required to provide its employees with information and training on those hazardous chemicals prior to being exposed to those chemicals in the work area. In the alternative, AAI was required to provide information and training on the four categories of hazards associated with the use of ARDEX X5.[52]

Whether specific to the chemicals or their categories of hazards, the training must have included at a minimum the methods and observations that may be used to detect the presence or release of the hazardous chemical in the work area; the physical, health, simple asphyxiation, combustible dust, pyrophoric gas hazards as well as other hazards of the chemicals; and the measures the employees can take to protect themselves from the hazards.[53]

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[49] 29 C.F.R. § 1910.1200(h)(3).
[50] *See* Wallace Decl. Ex. 3 *and* 29 C.F.R. § 1910.1200(c).
[51] Minn. R. 5206.0400, subp. 5(O)(77), (R)12, and (R)(13) (2021).
[52] 29 C.F.R. § 1910.1200(h)(1).
[53] *See* 29 C.F.R. § 1910.1200(h)(3).

AAI acknowledges that it is the employer of the five individuals at the Worksite on the date of the inspection, and that its employees were using ARDEX X5, which contains hazardous chemicals.[54] Thus, the cited standard applies to AAI, and there is no genuine issue of material fact in dispute as to the first element of the alleged violation.

2. AAI Did Not Comply with 29 C.F.R. § 1910.1200(h)(1).

The Department argues AAI violated 29 C.F.R. § 1910.1200(h)(1), when hazard communication training was not given to employees who were routinely exposed to hazardous chemicals, such as ARDEX X5. The Department relies on Wallace's interviews of three AAI crewmembers, AAI's lack of documentation of hazard communication training for the AAI crew, as well as AAI's discovery responses to establish its burden as the moving party. According to the Department, in statements made by the three AAI employees Wallace interviewed – Hennen, Risher and Deangelis - each denied having received any hazard communication training on the use of ARDEX X5. AAI's AWAIR program requires a written hazard communication program and the documentation of all hazard communication trainings provided.

The record is bereft of facts to establish AAI satisfied its hazard communication training obligation with respect to portland cement. Similarly, while Hennen now alleges a practice of daily safety meetings occurred, nothing in the record establishes that Deangelis, Luna or Risher were afforded hazard communication training in either the specific chemicals or the categories of hazards at the Worksite.

As the Department met its burden to establish a lack of disputed facts that the hazard communication standard was violated, the burden shifts to AAI to present specific facts demonstrating a need for resolution in a hearing. AAI does not dispute that it did not provide training on portland cement. Instead, it argues that the standard is satisfied by training on categories of hazards.[55] While this is an accurate statement of law, AAI has failed to present facts which, if true, establish it has provided training on each category of hazards posed by ARDEX X5. While AAI asserts it has provided training on ingestion and skin irritation risks, nothing in the record would establish that its crew was trained in any other category of hazard, such as inhalation and carcinogenicity.

There is no dispute that Deangelis and Risher told Wallace they did not receive hazard communication at the Worksite during the inspection. The motion record contains nothing to contradict this fact. At best, Hennen and Windom allege that AAI conducts morning safety meetings. This is a bare allegation without support elsewhere in the record. Neither Hennen nor Windom provide any specific facts which, if true, establish

[54] *See* Acoustic Associates, Inc.'s Memorandum of Law in Opposition to Complainant's Motion for Summary Disposition (Nov. 14, 2023) at 8.

[55] During oral argument, the Department argued that AAI's declarations in opposition to summary disposition are not consistent with its interrogatory responses, particularly as to Interrogatory No. 4. *See* Audio Recording of Oral Argument on Motion (Dec. 8, 2022). However, the Department has not moved to strike the Respondent's declarations for being laden with facts withheld in discovery. While this failure may affect admissibility or credibility at an evidentiary proceeding, it does not prevent consideration of these allegations on a motion for summary disposition.

AAI satisfied its obligation to provide hazard communication about the specific chemicals or hazard categories of ARDEX X5 at the Worksite.

Nothing in the record establishes that Luna, Deangelis, or Risher received even general hazard communication training by a union, previous employers, or AAI. The general allegations throughout the record that the union provides safety training lack any detail as to when such training was provided, to whom the training would have been provided, or what the training included. AAI's policy requires all training to be documented. AAI, however, has not presented documentation of any annual training since 2018, which Luna, Deangelis and Risher did not attend. AAI presented no details of toolbox talks or "daily training" which, if true, would establish that its employees had any training in satisfaction of the standard.[56] It is unreasonable to draw an inference, on this record, that Luna, Risher and Deangelis were trained despite the corresponding lack of documentation required by law and AAI's own policy and Deangelis' and Risher's unrebutted statements to Wallace.

Further, AAI identified only skin irritation and ingestion as categories of hazards associated with ARDEX 5 for which it contends it provided HAZ/COM training.[57] It is undisputed that inhalation, carcinogenicity and specific organ toxicity are also categories of hazards attendant to ARDEX X5. AAI has produced no facts to establish any hazard communication training as to these categories occurred, or that the training was adequate to meet the standard's content requirements.

Finally, AAI's answer to Interrogatory Number 4 is consistent with the conclusion that there is no genuine dispute of material fact that it did not comply with the standard. AAI was asked the following:

> Regarding Citation 01, Item 001: state whether you contend that you did not commit any violation(s) of 29 C.F.R. § 1910.1200(h)(1). If you do so contend, state the basis for your contention, including an identification of each fact and each document that supports that contention.[58]

AAI answered:

> AAI contends that it did not commit any violation(s) of 29 C.F.R. § 1910.1200(h)(1) because all employees on site have completed OSHA 10 training as well as silica safety training. Further, the required SDS sheets were on-site and all employees had access to them.[59]

Viewing these facts in the light most favorable to AAI as the nonmoving party, they do not establish a genuine issue of material fact to dispute Risher and Deangelis's statements

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[56] *See* Hennen Decl.; Windom Decl.
[57] *See* Hennen Decl. ¶ 43; Windom Decl. ¶ 38. These are the record's only allegations regarding training by category of hazard, identifying no hazards other than "skin irritation and ingestion" posed by thin-set mortars like ARDEX X5.
[58] Grosskreutz Decl. Ex. 1 at Interrog. 4.
[59] *Id.*

to Wallace that they had not received hazard communication training at the Worksite. Completion of an OSHA-10 course does not establish any hazard communication training specific to the Worksite.[60] Similarly, while the response is arguably sufficient to establish a dispute of fact regarding silica safety training for Hennen and Windom,[61] the same cannot be said for Luna, Deangelis, and Risher. Likewise, this response does not establish that any training was conducted for portland cement. AAI's answer to Interrogatory Number 4 also fails to create a dispute of fact to support its current argument that it satisfied the hazard communication requirement by addressing hazard categories rather than specific chemicals.

In summary, AAI's various claims about safety training are bare allegations that are inadequate to defeat summary disposition.[62] In *City of Maple Grove v. Marketline Const. Capital, LLC*, to avoid summary judgment Marketline alleged that Maple Grove made "various representations" that amounted to fraud or misrepresentation.[63] Summary judgment was properly granted because Marketline, despite being in the best position to know the specific facts, "did not identify who made the representations, when they were made, what the representations specifically were, whether it relied on those representations, or what damages were suffered."[64]

Likewise, AAI produced no training materials in support of its general claims about training by the union and at annual safety meetings, nothing to establish that the daily morning safety meetings covered any specific hazardous chemical or category at the Worksite, and nothing to create an issue of fact as to whether Deangelis, Luna, or Risher received any hazardous communication training from AAI or any other source. Thus, the Department is entitled to disposition as a matter of law that AAI did not comply with the hazard communication standard of 29 C.F.R. 1910.1200(h)(1).

3. Acoustics' Employees Were Exposed to Hazardous Chemicals.

The Department argues that there is no genuine issue of material fact in dispute that AAI's employees were all setting tile and using ARDEX X5 during the inspection. AAI does not dispute that its five employees were working with ARDEX X5 throughout the workday on the date of inspection.[65] Accordingly, there is no genuine issue of material fact requiring a hearing on the third element of the alleged hazard communication violation.

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[60] *See e.g.* Decl. of Sara E. Filo at Ex. D.
[61] To the extent that there is a dispute here, it is not material because whether three or five employees were exposed, the probability factor remains "5" under the Field Compliance Manual. *See* Wallace Decl. Ex. 7 at 146-148.
[62] *Nicollet Restoration*, 533 N.W.2d at 848.
[63] 802 N.W.2d 809, 817 (Minn. Ct. App. 2011).
[64] *Id.*
[65] *See generally* Windom Decl., Hennen Decl.

4. It is Undisputed that AAI Had Knowledge of the Hazardous Conditions.

The Department argues that the presence of Hennen, AAI's foreman, at the Worksite establishes AAI's knowledge of the hazardous conditions. AAI does not allege a lack of knowledge as a defense.

IV. CONCLUSION

The Department established its burden, as the moving party, that there are no genuine issue of material facts in dispute. Accordingly, AAI was required to put forward specific facts demonstrating a need for resolution at a hearing. Bare allegations are insufficient to make this showing. There is no genuine issue of material fact in dispute that must be determined at hearing. The citation is affirmed.

K. J. M.