Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **98-0213**
	:	
Trinity Industries, Inc.,	:	
Respondent.	:	

Appearances:

Leslie Paul Brody, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Robert E. Rader, Jr., Esquire
Rader, Campbell, Fisher & Pyke
Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Trinity Industries, Inc. (Trinity), is a corporation engaged in the manufacture of steel LPG tanks in Cedartown, Georgia. The Occupational Safety and Health Administration (OSHA) conducted an inspection and investigation on November 19, 1997. As a result of this inspection, respondent was issued a citation. Respondent filed a timely notice contesting the citation and proposed penalties. A hearing was held in Atlanta, Georgia, on September 24, 1998.

For the reasons that follow, Citation No. 1, item 1, is vacated; Citation No. 1, item 2, is affirmed as a serious violation; Citation No. 1, item 3, instance (a), is affirmed as a serious violation; and Citation No. 1, item 3, instance (b), is vacated.

Background

On October 23, 1997, Tim Locklear, a temporary employee supervised by Trinity, was injured while operating one of the roller machines. Mr. Locklear told the OSHA compliance officer that his glove caught on a burr on one of the inrunning rollers pulling his right hand into the machine. He stated that he tried to stop the machine with the emergency stop bar in front of the machine, but the machine would not stop. As a result of this incident, the employee lost four fingers and most of his palm. OSHA began its inspection and investigation on November 19, 1997.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (1) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation No. 1, Item 1
Alleged Serious Violation of 29 C.F.R. § 1910.22(a)(1)

The Secretary in Citation No. 1, item 1, alleges that:

> Place(s) of employment were not kept clean and orderly, or in a sanitary condition:
>
> 811 West Avenue, Cedartown, Georgia - The work floor was not kept clean and orderly, exposing employees to potential injury.

The standard at 29 C.F.R. § 1910.22(a)(1) provides:

> (a) *Housekeeping*. (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

This general housekeeping standard does not specifically define the terms "clean" and "orderly." A factual determination of housekeeping conditions must, of necessity, be made on a case-by-case basis.

In this case, the OSHA compliance officer, Pamela Evatt, testified that the plant floor was in a trashy and deplorable condition. In support of this conclusion, she stated there were debris, trash, oil, water, paper, metal stock, and wire laying all around. She said that she tangled her feet in some of the wire. Another compliance officer, William Cochran, testified that during the inspection, the OSHA inspectors stepped over and around a lot of scrap material. The inspection took place at the end of a shift.

Trinity admits that there is scrap in the area, including end pieces from spools of welding wire and strapping that must be cleaned up continuously throughout the day. Respondent argues, however, that its housekeeping program addresses these conditions, and that these materials are necessary for its production process.

Ms. Evatt testified that she took photographs of the area, but they were too dark. There is a conflict in testimony relating to the nature and extent of materials in the area and whether respondent admitted it had a housekeeping problem. No other evidence was presented to show the extent of the alleged debris in this area of the plant. Testimony by the Secretary's witnesses relating to these conditions was somewhat vague and conclusory. The Secretary's evidence presented at hearing does not establish that respondent failed to maintain this area in a clean, orderly, and sanitary condition. The evidence fails to establish that respondent did not comply with the terms of the standard. The alleged violation of 29 C.F.R. § 1910.22(a)(1) is vacated.

Citation No. 1, Item 2
Alleged Serious Violation of 29 C.F.R. § 212(a)(3)(ii)

The Secretary in Citation No. 1, item 2, alleges that:

> Point(s) of operation of machinery were not guarded to prevent employee(s) from having any part of their body in the danger zone(s) during operating cycle(s):

> 811 West Avenue, Cedartown, Georgia - The three-leg roller Serial #6107 was not provided with adequate point of operation guarding to prevent employee from having any part of their body in the inrunning rollers.

The standard at 29 C.F.R. § 1910.212(a)(3)(ii) provides:

> (ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

"Point of operation" is defined in 29 C.F.R. § 1910.212(a)(3)(i) as follows:

> Point of operation is the area on a machine where work is actually performed upon the material being processed.

The guarding requirements of the standard apply when the operation of the machine exposes an employee to injury. *Rockwell International Corp.*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶ 29,239 (No. 12740, 1980).

Respondent's three-leg metal roller machine is used to roll sheet metal into cylinders which later became the side walls of small LPG tanks. The operators place their hands 3 to 6 inches from the roller point of operation while feeding the sheet metal into the roller. The standard is clearly applicable to these working conditions.

The standard first requires that guards be in conformity with any appropriate standards. No other OSHA standards specifically apply to this condition. Respondent argues that the roller machine is guarded by means of an emergency bar, in accordance with ANSI standard B11.12-1996. This is not an "appropriate standard" envisioned by the Secretary in promulgating 29 C.F.R. § 1910.212(a)(3)(ii).

In 1982, the Commission held that:

> . . . [T]he phrase "any appropriate standards therefor" refers only to "applicable specific standards" published or incorporated by reference as occupational safety and health standards in Title 29 of the Code of Federal Regulations. We think that it is implicit that only such standards would have been referenced in section 1910.212(a)(3)(ii). It is unlikely, at the least, that the Secretary would have had employers look to standards not published or incorporated by reference as OSHA

standards.

George C. Christopher & Sons, Inc., 10 BNA OSHC 1436, 1982 CCH OSHD ¶ 25,956 (No. 76-647, 1982).

The ANSI standard relied upon by Trinity has not been published or incorporated by reference as an OSHA standard. It has been well established for the past seventeen years that such ANSI standards are not "appropriate standards" where the compliance with those standards would constitute compliance with this requirement of 29 C.F.R. § 1910.212(a)(3)(ii).

The standard further requires that, in the absence of applicable specific standards, the guarding device "shall be designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle." As discussed above, the operator's hands are 3 to 6 inches from the roller point of operation while feeding sheet metal into the roller machine. His hands are clearly within the danger zone during the operating cycle. The emergency bar does not prevent the operator's hands from entering that zone of danger. It is merely a method that may be used to stop the machine in case of an emergency, such as occurred in this case. The bar is attached to emergency stop buttons. It is an extension of the stop buttons. It is not a guard.

Even if this device were found to be acceptable guarding, the emergency bar on this machine was defective and provided no protection for the operator attempting to stop the roller. On October 23, 1997, respondent's operator caught his hand in the roller. Four fingers and part of his palm were amputated. He told the OSHA compliance officer that he tried to stop the machine with the bar and was unable to do so. He finally reached the emergency stop button which deactivated the roller.

On November 19, 1997, OSHA Compliance Officer Pamela Evatt inspected this plant and tested the emergency bar on the roller machine. She testified that she hit the bar twice with her leg without success. The roller continued to operate. She then stepped back and hit the bar with great force. The roller machine then stopped. This test was observed and verified by another OSHA compliance officer, William Cochran, who accompanied Ms. Evatt during this inspection. Ms. Evatt tested stop bars on other machines that worked properly. After observing the demeanor of these witnesses during the hearing, I find their testimony relating to this test

credible.

James Stewart, Trinity's corporate safety director, was present during the OSHA inspection. He testified that he saw Ms. Evatt test the bar. He then tested the bar with a weakened left arm. He stated that the bar functioned satisfactorily and stopped the machine. Neither compliance officer observed this action by Mr. Stewart. Such test does not discount the testimony of Ms. Evatt and Mr. Cochran. The bar provided no protection for the operator at least on the day of the inspection when tested by Ms. Evatt.

It is undisputed that respondent's employees used this roller machine on a regular and recurring basis. Respondent's supervisors knew employees were using these machines daily with only the emergency stop bar for protection. They knew there were no other point of operation guards on this roller machine. The incident on October 23, 1997, gave respondent notice that the operator's hands were not prevented from entering the danger zone during the operating cycle. After the employee injury, the supervisor only pressed the bar to see if it was operating properly, and took no action to prevent the operator's hands from entering the danger zone of the roller.

The evidence clearly establishes that respondent violated 29 C.F.R. § 1910.212(a)(3)(ii). This violation was serious in that there is a substantial probability that death or serious physical harm could result from this condition.

Citation No. 1, Item 3
Alleged Serious Violation of 29 C.F.R. § 1910.303(g)(2)(i)

The Secretary in Citation No. 1, item 3, alleges that:

> Live parts of electric equipment operating at 50 volts or more were not guarded against accidental contact by approved cabinets or other forms of approved enclosures, or other means listed under this provision:
>
> 811 West Avenue, Cedartown, Georgia - The tract welder machine, near the roller area, had exposed wires on the (a) 110 volt Dayton motor, and (b) the 90 volt counter motor.

The standard at 29 C.F.R. § 1910.303(g)(2)(i) provides:

> (2) *Guarding of live parts*. (i) Except as required or permitted elsewhere in this

> subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or by any of the following means:
>
> > (A) By location in a room, vault, or similar enclosure that is accessible only to qualified persons.
> >
> > (B) By suitable permanent, substantial partitions or screens so arranged that only qualified persons will have access to the space within reach of the live parts. Any openings in such partitions or screens shall be so sized and located that persons are not likely to come into accidental contact with the live parts or to bring conducting objects into contact with them.
> >
> > (C) By location on a suitable balcony, gallery, or platform so elevated and arranged as to exclude unqualified persons.
> >
> > (D) By elevation of 8 feet or more above the floor or other working surface.

This item alleges violations relating to wires on the 110-volt Dayton motor and the 90-volt counter motor. Both instances occurred on or in the area of the track welding machine. After review and consideration of all evidence relating to the 90-volt counter motor (instance (b)), I conclude that the standard is not applicable to this condition. While the exposed wiring lays over the 90-volt motor, evidence is insufficient to establish that the wires are connected to that motor.

Evidence was presented by respondent suggesting that the wires connect a transformer and the tracker light motor operating at only 5 volts. While OSHA determined that the counter motor was a 90-volt motor, the evidence is conflicting as to whether the wires were in fact connected to that motor. The evidence is inconclusive as to whether the wires were connected to a 90-volt motor subject to the requirements of this standard or a 5-volt motor not covered by this standard. The Secretary, therefore, has failed to carry her burden to prove applicability of 29 C.F.R. § 1910.303(g)(2)(i) to instance (b) relating to the counter motor. Instance (b) of Citation No. 1, item 3, is vacated.

Instance (a) of item 3 relates to wires connecting the 110-volt Dayton motor on the track welding machine. The standard clearly applies to this condition. It is undisputed that this

electrical equipment was operating at more than 50 volts. Compliance Officer Cochran tested the wiring and found it to be "live" or energized.

Respondent failed to comply with the requirements of the standard by failing to use approved cabinets or enclosures or the listed alternatives to guard against accidental contact. A review of the evidence shows clearly that the junction box cover was missing. This is a small junction box, approximately 2 inches by 2 inches, containing wires joined by a wire nut. The nut is screwed over the two joined wires. While the wire nut covers most of the exposed wire, this does not comply with the specific requirements of the standard. The wires are not protected by enclosures or any of the alternative methods allowed by the standard. Respondent uses the term "exposed live parts" in referring to those parts that must be protected. The standard, however, refers only to "live parts," not "exposed live parts." "Live parts" require protection in accordance with this standard. These parts need not be "exposed" or non-insulated to require such protection. This distinction is essential to a determination of whether respondent failed to comply with the standard.

Respondent's employees worked and walked in the area of the violative conditions. Employees passed within inches of these wires. The machine operator worked within one foot of the condition. These employees were clearly exposed to, and had access to, the violative condition.

Trinity's supervisors work in this area throughout the day and either knew or, with the exercise of reasonable diligence, could have known of the violative conditions. Trinity's plant is not a dynamically changing environment. The track welding machine is in a fixed location, and the junction box is not subject to being moved from one location to another. The violative conditions were in plain view.

Mr. Stewart, Trinity's corporate safety director, on direct examination, stated that he did not notice the cover missing before the inspection, but it was replaced before the compliance officers left the facility. He did not affirmatively state that he saw the cover on the box prior to the inspection. On cross-examination, he restated that he did not notice this condition the day before the inspection or the day of the inspection. On further cross-examination, however, he testified that Trinity does monthly inspections, and that this condition would not have gone

longer than a month. After due consideration, I conclude that respondent knew or, with the exercise of reasonable diligence, could have known of the violative conditions.

The evidence establishes that respondent violated 29 C.F.R. § 1910.303(g)(2)(i). This violation was serious in that there is a substantial probability that death or serious physical harm, including electrocution and electrical shock, could result from this condition.

Motion to Amend

At the hearing, the Secretary moved to amend item 3 to allege a violation of 29 C.F.R. § 1910.305(b)(1). This relates to protecting wires from abrasion. The standard at 29 C.F.R. § 1910.303(g)(2)(i) relates to protecting wires from accidental contact by employees. This motion raises a new issue which was not tried by consent. The motion is denied.

Penalties

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

No evidence was presented at hearing to indicate the exact number of employees working at the Cedartown plant. This is, however, one of fifteen plants under the safety supervision of Trinity's corporate safety director, Mr. Stewart. Trinity is found to be a large company with several facilities. During the past three years, OSHA cited the respondent for one violation at this plant. Instance (a) of item 3 was corrected prior to the conclusion of the inspection. Items 2 and 3 (instance (a)) are serious violations of high gravity. There is a substantial probability that death or serious physical injury could result from these violative conditions. This could include crushing injuries, amputation, electrical shock, and electrocution.

The high gravity and severity of item 2 are shown by the October 23, 1997 incident that resulted in amputation. Some limited protection against electrical shock from the conditions in item 3, (instance (a)), is provided by the wire nuts. This does not, however, provide protection from accidental contact as required by the standard.

Upon due consideration of these factors, it is determined that the following penalties are

appropriate.

1. For Citation No. 1, item 2, I find a penalty of $7,000 appropriate.

2. For Citation No. 1, item 3 (instance (a)), I find a penalty of $800 appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, is vacated.

2. Citation No. 1, item 2, is affirmed and a penalty of $7,000 is assessed.

3. Citation No. 1, item 3 (instance (a)), is affirmed and a penalty of $800 is assessed.

4. Citation No. 1, item 3 (instance (b)), is vacated.

STEPHEN J. SIMKO, JR.
Judge

Date: February 1, 1999