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SECRETARY OF LABOR
Complainant,
v.
TRINITY INDUSTRIES, INC.
Respondent.

OSHRC DOCKET
NO. 90-2532

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 2, 1994. The decision of the Judge will become a final order of the Commission on January 4, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 22, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 2, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-2532

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. TRINITY INDUSTRIES, INC., Respondent.	OSHRC DOCKET NO. 90-2532

APPEARANCES: Michael H. Olvera, Esquire, Dallas, Texas, For the Complainant. Robert E. Rader, Jr., Esquire, Dallas, Texas, For the Respondent.

Before: Administrative Law Judge Louis G. LaVecchia

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 Trinity's Houston, Texas facility in April of 1990. This resulted in the issuance of a serious citation with 137 items and an "other" citation with ten items. Counting all sub-items, the actual total was over 350 items. The trial in this matter involved fourteen days of hearings from August 1991 to February 1993. By the end of the trial the parties had settled almost 300 items. *See* Joint Exhibit 1, Revision 6. Only Trinity submitted a post-hearing brief, and the Secretary, by letter of September 2, 1994, withdrew eleven more items. The remaining items are set out below.

Serious Citation 1 - Item 10(a)

This item alleges there was only one swinging exit door in the north maintenance department in violation of 1910.37(f)(2). The testimony of John Lawson, the OSHA compliance officer ("CO") who inspected the facility, was unclear; he first testified there was only one swinging exit door in the area but then indicated there were two. (Tr. 56-60; 725-27; C-5-1). Trinity employees Bobby Sebesta and Robert Pyka testified there were two swinging exit doors in the north maintenance department. (Tr. 1559-60; 1904; R-39-40). The Secretary has not met his burden of proving the alleged violation. This item is accordingly vacated.

Item 10(b)

This item alleges a violation of the same standard in that exit doors in the warehouse were sliding rather than swinging doors. CO Lawson testified the sliding doors around the warehouse would not provide the same ease of egress a swinging door would. (Tr. 65; 70). However, Trinity employees Gary Schmedt and Robert Pyka testified that only one or two employees would ever be in the warehouse at the same time. (Tr. 1410-12; 1905-06). Schmedt also testified the sliding doors in the warehouse opened easily and that the doors were left open when workers were in the warehouse. (Tr. 1411-14). Lawson acknowledged there would be no difference as to employee safety in these circumstances. (Tr. 842-43). In my view, the evidence does not establish a violation. This item must be vacated.

Item 12(e)

This item alleges that the exit doors in the warehouse were not marked by readily visible signs in violation of 1910.37(q)(1). CO Lawson testified this was a hazard as employees might not be able to locate the exits in a fire. (Tr. 75). The record shows there were only two employees who went to the warehouse, that they were always the same employees and that the doors to the warehouse were left open while they were inside. (Tr. 1409-12; 1905-06). The record also shows the warehouse doors were easily distinguishable. (Tr. 74-75; 1156; 1239; 1409; 1563). The record does not demonstrate a violation, in my opinion. This item is vacated.

Item 32(a)

This item alleges a violation of 1910.132(a) in that an employee on top of a crane trolley was not wearing a safety belt and lanyard. CO Lawson testified he saw employee David Floyd up on a crane trolley without a safety belt and lanyard which exposed him to a fall. (Tr. 119). The record shows Lawson was 100 feet away while maintenance supervisor Bobby Sebesta was 35 feet away and looking right at Floyd. (Tr. 1569-73; 1726). Sebesta testified Floyd was protected from falling by a guardrail behind him and the crane bridge and trolley in front of him, and that if he had somehow fallen there was a 6-foot-wide catwalk just below. (Tr. 1570-71; R-41). In my view, the Secretary has not shown a violation. This item is vacated.

Item 32(c)

This item alleges a violation of the same standard in that employees were not required to wear steel-toed safety shoes. The record shows Trinity required its employees to wear ankle-high heavy leather shoes. (Tr. 1415). It also shows there had been only one foot injury in the three previous years and that that injury would not have been prevented by steel-toed safety shoes. (Tr. 1416-17; 1515). The alleged violation has not been established. This item must therefore be vacated.

Item 44

This item alleges there were no written lockout procedures for individual machines in violation of 1910.147(c)(4)(i). The record shows Trinity had a written lockout/tagout program. (Tr. 137; C-8). The basis of this item is that Robert Pyka, a shop superintendent who accompanied Lawson, did not provide any written procedures for individual machines. (Tr. 136). Pyka testified he was not responsible for the lockout program but that maintenance superintendent Bobby Sebesta was. (Tr. 1871-72; 1929-30). Sebesta confirmed this was so. He testified there were written procedures for individual machines in the maintenance department and that no one asked him for them. (Tr. 1577-79; 1733-37). Other employees verified his testimony and the procedures were introduced at the hearing. (Tr. 1418; 1578-79; 1995-98; 2007-08; R-45). This citation item is accordingly vacated.

Item 47(a)-(h)

These items allege there were eight work areas in which employees could be exposed to injurious corrosive materials without suitable facilities for quick drenching of the eyes or body in violation of 1910.151(c). These items were recommended because there were no commercial eye wash stations in the facility. However, CO Lawson testified that other sources of fresh running water would be acceptable if reachable in one to two minutes. (Tr. 755). Plant manager Gary Schmedt testified he inventoried all sources of fresh running water in the plant and timed the walking distance to them from the cited areas. Based on his inventory, there were sources of fresh running water suitable for drenching the eyes and body within one to two minutes of each of the cited areas. (Tr. 1419-24). His testimony was not rebutted by the Secretary. These items are vacated.

Item 50

This item alleges that Trinity did not maintain evidence that the required hydrostatic testing of the facility's fire extinguishers had been performed in violation of 1910.157(f)(16). The undisputed evidence of record shows that at the time of the inspection each extinguisher in the facility had either a sticker showing the date it had been hydrostatically tested and the name and address of the person who performed the test or the manufacturer's label showing testing was not yet required. (Tr. 175; 759; 764-65; 945-47; 1426-28; 1432; R-2; R-49). In my opinion, this complies with the standard. This item is therefore vacated.

Items 54(a)-(b)

These items allege violations of 1910.176(b) in that materials in the warehouse were stored in an unstable, hazardous manner. CO Lawson testified the materials depicted in C-5-42-43 were unstable because the pallets were broken. However, he only looked at the pallets and did not determine whether they were in fact unstable. (Tr. 181-83; 768). Gary Schmedt and Bobby Sebesta testified the pallets were stable due to the unique construction of the racks they were stored on and that they would not accidentally fall on anyone. (Tr. 1432-34; 1586-87). It is my conclusion the Secretary has not met his burden of showing the alleged violation. These items are vacated.

Item 60

This item, which alleges the parking brake on a forklift was not functioning properly in violation of 1910.178(p)(1), was amended to allege an "other" violation with no penalty. *See* Joint Exhibit 1, Revision 6. The basis of this item was CO Lawson's testing the brake and concluding it did not work properly. Bobby Sebesta testified his maintenance crew inspected the forklift the morning of the inspection and the parking brake was operating at that time. (Tr. 1587-89; 1739-48). In addition, the record casts some doubt on the manner in which Lawson tested the brake. (Tr. 197; 922-24; 1161-62; 1587-88; 1745-46). In my view, the evidence does not establish the alleged violation. This item must therefore be vacated.

Items 66(a)-(b)

These items allege violations of 1910.179(f)(2)(v) in that the wearing surfaces of the holding brake drums of two cranes were not smooth. CO Lawson testified that the wearing surfaces are required to be smooth as the holding brakes keep the load from falling. (Tr. 213-14). However, Bobby Sebesta testified that the mechanical load brake, not the holding brake, holds the load on these cranes and that even if the holding brake failed completely the load would not fall. He also testified the cited surfaces were in fact smooth. (Tr. 1590-92; 1748-52). On balance, I find the Secretary has not proved the alleged violations. These items are vacated.

Items 67(a)-(c)

These items allege violations of 1910.179(f)(4)(iv) in that the wearing surfaces of two bridge brake drums and one trolley brake drum were not smooth as required. CO Lawson first testified the drums were "scored," or grooved, as evidenced by the discolored lines shown in C-5-52. He then admitted that discoloration does not necessarily indicate grooves. (Tr. 225-34). Sebesta also testified that discoloration does not mean there are grooves. He further testified that all the facility's cranes are inspected monthly to replace or repair worn or defective parts, and that the cited cranes were safe. (Tr. 1594-95). As in the foregoing paragraph, the Secretary has not proved the alleged violations. These items are vacated.

Items 79(a)-(c)

These items allege that three alloy steel chain slings did not have durable identification affixed stating size, grade, rated capacity and reach, in violation of 1910.184(e)(1). As to item 79(a), the record shows the sling did have a rating tag but was cited because Lawson interpreted the standard to require each component of the sling assembly to be tagged. (Tr. 239; 772-73). This interpretation is unreasonable in light of the language of the standard and the definition of "sling" as an "assembly" at 1910.184(b). This item is therefore vacated.

As to item 79(b), Lawson's own testimony was that the untagged sling was not in use and was in an area where no one was working. (Tr. 246). In addition, three Trinity employees testified workers are trained to inspect slings before use, to not use untagged slings, and to take any such slings to maintenance to be re-tagged. (Tr. 1435-37; 1597-99; 2021-22). This item is also vacated.

As to item 79(c), the two cited slings were tagged, but, according to Lawson, the tags were so worn they were illegible. (Tr. 252; C-5-58-59). However, based on the testimony of two Trinity employees and R-3, another photo of the slings taken at the same time as C-5-58-59, the tags were not illegible. (Tr. 1106-07; 1597-98). This item is vacated.

Item 80

This item alleges the facility did not have chain inspection reports as required by 1910.184(e)(3)(ii). The basis of this item is that Trinity did not produce any chain/sling inspection reports for the three months preceding the inspection. (C-4, item 20). The standard requires only yearly reports. *See* 1910.184(e)(3)(i). In addition, Trinity has its chains and slings inspected yearly by a chain manufacturer and the report from the last inspection prior to the OSHA inspection was dated May 15, 1989. (Tr. 1438-40). This date was within twelve months of the OSHA inspection. This item is accordingly vacated.

Items 81(a)-(c)

These items allege that various lifting devices at the facility had no certificates of proof testing in violation of 1910.184(e)(4). The record shows the devices, called plate

hooks, are made at the plant because they cannot be obtained elsewhere. The record also shows the devices are designed, tested and rated by an in-house engineer. They have a safety factor of 1.5 times the load they are expected to support and are tagged to show their rating. None of the devices has ever failed and an after-inspection test of the devices by an outside chain manufacturer confirmed they were properly rated. (Tr. 1396-97; 1445-48; 1822-34; 1849-56). There was no violation, in my view. These items are vacated.

Items 84(a), (c) and (d)

These items allege violations of 1910.212(a)(3)(ii) in that certain equipment lacked point of operation guarding. As to item 84(a), the cited Kling Mill-All is depicted in C-5-90 and C-5-93-94. The operator stands behind a control panel to run it and the point of operation is at least 24 inches away. The machine is off when stock is put into it, after which the operator goes behind the panel to turn it on. There are no walkways around the equipment such that other workers would have reason to be near it. (Tr. 951-52; 1115-17; 1449-50). The Secretary has not shown employee exposure to the cited hazard. This item must therefore be vacated.

As to item 84(c), the cited steel saw is depicted in C-5-98. The evidence of record shows its blade turns at the rate of 4-6 rpm. The saw is called a "cold saw" as it cuts steel beams cold by chiseling through them so slowly that no steel chips are thrown out. The record also shows various OSHA inspectors had looked at these saws previously and concluded they were not hazardous. (Tr. 291-94; 305; 782-84; 958; 1263-68). Based on the record, this item must also be vacated.

As to item 84(d), the cited press brake's operation is depicted in R-22. R-22 shows that the operator activates the press brake with a foot pedal. It also shows the press brake is hydraulic and the ram descends very slowly. When the operator takes his foot off the foot pedal the ram stops instantly. There have never been any injuries on this type of press brake. (Tr. 310-12; 961; 1167-68; 1269-70). The Secretary has not established a violation. This item is vacated.

Item 88

This item alleges a violation of 1910.217(b)(1) in that a clutch trip rod spring on a punch press was not enclosed. CO Lawson testified that if the spring wore out, pieces of it could be ejected like shrapnel. (Tr. 373-75). James Stewart, a divisional safety director with Trinity, testified the spring had a U-bolt through its center and plates above and below it which would contain it if it failed. In his years of experience, he had never heard of such a spring being ejected and felt it was sufficiently guarded. (Tr. 1180-82; 1204-05; R-23). In my opinion, the Secretary has not met his burden of proving a violation. This item must therefore be vacated.

Items 91(a)-(b)

These items allege a violation of 1910.217(d)(6)(i) in that the tonnage and stroke requirements for the dies in a Verson press were not stamped on the dies or indicated on records available to the die setter. CO Lawson testified that the hazard was the dies being put in the wrong press by mistake and breaking or exploding during the punching process. (Tr. 402-04; 801). However, he admitted the hazard would not exist if the dies would only fit in that press. (Tr. 801-03). Gary Schmedt and Robert Pyka testified that the dies in the press were not interchangeable and would not fit in any other press. (Tr. 1462; 1988). The Secretary did not rebut this testimony. This item is accordingly vacated.

Item 102(d)

This item alleges that a conveyor located in the yard outside the saw shed had unenclosed sprocket wheels and chains in violation of 1910.219(f)(3). The record shows the conveyor is used to move steel beams from the yard into the saw shed. The saw operator loads the beams onto the conveyor and then goes into the saw shed to run it. To do so, he must stand behind a control panel inside the shed and keep his finger on the control button. The only time other employees are in the yard is when they unload beams from trucks. The conveyor is not running at these times because the operator assists to unload the beams. There is also a warning line with a "keep out" sign on it along the side of the conveyor. Employees have no reason to get behind the line, and no one has ever been injured by the

conveyor. (Tr. 443; 1475-81; 1535-37; 1633-43; C-5-149-50; R-36-37). The Secretary has not shown employee exposure to the cited condition. This item is vacated.

Item 109

This item alleges a violation of 1910.244(b) in that a grit blasting nozzle was laying on the floor. CO Lawson testified the hazard was someone stepping on the switch and accidentally activating the nozzle. He also testified that keeping the nozzle in a stand or wall hanger would abate the hazard. (Tr. 507-08; 817; 1876). The record shows the cited blaster was used infrequently and that there were hangers on the wall where it was to be kept when not in use. The record also shows a lack of knowledge of this condition on the part of Trinity. (Tr. 932; 1157; 1241; 1415; 1876-77). In my view, the requisite employer knowledge has not been established. This item is therefore vacated.

Item 110(a)-(b)

These items allege that fire extinguishers were not maintained in a state of readiness for instant use for welding and cutting operations as required by 1910.252(a)(2)(ii). The basis of these items was Lawson's opinion that the standard requires an extinguisher within 20 feet of a welding operation and that there was no extinguisher within that distance from the operator's station in Department F or the Miller welder in Department B. (Tr. 512; 515; 521-22). The record establishes there was an extinguisher within 50 feet of the first location and one within 30 feet of the second. (Tr. 1486-89). The standard does not specify a particular distance, and Lawson's opinion was based on training from a previous private employer. (Tr. 523). In addition, he acknowledged the applicability of the 75-foot maximum distance set out in 1910.157(d)(2) to the subject standard. (Tr. 520). The Secretary has not met his burden of proving a violation. These items are vacated.

Item 111

This item alleges a violation of 1910.252(a)(2)(xiv)(f) in that the supervisor in Department F did not assure there were sufficient fire extinguishers in that department. It is clear from the record this condition is the same as the one cited in item 110(a), *supra*.

(Tr. 525-26; 819-20). That item was vacated because the Secretary did not establish a violation; accordingly, this item must also be vacated.

Item 112(a)

This item alleges that employee Angel Stelo was working on a large dump truck 108 inches off the floor without being tied off in violation of 1910.252(b)(1)(i). (Tr. 527-28; 1233; 1665). Bobby Sebesta recalled the incident. He explained the truck was being fabricated in a jig which held the body together while employees tack welded it. The employees were tied off to a tag line on top of the truck while welding. The truck was then lifted out of the jig with a crane, at which time it was necessary to remove the line to avoid breaking it. CO Lawson evidently observed Stelo during the four to five minutes it took him to remove the line and hook up the crane to the truck bed. Stelo would then have walked off the truck and onto a platform. (Tr. 1665-69; 1784-88). In my view, a violation of the standard has not been shown due to the nature of this operation. This item is vacated.

Item 112(c)

This item alleges a violation of 1910.252(b)(1)(i) in that a welding platform had no guardrails. 1910.23(c)(1) requires platforms to be guarded when they are 4 feet or more above the floor. CO Lawson recommended this item because he measured the platform to be 4 feet and 1 inch above the floor. (Tr. 535). However, Bobby Sebesta, Robert Pyka and Neil Foreman, Trinity's corporate safety coordinator, testified the platform had been installed at 3 feet and 11 inches above the floor, that it had bowed somewhat over time, and that Lawson had evidently measured it at the high point. (Tr. 987-989; 1669-72; 1977-78). This item is vacated.

Item 114

This item alleges that piping used to supply oxygen to the welding system was painted white in violation of 1910.253(d)(4)(ii). The record shows there were over 8,000 feet of oxygen piping in the facility and that all but the few feet depicted in C-5-181 were properly color coded green. (Tr. 822; 1674). C-5-181 shows the piping was only partially white, and Lawson himself identified it as oxygen piping because of its green paint. (Tr. 544). Bobby

Sebesta testified the white paint was due to painting the walls and ceiling in the area and the fact the painter was not finished. He finished a few days later and then repainted the piping green and relabeled it as oxygen piping. (Tr. 1674-75; 1789). In my opinion, the evidence does not establish a violation. This item is accordingly vacated.

Item 115

This item alleges a backflow valve was missing from the oxygen/natural gas manifold system in the maintenance department in violation of 1910.253(e)(3)(i). Lawson testified the valve was needed to keep gas from backing up into the oxygen line and oxygen from backing up into the gas line. He also testified the valve can be on the manifold itself or at the torch, but evidently looked for it only on the manifold. (Tr. 552-55). Bobby Sebesta testified there was a backflow valve at the torch and circled it on C-5-182. (Tr. 1675-76). Based on the record, the Secretary has not demonstrated a violation. This item must therefore be vacated.

Items 127(a)-(g)

These items allege that seven different pieces of equipment had electrical wiring spliced with electrical tape in violation of 1910.305(f). The basis of these items was CO Lawson's opinion that electrical tape does not meet the standard because it does not provide the equivalent of the original insulation and that only "shrink wrap" can provide such insulation. (Tr. 637-43; 649-69). However, Bobby Sebesta and Jerry Riddles, Trinity's former corporate safety director, testified that both materials provide equivalent insulation as long as they are applied properly. (Tr. 1292-94; 1367-68; 1688-89; 1796). Sebesta described the proper procedure for applying electrical tape and stated that Trinity employees follow the procedure on all wiring. (Tr. 1697; 1795). Riddles testified that the use of electrical tape was not prohibited by either the OSHA standards or any other industry standards with which he was familiar. (Tr. 1292-94). In my view, the Secretary has not met his burden of proving a violation. This item is vacated.

Item 128(b)

This item, which alleges that a portable electric drill was wired directly in to a switch box in violation of 1910.305(g)(1)(ii), was amended to allege an "other" violation with no

penalty. *See* Joint Exhibit 1, Revision 6. The drill had a plug on it into which an extension cord was plugged and the cord was wired into the switch box. (Tr. 1009; 1186). Lawson's opinion was that the cord could be pulled out of the box and cause a fire or expose live parts. (Tr. 680). However, the record shows there was a strain relief device where the cord was wired into the box such that the cord could not be easily pulled out. (Tr. 1691). I conclude the alleged violation has not been established and that this item must be vacated.

Item 130(a)

This item alleges that a flexible cord on a crane magnet was spliced in violation of 1910.305(g)(2)(ii). The standard prohibits the splicing of flexible cords unless they are hard service cords No. 12 or larger and the splice retains the insulation and use of the original cord. The record shows CO Lawson assumed the cord was spliced because it had electrical tape on it and that he did not remove the tape to see if it was actually spliced. (Tr. 686-90; 832-34). The record also indicates the cord was No. 12 or larger and that if it was spliced it had been done so as to retain its original insulation and use. (Tr. 1687-89; 1697; 1795-97; 1815-16). Based on the record, a violation has not been shown. This item is vacated.

"Other" Citation 2 - Item 1

This item alleges Trinity did not make the records of its 1982 noise survey results available to OSHA in violation of 1910.20(e)(3). (Tr. 692-96). 1910.20(e)(3) is governed by 1910.20(d)(1), which states that medical records shall be retained for thirty years unless a specific standard provides otherwise. Occupational noise is governed by 1910.95, and 1910.95(m)(3)(i) specifically states that noise exposure measurement records shall be retained for two years. Jerry Riddles testified he kept his work notes from the 1982 testing results for the required two years. (Tr. 1299). The work notes no longer existed at the time of the inspection, but the summary of the noise surveys was retained and provided to OSHA. (Tr. 1012; 1299). Based on the record, the standard was not violated. This item is vacated.

Item 2(c)

This item alleges that a load rating was not posted on a grit blaster in violation of 1910.22(d)(1). The Secretary put on no evidence in regard to this item. This item must therefore be vacated.

Conclusions of Law and Order

1. Respondent, Trinity Industries, Inc., is engaged in a business affecting commerce and has employees within the meaning of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. As noted above, this case entailed over 350 items. In the interests of brevity and to avoid needless duplication, my findings above together with citations 1 and 2, Joint Exhibit 1, Revision 6, and the Secretary's letter of September 2, 1994, will constitute my conclusions of law and order in this matter. Since all of the contested items have been vacated, the only findings of violations and penalty assessments will be those reflected on Joint Exhibit 1, Revision 6. Accordingly, that exhibit, as well as the citations and the Secretary's letter, are incorporated herein by reference. So ORDERED.

Louis G. LaVecchia
Administrative Law Judge

Date: November 15, 1994