THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Turner Industries Group, LLP, Respondent.	OSHRC DOCKET NO. 08-0448

Appearances:

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

Patrick J. Veters, Esq., Jones, Walker, LLP, New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

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 Turner Industries Group ("Respondent") facility in Paris, Texas on September 27, 2007. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging a serious violation of 29 C.F.R. §1910.212(a)(3)(ii) with a proposed penalty of $2,625. Respondent timely contested the citation and a trial was held on March 9, 2009 in Dallas, Texas.

Jurisdiction

The parties agree that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The parties also agree that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (Complaint and Answer; Tr.5).

Factual Findings

An OSHA inspection was conducted at Respondent's facility as a result of an injury accident which occurred on September 26, 2007. For approximately two weeks prior to the accident, several of Respondent's employees were being trained to operate a Dyna Torque Pipe Facing Machine ("pipe-cutting machine"). (Tr. 27, 91; Ex. 10, 11-A through F). The machine is used to bevel (cut at an angle other than 90 degrees) pipe. (Tr. 11; Ex. 10). Although the training was conducted at Respondent's facility for Respondent's employees, it was led by a representative from the third-party machine manufacturer who was present at the request of and under the supervision and control of the Respondent during the timeframe in question. (Tr. 38-39). During the course of the training, on September 26th, two of Respondent's employees were taking measurements and making adjustments at two different points of operation on the pipe-cutting machine when it was unexpectedly started by the trainer. (Respondent's Post-Hearing Memorandum, pp. 1-2; Tr. 14-15, 90). One of the two employees, Josh Streety, injured his hand as a result. (Tr. 67). Mr. Streety's injuries required a trip to the hospital and approximately 50 stitches. (Tr. 67).

OSHA assigned Compliance Safety and Health Officer (CSHO) Elias Vela to conduct an investigation of the incident. (Tr. 72). CSHO Vela visited the facility the day after the accident, and as a result of his investigation, recommended a citation alleging a serious violation of 29 C.F.R. 1910.212(a)(3)(ii) for Respondent's failure to properly guard the points of operation on

the pipe-cutting machine.

Each of the two accessible points of operation on the pipe-cutting machine consisted of a circular spinning bevel which cut large sections of pipe mounted over several protruding shafts. (Tr. 61; Ex. 11-A through F). Normally, the point of operation closest to the operator was equipped with a guard, which was removed to make adjustments and take measurements while the machine was turned off. (Tr. 21; Ex. 11-D). The second accessible point of operation, on the opposite side of the machine from the operator, was never equipped with a guard prior to the accident. (Tr. 61; Ex. 11-D, 11-F). Even with the first point of operation guarded, an employee could still walk around and access the second unguarded cutting area while the bevels were engaged. (Tr. 23, 64; Ex. 11-B, 11-D). Mr. Streety was injured while working on the unguarded side. (Tr. 45).

Some of the machines at Respondent's facility were equipped with auto-shutoffs and electric eyes which disabled equipment when a guard was removed or a point of operation was accessed. (Tr. 23). The pipe-cutting machine was not equipped with such protection. (Tr. 23). I note that while employees took measurements and made adjustments at the points of operation, the pipe-cutting machine was still capable of being energized. (Tr. 22). Respondent's Job Safety Analysis further instructed operators to "not get between pipe and beveller" and to "not start machine with guard in open position." (Ex. 1-B).

Khushrooh Pardiwalla, the supervisor who directed employees to participate in this training, testified that Respondent recognized the hazard of employees getting their hands caught in pinch-points while using the pipe-cutting machine. (Tr. 19-20, 66). It was not possible to close the guard on the backside of the machine where Mr. Streety was injured, since no guard existed at that location. (Ex. 11-D, 11-E). He conceded that if an employee had his hands or fingers in the unguarded area while the machine was operating, they could be pinched, lacerated, broken, or even torn off. (Tr. 19). He testified that prior to the accident, Respondent's safety

practice basically relied on operators to not turn on the machine when other employees were in the zone of danger. (Tr. 24). Mr. Pardiwalla acknowledged that if the pipe-cutting machine had been equipped with guards which automatically de-energized the machine when the points of operation were accessed, this accident would not have occurred. (Tr. 40-41). He also conceded that such guards were feasible for this particular pipe-cutting machine. (Tr. 41-42).

Mr. Pardiwalla personally observed employees using the pipe-cutting machine with the backside completely unguarded during the two weeks of training leading up to the accident. (Tr. 28, 30). During this training, the machine was typically operated by three people at one time. (Tr. 30). The third party trainer would turn the machine on and off while two of Respondent's employees made adjustments and took measurements at each point of operation. (Tr. 30; Ex. 4, 5, 6, 7, 8).

Mr. Pardiwalla attempted to distinguish the training sessions from normal working conditions by explaining that the machine was intended to be operated by only one person at a time once training was completed. (Tr. 31). However, Respondent's written Job Safety Analysis, in effect both before and after the accident, recommended that the machine be operated by two employees at a time so that there would always be someone available to reach the emergency shutoff switch. (Tr. 32-33; Ex. 1-A, 1-B).

In calculating the proposed penalty of $2,625 for this violation, CSHO Vela characterized this condition with a "medium" severity of potential injury and a "greater" probability of an accident due to the fact that one actually occurred. (Tr. 72-73). He reduced the original calculated penalty by 10% for Respondent's size, good faith during the inspection, and OSHA violation history. (Tr. 73). He also testified that "it's very unlikely" a similar accident would occur in the future. (Tr. 83).

Discussion

To establish a *prima facie* violation of the Act, the Secretary must prove: (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, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Citation 1 Item 1

The Secretary alleges in Citation 1 Item 1 that:

> *29 CFR 1910.212(a)(3)(ii): 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 cycles:*
>
> *On or about Sep[tember] 26, 2007, and times prior to, machine guarding did not protect employees from hazards created by rotating machine parts of the Dyna Torque Pipe Facing Machine.*

The cited standard provides:

> *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 therefore, 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.*

The cited standard applies to machinery with a point of operation that exposes employees to possible injury. "Point of operation" is defined, at 29 C.F.R. §1910.212(a)(3)(i), as "the area on a machine where work is actually performed upon the material being processed." The record clearly establishes that the cited condition was a failure to guard an accessible area of the pipe-cutting machine where a spinning bevel actually cut pipe. The Secretary established that the standard applies to the cited condition.

One of the points of operation on the pipe-cutting machine, at the time of the injury and

for at least two weeks prior, was wholly unguarded even while the machine was being used. Any of the employees who participated in the training could, and did on one occasion, have their hand in the unguarded point of operation while the machine was actually cutting pipe. It is not sufficient that Respondent relied on employees to keep their hands out of unguarded areas while the machine was operating by telling them to "not get between the pipe and the beveller." The Commission has recognized that the guarding standards were designed to protect employees from common human errors resulting from neglect, distraction, inadvertence, carelessness, or fatigue. *Slyter Chair, Inc*., 4 BNA OSHC 1110, 1975-1976 CCH OSHD ¶20,589 (No. 1263, 1976); *B.C. Crocker*, 4 BNA OSHC 1775, 1976-1977 CCH OSHD, ¶21,179 (No. 4387, 1976). The Secretary established a violation of the cited standard.

Respondent argues that once training was completed, only one employee would operate the machine at a time and there was no reasonable expectation that the single operator would walk around to the unguarded portion of the machine while it was in operation. However, Respondent ignores the focus of the citation in this case. The Secretary alleges that for two weeks up to and including the accident, Respondent's employees were being trained as a group, with at least two employees simultaneously working on the machine, resulting in daily employee exposure to the unguarded point of operation. Second, in contradiction of Respondent's argument, its written procedures *required* two employees at a time to operate the pipe-cutting machine. Even if operating the machine alone, employees were required to periodically access the unguarded side to take measurements and make adjustments. The Respondent has cited no legal authority to support its argument that a different standard of care exists during training sessions as opposed to regular business operations. I do not accept such argument in light of the purpose of the Act. I find that even if the accident had not occurred, it was still reasonably predictable that Respondent's employees could come within the zone of danger of the unguarded side of the machine. *S&G Packaging Company, LLC*, 19 BNA OSHC 1503, 2001 CCH OSHD

¶32,401 (No. 98-1107, 2001). The Secretary established employee exposure to the unguarded point of operation on the pipe-cutting machine.

The exposed employees' immediate supervisor observed them repeatedly operating this machine in this condition before the accident. The lack of a guard on the backside of the pipe-cutting machine was obvious to anyone even casually observing its operation. (Ex. 11-D, 11-E, 11-F). The supervisor's knowledge of the machine condition and his employees' daily group operation of the machine is imputed to the Respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991). The Secretary established Respondent's knowledge of the violative condition.

There is no dispute that serious injury or death could result from an employee coming into contact with rotating, pipe-cutting bevels. Unfortunately in this instance, such an injury actually occurred. The Secretary properly characterized the violation as serious.

Affirmative Defenses

Respondent argued a defense of "unforeseen misconduct of a third party contractor." (Tr. 6). Respondent's argument is rejected. Such affirmative defense ignores the fact that the third party contractor was present at the request of and under the direction and control of the Respondent. Furthermore, Respondent's argument focuses on responsibility for the actual accident, which is not an issue in this proceeding. As stated above, even if the accident had not occurred, Respondent's employees were still exposed to the unguarded side of the pipe-cutting machine during the two weeks of group training leading up to the accident.

Respondent did not argue the merits of any other affirmative defenses. Therefore, any other alleged affirmative defenses are deemed abandoned.

Penalty

In calculating the appropriate penalty for a violation, Section 17(j) of the Act requires the Commission to 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. *29 U.S.C. §666(j)*. 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, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993).

Several employees (the record fails to establish the precise number) were exposed to this unguarded machine over a period of two weeks. The circumstances of employee exposure were somewhat unusual in that they occurred during training from the machine manufacturer. I give considerable weight to the testimony of CSHO Vela when he stated that it was "very unlikely" such an accident would occur again. Considering the totality of the circumstances, I find that a penalty of $1,000 is appropriate for the violation.

ORDER

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

1. Citation 1 Item 1 is AFFIRMED as a serious violation and a penalty of $1,000 is ASSESSED.

Date: June 18, 2009
Denver, Colorado

_/s/_____
Patrick B. Augustine
Judge, OSHRC