

SECRETARY OF LABOR,

Complainant,

v.

LOUIS A. DIERZEN d/b/a DIERZEN
WELDING & MACHINE COMPANY,
DIERZEN MACHINE COMPANY, and
DIERZEN TRAILER CORPORATION,

Respondent.

OSHRC DOCKET NO. 97-0596

APPEARANCES:

For the Complainant:

Helen Schuitmaker, Esq., Office of the Solicitor, Department of Labor, Chicago, Illinois

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the “Act”).

Respondent, Louis A. Dierzen d/b/a Dierzen Welding & Machine Company, Dierzen Machine Company, and Dierzen Trailer Corporation (Dierzen), at all times relevant to this action maintained a place of business at 101 West Main, Newark, Illinois, where it was engaged in welding and related activities. Respondent is an employer engaged in a business affecting commerce (Tr. 14) and is subject to the requirements of the Act.

On March 7, 1997 the Occupational Safety and Health Administration (OSHA) conducted a follow-up inspection of Dierzen’s Newark work site to ensure the abatement of health and safety violations which were the subject of an earlier, uncontested, citation (Tr. 11-12). As a result of that inspection, Dierzen was issued a Notification of Failure to Abate Alleged Violations, in addition to citations alleging “repeat” violations of the Act together with proposed penalties. By filing a timely notice of contest Dierzen brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 19, 1997, a hearing was held in Chicago, Illinois. Neither Respondent, nor his representative appeared at the hearing. The Secretary moved to amend the caption to reflect Respondent's registration in the state of Illinois (Tr. 7). That motion was granted (Tr. 8). Following the Secretary's presentation of her *prima facie* case, the cited violations, as set forth below, were affirmed.

Alleged Violations

Notification of Failure to Abate Alleged Violation: Citation 1, item 2

29 CFR 1910.107(c)(6): Electrical wiring and equipment not subject to deposits of combustible residues but located within spraying area(s) was not the explosion proof type approved for Class I, Group D, locations conforming to the provisions of Class I Division II, hazardous locations:

Spray Area: The equipment and wiring such as but not limited to, lighting and electrical switches were not intrinsically safe or approved for hazardous location.

OSHA Compliance Officer (CO) Renee Perry testified that on March 7, Respondent had purchased explosion-proof lighting approved for the spray area, but had not yet installed that equipment (Tr. 12). Employees were using flammable paint in the spray area, which CO Perry testified could be ignited by a sparking electrical switch (Tr. 13-15). Perry also testified that combustible cleaning rags saturated with paint and the thinner toluene were stored in cardboard boxes in the spray area (Tr. 15-16).

A proposed penalty of \$60,000.00 was proposed. CO Perry testified that Dierzen is a small employer, with only 12 employees. The gravity of the cited violation, however, was high (Tr. 17). Moreover, the Act provides for the imposition of penalties of up to \$7,000.00 for each day during which a violation continues past the abatement date permitted. CO Perry testified that the original abatement date for the electrical wiring was January 17, 1997; the gravity based penalty of \$2,000.00 was multiplied by 30 days (Tr. 27).

Neither the facts nor the proposed penalty were contested, and will be affirmed.

Repeat citation 1, item 1 states:

29 CFR 1904.2(a): A log of all recordable occupational injuries and illnesses, (OSHA Form No. 200 or equivalent), was not maintained at the establishment:

Entire Facility: Employees have been injured and received treatment, but there has not ben a 200 log or equivalent maintained at the facility.

Dierzen Welding and Machine Company was previously cited for a violation of this Occupational Safety and Health Standard 1904.2(a) which was contained in OSHA Inspection Number 122309164, Citation Number 2, Violation Number 1, Issued on 11/15/97.

On March 7, Respondent told CO Perry that Dierzen had a No. 200 log, but that it was not at the workplace (Tr. 12-13). The log was not subsequently provided, though CO Perry returned to the work site on the following day (Tr. 21-22, 25).

A penalty of \$200.00 was proposed, and will be assessed.

Repeat citation 1, item 2 alleges:

29 CFR 1910.107(e)(2): The quantity of flammable or combustible liquids kept in the vicinity of spraying operation(s) exceeded the minimum required for operation:

Spray Area: The company stored over fifty gallons of class 1B flammable liquids such as, but not limited to primers and paint.

Dierzen Welding and Machine Company was previously cited for a violation of this Occupational Safety and Health Standard 1910.107(e)(2) which was contained in OSHA Inspection Number 122309164, Citation Number 1, Violation 3b, Issued on 11/15/96.

On March 7, CO Perry found that over 120 gallons of Class 2 flammable spray paint were stored in the spray area (Tr. 13, 19). Welding operations were being performed 20-25 feet from the spraying (Tr. 18-19). CO Perry testified that the paint posed a fire and/or explosion hazard, in that welding sparks could ignite the mist of flammable vapors produced by they spray operation (Tr. 18, 20).

Dierzen was previously cited for violation of the same standard (Tr. 19). That citation was uncontested (Tr. 19). A penalty of \$4,000.00 was assessed.

The CO's evidence and penalty assessment are unchallenged, and will be affirmed.

Other than serious citation 2, item 1 alleges:

29 CFR 1910.178(p)(1): Powered industrial truck(s) with defect(s) or in any way unsafe had not been withdrawn from service until restored to safe operating condition(s):

Inside and outside of the facility: The employees are required to shout or scream when crossing aisles and whenever vision obstructed. The horn was not operating on the forklift truck.

CO Perry testified that the horn on the forklift in operation on Dierzen's premises was not working (Tr. 22).

The violation will be affirmed without penalty as proposed.

ORDER

1. Notification of Failure to Abate Alleged Violation, citation 1, item 2 is AFFIRMED, and a penalty of \$60,000.00 is ASSESSED.

2. Repeat citation 1, item 1, alleging violation of §1904.2(a) is AFFIRMED, and a penalty of \$200.00 is ASSESSED.
3. Repeat citation 1, item 2, alleging violation of §1910.107(e)(2) is AFFIRMED, and a penalty of \$4,000.00 is ASSESSED.
4. Other than serious citation 2, item 1, alleging violation of §1910.178(p)(1) is AFFIRMED, without penalty.

Stanley M. Schwartz
Judge, OSHRC

Dated: