United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Dierzen-Kewanee Heavy Industries, LTD, Respondent.	OSHRC Docket No. **07-0675 and 07-0676**

Appearances:

Suzanne Dunn, Esq., Office of the Solicitor, U. S. Department of Labor,, Chicago, Illinois
For Complainant

James E. Caldwell, Esq., James Edward Caldwell & Associates, Chicago, Illinois
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Dierzen-Kewanee Heavy Industries, LTD (Dierzen), manufactures light curved-bed dump truck bodies. It operates out of space in a former boiler factory in Kewanee, Illinois. Dierzen began its operations in 2003 with three employees. Four and one-half years later, it employs thirty-six individuals (Tr. 11-12, 134).

The Peoria Area Office of the Occupational Safety and Health Administration (OSHA) has a difficult history with Dierzen. OSHA sought assurance that violations listed in previous OSHA citations had been corrected. When Dierzen ignored OSHA's requests for it to send in abatement information, OSHA scheduled Dierzen for a follow-up inspection in October 2006. As a result of that inspection, OSHA issued the instant citations on April 10, 2007. Categorizing the standards as primarily related to "safety" (Docket No. 07-0675) or to "health" (Docket No. 07-0676), OSHA issued serious, repeat, willful, and "other than serious" citations and penalties to Dierzen. Dierzen did not contest the existence of any of the violations, which thus became a final order "not subject

to review by any court or agency" [29 U.S.C.659(a)]. Dierzen contested only the reasonableness of OSHA's proposed monetary penalties.[1]

The parties participated in lengthy settlement judge proceedings but were ultimately unable to reach a resolution on the appropriate penalties. The case was re-assigned to the undersigned judge to conduct the hearing and to issue a decision in the matter. A hearing was held on July 8, 2008, at which the parties presented evidence and argued their positions on the record. It is determined the proposed penalties should not be reduced based upon purported financial difficulties. For the reasons discussed below, the assessed penalties afford some reduction from OSHA's proposed penalties.

Background

OSHA's first inspection of Dierzen began on April 12, 2005. OSHA sent both a safety specialist and an industrial hygienist to conduct a safety and health inspection of the manufacturing facility. As a result of that inspection, on June 7, 2005, OSHA cited numerous violations, *i.e.*, ten safety violations (Exh. C-1) and thirty-six health violations (Exh. C-2, numbered 1 through 32). Dierzen contested the citations, and the case proceeded under Review Commission jurisdiction towards hearing. Shortly before the scheduled hearing, on April 28, 2006, the parties resolved the matter by stipulation and agreement (Exh. C-3). The settlement substantially reduced the penalties to $10,000.00, which the company was to pay under an extended installment agreement. Dierzen agreed the violations had been or would be abated within the specified time frame. Dierzen paid only the first installment of the reduced penalty and refused to make further payments. Significantly for this case, Dierzen also refused to provide information verifying the violations had been corrected.

OSHA attempted to secure the abatement information through repeated requests by telephone and by letter. Dierzen did not respond. OSHA sought to secure the information by issuing a separate July 2006 citation to Dierzen, which asserted the company failed to provide OSHA with abatement information. Dierzen did not respond to that citation. OSHA then determined to conduct a "follow-up" inspection to check the status of abatement of the 2005 citations (Tr. 51).

[1] Dierzen does not contest three "other than serious" violations in Citation No. 4, Docket No. 07-0676, which carry no penalties (Tr. 111).

OSHA's safety inspector William Hancock and its industrial hygienist Sue Ellen DeManche began the follow-up inspection on October 11, 2006. A follow-up inspection is limited to review of the earlier-cited items and to other apparent violations "in plain sight." Following the inspection, on April 10, 2007, OSHA cited Dierzen with willfully violating four standards and with repeatedly violating one other in the "safety" case. In the "health" case OSHA cited two serious, seven willful, fourteen repeat, and three "other" violations. Only the amount of the penalties is at issue.

Discussion

Under § 17(j) of the Act, penalties are calculated with "due consideration" given to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. OSHA seeks to standardize penalties throughout the nation by providing guidance to its personnel in a Field Inspection Reference Manual (FIRM). The evidence established the Secretary considered these four statutory factors and followed OSHA's FIRM to arrive at its proposed penalties (Tr. 23, 52-54, 65, 129). The Commission, however, is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors.

1. Size, Good Faith, and Past History

Size: The employer's size is the first of the mandated penalty considerations. Dierzen argues the statute's phrase "size of the business" requires the judge to weigh its status as a newly formed business operation. Dierzen asserts it was promised start-up financing from the State which never materialized. If it had the promised money, it posits, it could have taken care of the facility's safety and health dangers after OSHA pointed them out in the earlier citations. Dierzen suggests it did not have the resources to come into compliance with the safety and health requirements or to pay the OSHA penalties. It argues only a nominal penalty is appropriate.

The Secretary opposes such a formulation of "size" and contends it is generally inappropriate to consider an employer's financial condition in penalty calculations under the Act. She asserts "size" refers only to the number of employees employed.

Even if the Secretary's penalty formula does not result in penalties which are punitive in nature, a penalty may be unduly burdensome or excessive in a specific case. The Commission has

not finally determined whether an employer's poor financial condition can properly weigh towards a penalty reduction. In rare occasions the Commission has stressed the impact of a total penalty on the viability of a business and reduced the penalty accordingly. *See Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1065 (No. 881, 1972) (full adjustment of the penalty for size avoids "destructive penalties" where a safe and healthful workplace was secured); *Specialists of the South, Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990) (smaller combined penalty approved for impressive, co-operative employer).

In such cases the employer has met prerequisites. First, the employer has actually proven its precarious financial condition. Dierzen provided no real evidence of a negative financial status. It offered no documentary evidence. Renee Goff, one of the earliest employees who is now "safety administrator," testified Louie Dierzen instructed there was insufficient money for abatement with expensive equipment. This is hardly sufficient proof to document Dierzen's financial data.

Of equal importance, an employer must establish it deserves to have its poor finances affect the penalty. In *Interstate Lead Company*, 15 BNA OSHC 1989, 2000 (No. 89-2088P, 89-3296, 1992), Judge James D. Burroughs succinctly summarized this concept (emphasis added):

> As a practical matter, the financial condition in certain cases must be considered. OSHA and the Commission were not created to eliminate business activity, as some employers contend. OSHA was created to preserve the health and safety of working men and women of this nation. They constitute resources in which the nation has a vital interest in protecting. *Where an employer approaches its responsibility under the Act in good faith, has no detrimental history, and seeks to abate violations, it is only practical that some considerations be given to an employer's negative financial condition and the effect of penalties assessed on the viability of the business.*

However, if the employer has not acted in good faith but uses a precarious financial condition as an excuse to ignore the safety and health of its employees, the extraordinary relief is not warranted.

Dierzen consistently demonstrated a cavalier attitude and a lack of cooperation towards achieving safety and health in its facility. It was unresponsive to the Act's ordinary enforcement mechanism of citation and penalty, and it simply ignored or stalled OSHA and reneged on its agreement to come into compliance and pay earlier penalties. Following the 2005 inspection Dierzen exerted minimal to no effort to correct the violations. During the follow-up inspection owner Louis Dierzen advised Hancock he was trying to correct things he could, but that he could

not correct many of the violations because he did not have the money (Tr. 28-29). The facts do not bear out this assertion. Russ Spencer, an engineer who contracts with Dierzen, was Dierzen's designated representative during the inspection (Tr. 17). Spencer told Hancock he developed an abatement plan, together with some time frames to correct the violations. Owner Louie Dierzen told Spencer to send the plan to Dierzen's attorney, which Spencer did. He never heard or did anything further. Spencer understood from Louie Dierzen he would get no money to abate violations. Dierzen did not seek to abate those violations which required minimal expenditure, and it did not seek to protect employees in any alternate way.

No one relishes imposing the type of penalty which may jeopardize a small business, especially a small manufacturing concern. Yet the Act never contemplated employees should risk their health and safety simply because their employer is a poorly funded concern.

Under the FIRM OSHA reduced its initial penalty calculations by forty percent, because having thirty-six employees fits within a range corresponding to a "small" employer (Tr. 164). Looking at the specific number of employees, rather than the number in a range, convinces this judge to further reduce some penalties because Dierzen is a very small employer.

Good Faith: OSHA is correct that Dierzen has not acted in good faith and is not entitled to a good faith credit.

Past History: Dierzen's past history is negative. OSHA discussed the earlier violations in the 2005 closing conference. The violations were further explained in the written citations, which were litigated until the eve of trial. When Dierzen settled the case on apparently favorable terms, it had a second chance to comply with the Act, which it ignored. No credit is warranted for past history.

Classification of Violations of Willful or Repeat: Of most significance to the over-all penalty in this case is that many violations are willful or repeat. As the Act designates, these carry an enhanced penalty. The OSH Act sets a maximum of $7,000.00 for each serious violation, but a $70,000.00 maximum penalty for each willful or repeat violation [29 U.S.C. 666(a)]. Dierzen does not contest the characterizations of the individual violations. Even if it did, the facts establish the violations are properly classified. Dierzen acted with conscious disregard that the precise conditions found in 2005, and still existing in 2006, constituted violations of the safety and health standards. In numbers of employees Dierzen grew by 1000 percent from 2003 to 2006. If Dierzen directed a

portion of the effort necessary to achieve that remarkable feat towards the employees' safety and health, this case would not exist.

Following its procedures, OSHA properly proposed $33,000.00 for each willful violation in both the safety and health cases. After consideration of the degree of willfulness, the gravity of each violation, and some mitigating efforts by certain Dierzen personnel, this judge arrives at a different assessment than OSHA proposed. This does not signify Dierzen's actions and omissions are viewed with less disfavor.

Many violations were also classified as repeat. With a significant effect of lessening the over-all penalty, OSHA considered violations repeat rather than willful. OSHA asserted the violation was repeat if Dierzen sought to address the violations in some way, even if the effort was not effective (Tr. 129). Dierzen is a small employer and was in repeat violation for the first time, meaning OSHA doubled its initial penalty calculation. For the repeat health violations, DeManche concluded there was less likelihood the violations would result in accidents since few employees were exposed over a relatively short duration of exposures (Tr. 129). The assessed penalties reflect that view.

2. Gravity of Individual Violations and Assessed Penalties

Of the four statutory penalty factors, the gravity of the violation is usually the most significant. *See e.g., Orion Constr., Inc*., 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999). Gravity addresses the setting and the circumstances of the violations, *i.e.*, the degree to which the standard was violated and the harm anticipated. The specific considerations include such facts as the number of employees exposed to the conditions, the duration of exposure, the degree of probability that an accident would occur, or precautions taken against injury. *Agra Erectors Inc.*, 19 BNA OSHC 1063,1065 (Docket No. 98-0866, 2000).

DOCKET NO. 07-0675 – The Safety Case

The April 10, 2007, safety citation asserted four willful and one repeat violations. The gravity and the assessed penalty are discussed below.

Willful Citation No. 1, Items 1 - 4

Willful Item 1 – § 1910.23(c)(1)

Dierzen willfully violated the fall protection standard of § 1910.23(c)(1) (item 1). Employees welded down onto truck bodies from an open-sided skeletal frame fixture 7 feet, 9

inches, above a concrete floor. At any given time five employees weld from atop the frame fixture for several hours a week. Dierzen did not provide fall protection. Falls from the frame would likely result in broken bones, concussions, or other serious injury. Spencer admitted Dierzen did not attempt to correct the violation. Nor did it make any modifications to lessen the hazard or to provide alternative fall protection (Tr. 21-22, 45, 48). Considering these facts and the statutory elements discussed above, a penalty of $13,500.00 is assessed.

Willful Item 2 – § 1910.147(c)(4)(i)

Dierzen willfully violated the lockout/tagout (LOTO) requirements of § 1910.147(c)(4)(i) (item 2) by refusing to develop written LOTO procedures for hazardous energy sources, *i.e.*, the "computer numerically controlled" (CNC) lathe (used to turn down metal parts and form and cut them into the desired sizes) and the CNC plasma cutter (used for cutting sheets of steel plate). Two maintenance workers serviced the equipment for several hours each day. Without specific written LOTO procedures to identify and control the energy sources, the machinery could unexpectedly start and crush, cut, or amputate the fingers or hands (Tr. 24-29). Considering these facts, the statutory elements, and the relationship between this and the following violation, a penalty of $8,000.00 is assessed.

Willful Item 3 – § 1910.147(c)(7)(i)

In item 3, a violation of § 1910.147(c)(7)(i), Dierzen willfully failed to provide LOTO training. Dierzen should have trained the two maintenance employees and others on the shop floor to follow procedures on how to lock and tag out equipment. Although the Cincinnati shear was initially locked out for service, another employee bypassed the lock in order to operate the shear. Dierzen did not itself train anyone, but a maintenance employee learned about the procedures from another employer (Tr. 29-34). The duration of the exposure and the potential injuries are described above. Considering these facts and the statutory elements, a penalty of $8,000.00 is assessed.

Willful Item 4 – § 1910.212(a)(3)(ii)

Dierzen willfully violated § 1910.212(a)(3)(ii) (item 4) when it failed to guard the points of operation of the Cincinnati 400-ton press brake and Cincinnati Model 1810 shear. The anticipated hazard for the operators, whose fingers could be as close as two inches from the die or knife blade of the shear, was amputation of the fingers or other parts of the hand. One operator used these

pieces of equipment, and he was exposed to the hazard for approximately 4 hours a week (Tr. 34-37). Considering these facts and the statutory elements, a penalty of $13,500.00 is assessed.

Repeat Citation No. 2, Item 1

A repeated violation also carries an increased monetary penalty. As a first repeat citation for an employer with 250 or fewer employees, OSHA doubled Dierzen's recommended penalty.

Repeat Item 1 – § 5(a)(1) of the OSH Act

Dierzen violated the "general duty clause"of § 5(a)(1) of the Act when it failed to protect employees from the recognized hazard associated with failing to guard the foot treadle of the Cincinnati 400-ton press brake. If the foot treadle were accidentally hit or pressed, the machine could cycle while the operator's hands were in the equipment, perhaps amputating the operator's fingers or hands. The repeat classification is based on a previous § 5(a)(1) violation for the same condition, except that the equipment (a Cincinnati 225-ton press) differed. One employee was exposed to the hazard for 4 hours each week (Tr. 37-40). Considering these facts and the statutory elements, a penalty of $3,000.00 is assessed.

DOCKET NO. 07-0676 – The Health Case

At issue in the April 10, 2007, health citations are penalties for three serious, seven willful, and 14 repeat violations. Although a "follow-up" inspection, OSHA's industrial hygienist Sue Ellen Demanche noted three violations which had not previously cited but were in plain sight as she checked for the follow-up items. These violations are classified as serious.

Serious Citation No. 1, Items 1 - 3

Serious Item 1 – § 1910.107(g)(3)

Dierzen failed to dispose of rags and waste saturated with paint finishing materials from the spraying room in violation of § 1910.107(g)(3). It could have used a closed metal waste container or other approved waste disposal methods. Instead, Dierzen left the solvent and paint-soaked paper and rags in an open plastic trash can. The readily combustible materials, piled together, could burst into flames from a random spark or they could accelerate or intensify a fire. The likely injury is severe burns and smoke inhalation. Two employees were exposed to the hazard for approximately 3 hours each workday (Tr. 63-64, 115). Considering these facts and the statutory elements, a penalty of $900.00 is assessed.

Serious Item 2 – § 1910.303(b)(2)

Section 1910.303(b)(2) requires electrical equipment to be used and installed in accordance with the labeled instructions. In the welding area, Demanche stepped near an energized 240-volt metal "handy box" improperly used as an outlet device for the arc welder. Manufacturer's instructions specify handy boxes must be mounted in a wall. When on the floor, the outlet is subject to being stepped on, tripped over, kicked, or knocked around, pulling on the energized conductors. Also, the employee would hold the handy box to plug in the arc welder. Coming into contact with any bare wires of the improperly protected conductors could cause shocks or burns. Twenty-two welders worked in the area for 8 hours each day (Tr. 65-67, 116). Considering these facts and the statutory elements, a penalty of $1,200.00 is assessed.

Serious Item 3 –§ 1910.305(b)(1)

Section 1910.305(b)(1) requires the unused openings in circuit breaker boxes to be effectively closed. A circuit breaker box contained open slots, exposing live wires, which an employee could inadvertently contact while accessing the box. The circuit breaker box was energized at 240 volts. Dierzen's twenty-two welders could be exposed to severe shock if they made contact with the parts during their 8-hour workdays (Tr. 67-68, 117). Considering these facts and the statutory elements, a penalty of $900.00 is assessed.

Willful Citation No 2, Items 1a - 4b

Willful grouped Items 1a, 1b and 1c –
§ 1910.106(d)(4)(iii), § 1910.107(c)(5), and §1910.107(c)(6)

For penalty purposes the Secretary grouped three willful violations related to multiple unapproved electrical wiring, outlets, and cords, located in and adjacent to the paint spraying area. Dierzen violated § 1910.106(b)(4)(iii) (item 1a) when it stored flammable liquids in a room with unapproved electrical equipment that was adjacent to the spray area. Dierzen violated § 1910.107(c)(5) (item 1b) when using unapproved electrical equipment in the spray area which could have deposits of readily ignitable residues, explosive vapors, and solvents. Dierzen violated § 1910.107(c)(6) (item 1c) by using unapproved electrical wiring, installations, and flexible cords in this hazardous location. The grouped violations share the common hazard in the areas where flammable vapors collect a spark from unapproved electrical equipment could start a fire. Two employees wiped down the truck exteriors with solvents, mixed paints and solvents, and spray painted for 3 hours each workday. They used the electrical equipment frequently. A fire could

expose employees to burns and smoke inhalation (Tr. 69-72, 118). Considering these facts and the statutory elements, a penalty of $20,000.00 for the three grouped violations.

Willful Item 2 –§ 1910.134(i)(7)

To remove paint and rust from the trucks, Dierzen's abrasive blaster pressure-sprayed abrasive silica sand through the hose. The operator wears an air line respirator powered by an oil lubricated compressor. Dierzen had not utilized either a carbon monoxide or a high-temperature alarm to monitor the air coming into the respirator in violation of § 1910.134(i)(7). If the compressor heated excessively or malfunctioned in other ways, carbon monoxide could be sent directly into the respirator without anyone becoming aware. One employee was exposed while blasting approximately 1½ hours a day, three times a week. Dierzen made no effort to correct the violation which could lead to carbon monoxide poisoning, even though abatement could have been quickly, easily, and inexpensively achieved (Tr. 72-74). Considering these facts and the statutory elements, a penalty of $10,000.00 is assessed.

Willful Item 3 – § 1910.244(b)

In willful violation of § 1910.244(b) Dierzen failed to equip the operating valve of the abrasive blasting equipment with a "deadman's switch." The switch immediately deactivates the sprayer when the operator ceases to manually depress it. The potential hazard is that if the operator loses control of the hose, it could continue pressure spraying the operator or others with silica sand, leading to severe abrasions. The abrasive blaster was exposed to the hazard 1½ hours a day, 3 days a week. Placing the deadman's switch to the nozzle is neither difficult nor expensive (Tr. 75-76). Considering these facts and the statutory elements, a penalty of $10,000.00 is assessed.

Willful Items 4a and 4b – §§ 1910.1000(c) and § 1910.1000(e)

The two grouped violations of § 1910.1000(c) (item 4a) and § 1910.1000(e) (item 4b) concern over-exposure to silica dust. During the sampled period, the abrasive blaster was exposed to respirable silica over twice the permissible exposure limit (PEL). Despite the known silica hazard, Dierzen did not seek any feasible administrative or engineering controls to prevent the over-exposure. Exposure to respirable silica above the PEL leads to silicosis, decreased lung capacity, cancer, and potentially to death. The operator was exposed 1½ hours a day, 3 days a week. The only change in the cited conditions between 2005 to 2006 is that production and sand blasting increased. Dierzen considered splitting the work with another employee, but never did so. It

considered no other controls (Tr. 76-79, 119, 127). Although not relevant to the existence of the violation, the fact that the blaster wore an airline respirator lessens the gravity of the exposure. Considering these facts and the statutory elements, a penalty of $20,500.00 is assessed.

Repeat Citation No. 3, Items 1 – 12

Repeat Item 1 –§ 1910.23(a)(5)

In violation of § 1910.23(a)(5) Dierzen failed to guard a concrete pit in the spray paint room which existed at the time Dierzen purchased the facility. The pit was 21 inches wide by 110 inches long by 51 inches deep. Dierzen's painter told OSHA Dierzen covered the pit with boards at one point, but the boards gradually disappeared. The pit was open during the inspection. The painter and helper were exposed to the hazard 3 hours a day, 5 days week, while they prepped and painted the trailers or cleaned the equipment and mixed paints. They spent much time walking and spraying in the area, looking upward. A 4-foot fall into the pit could result in broken bones (Tr. 79, 82, 120). Considering these facts and the statutory elements, a penalty of $2,000.00 is assessed.

Repeat Item 2 – § 1910.106(d)(4)(i)

Dierzen used the room adjacent to and opening into the spray paint area to store flammable liquids in violation of § 1910.106(d)(4)(i). The storage room should have had a self-closing door between the two rooms, but the door was kept open. The purpose of the standard is to prevent flammable vapors from igniting. The spray painter and his helper were exposed to the hazard while they regularly secured materials from the storage room for the period stated above (Tr. 82- 84). Considering these facts and the statutory elements, a penalty of $3,000.00 is assessed.

Repeat Items 3a – 3b, § 1910.134(c)(1) and 1910.134(c)(3)

Repeat items 3a through 6 each relate to airborne respirable chemicals. Dierzen violated § 1910.134(c)(1) (item 3a) by failing to develop and implement a written respiratory protection program. It neither hired a trained administrator nor trained any of its employees to oversee the program and conduct evaluations, in violation of § 1910.134(c)(3) (item 3b). Dierzen utilized two types of respirators, an airline respirator for the abrasive blasting and a half-mask respirator for painting. The purpose of a program is to ensure the respiratory protection requirements are met for the range of hazardous airborne contaminants in Dierzen's facility, *e.g.*, to ensure the proper use of respirator filters and cartridges, and that training, medical evaluations, and fit testing are completed. Without a program employees are less likely to control their exposure to airborne contaminants

during their 1½ to 3 hours of exposure (Tr. 84 - 87, 121). Considering these facts and the statutory elements, a penalty of $2,400.00 is assessed for the two grouped violations.

Repeat Item 4 – § 1910.134(e)(1)

In repeat violation of § 1910.134(e)(1) Dierzen did not provide medical evaluations for the painter and the helper to assure they were medically able to wear respirators. The anticipated hazard is that an employee with a medical condition affected by the respirator could suffer pulmonary stress, shortness of breath, or dizziness. Although Dierzen did not provide the abrasive blaster with a medical examination, he had the examination from a previous employer and learned he could wear the respirator. The frequency and duration of the exposure is described above (Tr. 87-89). Considering these facts and the statutory elements, a penalty of $1,800.00 is assessed.

Repeat Item 5 – § 1910.134(f)(1)

In violation of § 1910.134(f)(1) Dierzen did not provide the painter or his helper with the quantitative or qualitative fit test to assure a correct size and a correct seal are optimal. Dierzen could have provided the "quantitative fit test" (where computerized equipment counts the particles inside and outside the employee's respirator) or the "qualitative fit test" (where employees identify when they a smell an odor). Dierzen did neither. The resulting injury would most likely be a temporary dizziness or headaches. The frequency and duration of the exposure for the painter and helper is described above. Although Dierzen did not perform a fit test for the abrasive blaster, he had been fit tested by a previous employer (Tr. 90-93). Considering these facts and the statutory elements, a penalty of $1,800.00 is assessed.

Repeat Item 6 – § 1910.134(k)(3)

Dierzen offered no respiratory protection training for employees required to wear respirators in violation of § 1910.134(k)(3). The three employees were exposed to a variety of airborne contaminants which could lead to silicosis, lung scarring, carbon monoxide poisoning, dizziness, or shortness of breath. Without proper training on the use and care of the respirator, it may become useless to the employee. For example, one employee wore an ineffective organic vapor cartridge for silica and left the respirator in the open environment to collect dust and contaminants. An employee was wiping out the inside of his respirator with alcohol, which can degrade the plastic and interfere with seal. The blaster did not understand his potential for carbon monoxide poisoning. The frequency and duration of the exposure for the three employees is described above. Although

Dierzen did not provide the training, one employee was trained by another employer (Tr. 93-96). Considering these facts and the statutory elements, a penalty of $1,800.00 is assessed.

Repeat Item 7 – § 1910.157(e)(3)

Dierzen did not annually check the maintenance of at least eight fire extinguishers in violation of § 1910.157(e)(3). Throughout the facility the fire extinguishers had not been tested since either 2001 and 2002. A couple of the fire extinguishers were discharged and had not been refilled. Two or three extinguishers had been purchased since the 2005 inspection, but they remained in their boxes in the office. Few knew of their existence, and they were not available to employees on the floor. The anticipated injury is smoke and burns from a fire which was quickly extinguished. All thirty six employees were exposed to a potential fire during their 8-hour shifts. (Tr. 96-98). Considering these facts and the statutory elements, a penalty of $1,800.00 is assessed.

Repeat Items 8a and 8b – §§ 1910.178(l)(1)(i) and § 1910.178(l)(6)

Items 8a through 10 concern operation of Dierzen's powered industrial trucks.

Dierzen did not train employees on the proper operation of powered industrial trucks in violation of § 1910.178(l)(1)(i) (item 8a). Because of the importance of forklift training to safety in a facility, § 1910.178(l)(6) (item 8b) also requires Dierzen to certify the training, which it did not do. Both the operator and other employees can be exposed to potential broken bones or other injuries or death when untrained operators can strike employees with the forklift or cause material to fall on the operator or others. Ten employees operate forklifts 8 hours a day. Thirty six other employees worked around the untrained operators. Dierzen's Renee Goff developed a program to conduct training, but the program was never implemented (Tr. 98-101, 122). Considering these facts and the statutory elements, a penalty of $1,800.00 is assessed for the two grouped violations.

Repeat Items 9 and 10 – §§ 1910.178(n)(4) and 1910.178(q)(1)

OSHA observed the forklift which did not slow down at a blind intersection and did not sound its horn in violation of § 1910.178(n)(4) (item 9). Significant ambient noise was generated around the elevators and the shears, aggravating the hazard of forklifts speeding through blind intersections without sounding a horn. The potential is for a forklift-to-forklift or a forklift-pedestrian collision and resulting broken bones or other serious injury or death. Employees were exposed intermittently during their 8-hour workshifts. Considering these facts and the statutory elements, a penalty of $2,400.00 is assessed for item 9.

Dierzen did not inspect the forklifts in violation of § 1910.178(q)(1) (item 10). On paper Dierzen began an inspection program where unsafe equipment was to be tagged out. However, at the time OSHA arrived, Dierzen had not begun to implement the program (Tr. 101-105, 123, 128). Considering these facts and the statutory elements discussed above, a penalty of $1,800.00 is assessed for item 10.

Repeat Items 11 and 12 – §§ 1910.1200(e)(1)and § 1910.1200(h)(1)

Dierzen violated two hazard communication standards when it failed to create or implement an adequate hazard communication program in violation of § 1910.1200(e)(1)(item 11). It did not train employees on how to lessen the impact of the hazardous chemicals on their bodies in violation of § 1910.1200(h)(1) (item 12). Dierzen apparently began to compile some material safety data sheets (MSDSs), but it did secure all of them and did not train employees on how to find or use them. Employees are less likely to understand and protect themselves from the hazards associated with exposure to such substances as paint and solvent fumes, welding fumes, silica, and cylinder gas without access to information and training. Four employees were particularly affected by the failure to train because they worked directly in areas where they were exposed to the hazardous substances (Tr. 106-112, 124-125). Considering these facts, the statutory elements, and the existence of some overlap with other violations, a penalty of $1,500.00 each is assessed for items 11 and 12.

Conclusion

It is unescapable that Dierzen considered OSHA and requirements of the OSH Act to be a mere bother and that delays in compliance would work to its benefit. The Act established monetary penalties to counter such attitudes and to encourage employers to be proactive in addressing the safety and health hazards in their facilities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

Docket No. 07-0675		
Willful Citation No. 1		
Item No.	**Standard**	**Penalty**
1	29 C.F.R. § 1910.23(c)(1)	$13,500.00
2	29 C.F.R. § 1910.147(c)(4)(i)	$ 8,000.00
3	29 C.F.R. § 1910.147(c)(7)(i)	$ 8,000.00
4	29 C.F.R. § 1910.212(a)(3)(ii)	$13,500.00
Repeat Citation No. 2		
Item No.	**Standard**	**Penalty**
1	Section 5(a)(1)	$3,000.00

Docket No. 07-0676		
Serious Citation No. 1		
Item No.	**Standard**	**Penalty**
1	29 C.F.R. § 1910.107(g)(3)	$ 900.00
2	29 C.F.R. § 1910.303(b)(2)	$1,200.00
3	29 C.F.R. § 1910.305(b)1)	$ 900.00
Willful Citation No. 2		
Item No.	**Standard**	**Penalty**
1a	29 C.F.R. § 1910.106(d)(4)(iii)	$20,000.00
1b	29 C.F.R. § 1910.107(c)(5)	
1c	29 C.F.R. § 1910.107(c)(6)	
2	29 C.F.R. § 1910.134(i)(7)	$10,000.00
3	29 C.F.R. § 1910.244(b)	$10,000.00
4a	29 C.F.R. § 1910.1000(c)	$20,500.00
4b	29 C.F.R. § 1910.1000(e)	

Repeat Citation No. 3		
Item No.	**Standard**	**Penalty**
1	29 C.F.R. § 1910.23(a)(5)	$2,000.00
2	29 C.F.R. § 1910.106(d)(4)(i)	$3,000.00
3a	29 C.F.R. § 1910.134(c)(1)	$2,400.00
3b	29 C.F.R. § 1910.134(c)(3)	
4	29 C.F.R. § 1900.134(e)(1)	$1,800.00
5	29 C.F.R. § 1910.134(f)(1)	$1,800.00
6	29 C.F.R. § 1910.134(k)(3)	$1,800.00
7	29 C.F.R. § 1910.157(e)(3)	$1,800.00
Repeat Citation No. 3		
Item No.	**Standard**	**Penalty**
8a	29 C.F.R. § 1910.178(l)(1)(i)	$1,800.00
8b	29 C.F.R. § 1910.178(l)(6)	
9	29 C.F.R. § 1910.178(n)(4)	$2,400.00
10	29 C.F.R. § 1910.178(q)(1)	$1,800.00
11	29 C.F.R. § 1910.1200(e)(1)	$1,500.00
12	29 C.F.R. § 1910.1200(h)(1)	$1,500.00
Other Citation No. 4		
Item No.	**Standard**	**Penalty**
1	29 C.F.R. § 1910.1200(f)(5)(i)	None
2	29 C.F.R. § 1910.1200(f)(5)(ii)	None

A total penalty of $133,100.00 is assessed for Docket Nos. 07-0675 and 07-0676.

/s/ Nancy J. Spies
Nancy J. Spies, Judge

Date: February 17, 2009