Secretary of Labor,
Complainant,

v.

Trinity Industries, Inc.,
Respondent.

OSHRC Docket No. **00-2167**

EZ

APPEARANCES

Paul Spanos, Esq.
Office of the Solicitor
U. S. Department of Labor
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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Trinity Industries, Inc. (Trinity), manufactures heads (ends) for tanks and similar vessels at a plant in Mosteller, Ohio. On September 14, 2000, while greasing a head during the flanging operation, an operator's left index finger was crushed by the side rollers on the flange machine. After receiving a complaint regarding the accident, the Occupational Safety and Health Administration (OSHA) inspected Trinity's flanging operation and issued a serious citation on October 31, 2000. The citation alleges that Trinity violated 29 C.F.R. § 1910.212(a)(1) by failing to guard the in-running pinch point between the head and side rollers on flange machine #1. A penalty of $5,000 is proposed. Trinity filed a timely notice of contest.

Designated for E-Z trial proceedings, pursuant to 29 C.F.R. §§ 2200.200, *et seq*., the hearing was held in Cincinnati, Ohio, on March 1, 2001.[1] The parties stipulated jurisdiction and coverage. The parties filed post-hearing briefs.

[1]The record was left open for 10 days to allow the Secretary time to consider the need for additional evidence to address Trinity's employee misconduct defense raised immediately prior to the hearing (Tr. 200). After the Secretary advised that additional evidence was not necessary, the record was closed on March 14, 2001. Also, Trinity's infeasibility defense asserted during the E-Z trial prehearing conference was not pursued at the hearing and, therefore, is considered abandoned.

Trinity denies the violation and argues that the in-running pinch point at the side rollers does not present a hazard to operators if proper greasing procedures are followed. Trinity asserts that the accident on September 14, 2000, was due to unpreventable employee misconduct. Also, Trinity argues a lack of fair notice to additional guarding requirements because a barrier screen guard was installed between the operator's control panel and flange machine #1 as a result of OSHA's 1989 citation.

For the reasons discussed, Trinity's employee misconduct and fair notice defenses are rejected. The violation of § 1910.212(a)(1) is affirmed and a penalty of $4,000 is assessed.

The Inspection

Trinity's Mosteller plant manufactures various size heads to cover the ends of tanks or similar vessels used by such companies as oil refineries and gas companies (Tr. 57). The Mosteller plant employs approximately 54 employees in two buildings, one building for welding operations and the other building for forming the heads (Tr. 147-149). Heads are dish-shaped, ranging in sizes from 9 inches to 250 inches in diameter. Generally, heads are made of carbon steel or stainless steel (Exhs. R-4, R-16; Tr. 6, 56, 169, 191). The Mosteller plant manufactures approximately 500 heads per week (Tr. 140).

As part of the manufacturing process, a flange is formed around the head. To form the flange, the plant has ten flange machines (Tr. 14). The machines are the same except two flange machines operate by air pressure as opposed to hydraulics (Tr. 50). There are approximately eleven flange machine operators (Tr. 59, 149).

To operate the flange machine, the operator works from behind a control panel approximately five feet from one side of the machine (Tr. 128). The flange machine has three moving components, the pedestal, forming rollers and side rollers which must constantly be adjusted during the forming process. These adjustments are made by the operator from the control panel using joy sticks (Tr. 122, 162).

A flange process begins after the head is placed by a tow motor on the pedestal in the center of the flange machine (Exh. R-1). The pedestal then is raised until the knob-like forming rollers contact the head (Exh. R-2; Tr. 17). The lower inside forming roller is stationary. The higher outside forming roller moves to bend or form the flange. The power of the forming rollers causes the head to rotate at the desired speed (Tr. 151-152, 169).

The side rollers are positioned on the outside of the head. The side rollers function to support the head and keep it level as it runs through the forming rollers (Exh. R-3; Tr. 122). The side rollers are not powered (Tr. 51).

As the head rotates between the forming rollers, the flange is formed around the head (Exh. R-4; Tr. 18). During the bending process, heat is created. If the head gets too hot, the steel softens enough that the force of the metal side rollers can create ridges on the surface of the head. This is referred to as "gaulding" (Tr. 129, 155). To avoid gaulding, operators periodically apply grease to the head using a rigid grease stick (Exh. R-5; Tr. 26, 129, 155). To apply the grease, the operator leaves the control panel and applies it directly to the head.[2]

The three potential pinch points on the flange machine include (1) the area where the head rotates into the forming rollers, (2) the area where the small roller is placed inside the head to support the cutting arm when the head is beveled, and (3) the area where the head rotates into the side rollers (Exh. R-1; Tr. 53, 59-60). The OSHA citation involves only the pinch point where the head rotates into the side rollers. Employee exposure was not shown as to the other pinch points.

In 1989, Trinity received an OSHA citation which included an alleged violation of § 1910.212(a)(1) for failing to guard "the in running nip points created between the side roll and the head" on flange machine #1 (Exhs. R-13; Tr. 102). The alleged violation involved the operator's exposure at the control panel and during the greasing process (Exh. R-14; Tr. 115). In 1995, Trinity sent OSHA a summary of corrective actions for the 1989 citation, including a photograph of a barrier screen guard installed between the operator's control panel and the flange machine (Exh. R-12; Tr. 77). OSHA did not express any objection to the barrier guard (Tr. 88, 113, 128).

On September 14, 2000, at approximately 1:00 a.m., flange machine #1 operator Cecil Whitt was greasing the head where it rotates into the side roller when the grease stick got caught (Tr. 28-29, 34). Whitt's left index finger was pulled through the roller. He was hospitalized and his treatment included skin grafts (Tr. 35). Whitt returned to work on October 23, 2000, and still

[2]The only other time the operator leaves the control panel is when he goes to the other side of the flange machine to operate the cutting arm from another control panel (Exh. R-1).

operates the flange machines (Tr. 36, 38). Whitt has worked for Trinity for 11 years, eight years as a flange machine operator[3] (Tr. 7, 135).

After receiving a complaint regarding Whitt's accident, OSHA compliance officer (CO) John Collier inspected Trinity's flanging operation on September 27, 2000 (Tr. 66-67). The inspection was limited to the operation of flange machine #1. Trinity demonstrated the operation of the machine, including the greasing process (Tr. 67, 81). CO Collier did not see the flange machine in actual production (Tr. 66). He noted that a notch[4] had been cut from one corner of the barrier guard in front of the control panel to provide the operator better visibility of the head (Exh. R-2; Tr. 79, 81, 176). Based on the inspection, the serious citation was issued on October 31, 2000.

Discussion

The citation alleges that machine guarding was not provided to prevent access to the in-running pinch point created between the head and side rollers on flange machine #1.[5]

Section 1910.212(a)(1) provides:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are -- barrier guards, two-hand tripping devices, electronic safety devices, etc.

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[3]Three classifications of flange operators -- trainee, class B flange and class A flange. Whitt was a class B flange (Tr. 127, 134).

[4]The notch was not in the barrier guard when the photograph was sent to OSHA in 1995 (Exh. R-12).

[5]The Secretary has the burden of proving a violation of a safety standard.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) 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).

Trinity does not dispute the application of § 1910.212(a)(1) to its flange machines. The area between the head and the side rollers is an in-running pinch point which exposes operators' hand and fingers to the hazard of pinching or crushing, if caught.

The parties agree that a flange machine operator could potentially be exposed to the in-running pinch point between the head and side rollers when (1) the operator is operating the machine from behind the control panel, (2) the operator is walking by the machine, and (3) the operator is greasing the head. The screen barrier guard installed by Trinity in front of the control panel in 1995 protects the operator from exposure while working at the control panel (Tr. 96-97, 110). With regard to the operator's exposure while walking from the control panel to the other side of the flange machine, OSHA is concerned with possible slips and falls. Such concerns are based on speculation not supported by the record (Tr. 72). There is no showing that the operator comes within the zone of danger of the in-running pinch point. The area around the flange machine appears clear and open. The operator has sufficient walking space around the machine without exposure to the side rollers (Exhs. R-1, R-16).

This case involves operators' exposure while greasing the head. The grease is not applied from behind the barrier guard in front of the control panel. The operator bypasses the guard to apply the grease directly on the head.

Alleged Violation of § 1910.212(a)(1) - Greasing the Head

Section 1910.212(a)(1) is a general provision that applies to a number of hazards on all types of machinery. The standard contemplates abatement by some device or guard which prevents an employee's exposure to the zone of danger. The guarding is intended to eliminate danger from unsafe operating procedures, poor training, or operator inadvertence. By providing machine guarding, reliance upon the skill or attentiveness of an operator is replaced. *American Luggage Works, Inc.*, 10 BNA OSHC 1678, 1682 (No. 77-893, 1982).

It is undisputed that there was no guard or other device present at the side rollers to prevent operators' access to the in-running pinch point. Instead, Trinity argues that if its instructions to avoid pinch points and grease away from the side rollers were followed, there was no employee exposure.

In order to meet her burden, "the Secretary must do more than show that it may be physically possible for an employee to come into contact with the unguarded machinery in

question. Rather, the Secretary must establish that employees are exposed to a hazard as a result of the manner in which the machine functions and the way it is operated." *Jefferson Smurfit Corp.,* 15 BNA OSHC 1419, 1421 (No. 89-0553, 1991).

The test for determining an employee's exposure to a hazard is whether it is "reasonably predictable" that employees would be in the zone of danger created by a noncomplying condition. *Kokosing Construction Co., Inc.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). "Reasonably predictable" is shown either by operational necessity or otherwise, including inadvertence, that employees have been or will be in the zone of danger. *Fabricated Metal Products, Inc.,* 18 BNA OSHC 1072, 1073-1074 (No. 93-1853, 1997).

There is no issue that Whitt was exposed to the in-running pinch point between the head and side rollers when he attempted to grease the head at the side rollers. According to Whitt, he applied grease to the side rollers approximately two times per head (Tr. 30-31). On average, an operator works on one to twenty heads per shift (Tr. 148). During his 8 years as an operator, Whitt testified that he has always greased the head at the side rollers. He was taught his greasing method by his former supervisor (Tr. 31). Whitt's exposure to the in-running pinch point satisfies the Secretary's burden of establishing exposure.

In addition to exposure, the Secretary must show for the purposes of establishing a *prima facie* violation, that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun-Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-1966 (No. 82-928, 1986). An employer who lacks actual knowledge can nevertheless have constructive knowledge of conditions that could be detected through an inspection of the worksite. An employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A. L. Baumgartner Construction, Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). When a supervisory employee has actual or constructive knowledge of the violation conditions, knowledge is imputed to the employer. *Dover Elevator Co*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Although they regularly walked throughout the shop floor, Trinity manager Mark Lang and foreman Leman Calhoun denied seeing Whitt applying grease at the side rollers (Tr. 138,

194). Although not recalling specific instances, foreman Calhoun knew that he had seen Whitt grease heads on numerous occasions. Calhoun speculated that he would have stopped Whitt if he was not complying with Trinity's instruction to grease away from pinch points (Tr. 196-199).

Whitt has been a flange machine operator for 8 years. When he started, Whitt was trained for the job by his foreman. Whitt testified that he was trained to apply the grease to both the head and side rollers (Tr. 32). He testified that he has greased the side rollers and head for eight years (Tr. 29). He greased the side rollers in the open and visible to anyone in the area.

Whitt's testimony regarding his method of greasing the heads and side rollers is accepted as credible. He was obviously injured from greasing at the in-running pinch point. There was no reason shown for him to inaccurately describe his greasing process. He is still employed at Trinity and appeared truthful and not biased.

Trinity foreman Brent Calhoun was on the shop floor throughout the shift observing the flange operation (Tr. 196). Manager Mark Lang testified that in addition to periodically walking through the area of the flange machine, the windows in the scheduling office look onto the area (Tr. 138-139, 147, 150). Where a supervisory employee is in close proximity to a readily apparent safety violation, constructive knowledge is established. *Hamilton Fixture*, 16 BNA OSHC 1073 (No. 88-1720, 1993), *aff'd. without published opinion*, 28 F.3d 1213 (6th Cir. 1994).

Based on the openness of the area, the regularity of his greasing procedure, and the lack of guarding at the side rollers, Trinity should have known for the purposes of establishing a violative condition that Whitt was exposed to the hazard of in-running pinch points when applying grease.

A *prima facie* violation of § 1910.212(a)(1) is established as serious. Trinity does not dispute the serious classification. The injury to Whitt demonstrates that exposure to the in-running nip point between the head and side rollers can cause a serious injury. Whitt was hospitalized and his treatment included skin grafts. He was off work for more than one month (Tr. 35, 38). A violation is serious under § 17(k) of the Act (29 U.S.C. § 666(k)) if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. "In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or

serious harm if an accident should occur." *Whiting-Turner Contracting Co*., 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

Trinity's Affirmative Defenses

Fair Notice

Trinity asserts that based on installing the barrier guard in front of the operator's control panel to abate the 1989 violation of the same standard at § 1910.212(a)(1) and on the same flange machine #1, it did not have fair notice that the Secretary was requiring additional abatement. The 1989 citation included the operator's exposure to the side rollers while greasing the head (Exhs. R-13, R-14; Tr. 108, 115-116). Trinity placed a barrier guard between the operator's control panel and the flange machine in 1995. A photograph showing the barrier guard was sent to OSHA as abatement of the 1989 citation (Exh. R-12). After reviewing the photograph, OSHA did not express any objection to the barrier guard (Tr. 77-78, 88, 113). Prior to the current citation, OSHA did not reinspect the flange machine.

Because of OSHA's failure to object, Trinity asserts that it assumed the hazard was abated (Tr. 128). If not considered abated, Trinity argues that it lacked fair notice of an inadequacy in its guard design and the citation should be vacated. *Miami Industries, Inc*., 15 BNA OSHC 1258, 1261-64 (No. 88-671, 1991), *rev'd. and remanded on the lack of fair notice*, 15 BNA OSHC 2025, 2026 (6th Cir. 1992) (employer was not afforded reasonable notice when OSHA initially approved an abatement plan which was subsequently cited as not in compliance).

Trinity's fair notice argument is rejected. Trinity has known since 1989 that its lack of guarding on flange machine #1 exposed the machine operator to in-running pinch points created between the side rollers and the head. The operator's exposure to the pinch point occurred while working at the control panel and during the greasing operation. The barrier guard installed by Trinity was offered to OSHA as its abatement measure. OSHA believed that the operator would remain behind the barrier guard for all flanging operations, including greasing (Tr. 116, 118). OSHA was not aware that the grease was to be applied other than from behind the barrier guard

(Tr. 109). Also, it is noted that Trinity, since the 1995 photograph of the barrier guard, modified it by cutting a notch in one corner [6] (Tr. 142).

By permitting operators to bypass the barrier guard, Trinity's abatement method did not eliminate operators' exposure to the in-running pinch point. When its abatement was submitted to OSHA, Trinity appeared to be relying on the barrier guard to protect operators during the greasing process. However, operators were permitted to bypass the guard to apply the grease to the head. Assistant area director Dennis Collins testified that he recalled:

> having our discussion about not having anyone close to that nip point using a short grease stick but having some sort of an extended either a stick that would hold the grease stick so that you could have a guard and do the greasing from behind the guard or, certainly, if nothing else, to ensure that you don't have someone in close proximity to the ingoing nip point. (Tr. 108).

Collins' discussion of abatement options was during the inspection in 1989. Plant manager Lang testified that he never advised OSHA in 1989 that operators would grease the head in close proximity to the side rollers (Tr. 156-157). The information provided to OSHA in 1995 included a photograph of the barrier guard. OSHA was not informed that any other method of abatement was also being recommended. By not objecting to the barrier guard, OSHA did not agree that a guard was not necessary during the greasing process. OSHA was not aware that the barrier guard was bypassed or circumvented when applying the grease. Moreover, compliance with the safety standards is a continuing obligation and an employer cannot show lack of knowledge by relying on the Secretary's earlier citation.

Section 1910.212(a)(1) allows an employer to determine its best method(s) to guard a machine and gives as examples barrier guards, two-hand controls and electronic devices. An employer is free to choose its method of abatement. However, the mere receipt of an employer's abatement method does not give rise to an inference that OSHA made a decision that the hazard was fully abated, especially when an operator is bypassing the barrier guard and accessing the pinch point. OSHA's silence in response to Trinity's 1995 abatement letter does not imply agreement. Also, it is noted that in 1999, another operator was injured by the pinch point at the

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[6]Even if not notched, the screen guard did not prevent employees' exposure during the greasing procedure (Tr. 81). Also, in the photograph submitted to OSHA in 1995, the screen guard appears much larger than the current barrier guard (Exh. R-12).

side rollers while attempting to measure the head. Trinity was on notice that its barrier guard did not prevent operator exposure to the in-running pinch point (Tr. 152-153, 157, 161). Trinity cannot claim lack of fair notice.

Unpreventable Employee Misconduct

Trinity asserts that Whitt's accident was due to unpreventable employee misconduct. In order to establish employee misconduct, Trinity must show that Whitt's conduct in greasing the head and side rollers was a departure from an effectively communicated and enforced work rule. The issue is whether Trinity (1) has established work rules designed to prevent the violative condition, (2) has adequately communicated the rules to its employees, (3) has taken steps to discover violations, and (4) has effectively enforced the rules when violations have been discovered. *Nooter Construction Co.,* 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). The defense applies when the behavior of the employee, not the existence of the violative condition, is at issue.

Trinity's Safety Rules

Flange machine operators testified regarding verbal instructions to avoid pinch points and apply the grease away from the side rollers (Tr. 166, 191). Operators Joseph Dane and Curtis Wood, operators in excess of 20 years, testified that the rule was to grease the head on the side away from the side rollers.[7] When greasing the head, they testified that they were approximately 4-5 feet away from the side rollers, depending on the size of the head (Tr. 164, 168, 173-175, 181-182, 185, 188). Dane relies on "common sense" to determine how close to the side rollers to grease (Tr. 191-192). After the accident to Whitt, operators were instructed to grease on the machine side of the head (Exh. R-17; Tr. 190).

As described by Trinity's counsel, the rule was:

> Your Honor, here's I think part of the confusion. In the past, before Mr. Whitt's accident, the rule was you could grease the head from the flange side. Now, if you draw a line through Respondent's Exhibit 17 from the forming roll down through the head, from 12:00 to 6:00, anything on the right would be

[7]The side away from the side rollers was identified as the "open" or "flange" side. The opposite side in front of the cut arm control panel was identified as the "machine" side (Exhs. R-2, R-17).

> considered the flange side. So, the rule was you could grease the head on the flange side. You've got to stay away from the pinch points, but you can grease it from that side. You don't have to go clear around to the machine side to grease it.
>
> After the accident, they said, "From now on, even if you're away from the pinch points, you can't grease it on the flange side. You've got to go clear over to the machine side."

(Tr. 190).

Based on the record, Trinity's verbal safety rule to avoid the pinch point and grease on the flange side is not sufficient and not a substitute for the standard's machine guarding requirement. Such general verbal instruction does not prevent breaching the zone of danger by an inattentive operator. *Power Plant Division, Brown & Root, Inc.,* 10 BNA OSHC 1837, 1840 (No. 77-2553, 1982) (an employer's work rule that employees tie off is not a defense to a citation alleging a lack of standard guardrails).

Although not necessarily required, Trinity's safety rules were not written (Tr. 144). The rules requiring employees to avoid in-running pinch points or the location where to apply the grease to the head were verbal and left to the "common sense" of the operator (Tr. 144-145, 187-188). An unwritten work rule may lead to questions about its effectiveness in preventing employee exposure to a hazard. *Miller Electric Co*., 2000 CCH OSHD ¶ 32,276, p. 49,249 (No. 99-1702, 2001) (ALJ case on review).

An employer's work rules to be effective must be clear enough to eliminate operator exposure to the safety hazards addressed by the standards or designed to prevent the hazards. *Foster-Wheeler Constructors, Inc.,* 16 BNA OSHC 1344, 1349 (No. 89-287, 1993); *Gary Concrete Products, Inc.*, 15 BNA OSHC 1051, 1056 (No. 86-1087, 1991). A work rule permitting greasing on the flange side of the machine as long as the pinch point is avoided is not effective. The flange side of the head is the side nearest the operator's control panel (Exh. R-17). Such a verbal rule leaves it to the operator to determine how close to the side rollers to apply the grease (Tr. 192). The rule lacks sufficient specificity and direction. It is too general. An operator's exposure to the pinch point is minimal, not necessarily eliminated, if grease is applied three feet from the in-running pinch point (Tr. 74, 93).

Whitt, a flange machine operator for eight years, denied the existence of any verbal rule prohibiting greasing the head at the side rollers. His training, however, was to avoid pinch

points, including the side rollers (Tr. 51-52). Whitt's accident shows that the verbal rule was confusing and not effective.

Communication of the Rule

Trinity's weekly safety meetings instructed flange machine operators to avoid pinch points, catch points and run-in points (Exhs. R-6 - R-11). The notes from the weekly safety meetings do not identify the side rollers as an in-running pinch point. Operator Curtis Wood confirmed that side rollers were not specifically identified as a pinch point (Tr. 160-161). Plant manager Lang testified that there were hundreds of circumstances at the plant which qualified as a pinch point (Tr. 157-158). Operators Wood and Dane testified that their instruction was not to grease in-running pinch points. Otherwise, they were free to grease anywhere along the flange side (Exh. R-17).

Trinity's instruction was inadequate. In 1999, the injury records reflect that seven employees were injured due to pinch points, including one on a flange machine (Exh. R-11; Tr. 152, 161). The flange machine operator was injured by the in-running nip point between the head and roller when he was attempting to measure the head (Tr. 152-153, 157, 161).

When first employed, Whitt testified that he was trained by the foreman to grease the side rollers (Tr. 31). The subsequent training by Trinity was not effective enough to modify or change Whitt's initial training. He testified that for eight years he has applied the grease at the side rollers.

Monitoring and Enforcement

Another issue in contention is whether the work rules were effectively monitored and enforced. An employer must ensure employee compliance with its work rules. Monitoring requires that employees are properly supervised. Enforcement means that an employer has a disciplinary program and that it is enforced. To show that a disciplinary system is effective, an employer must present evidence of having actually administered the discipline outlined in its program. *GEM Industrial, Inc*., 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996).

The record fails to establish that Trinity ensured compliance with its unwritten safety rules. Whitt has applied grease at the side rollers for eight years. Whitt testified that he greases each head, if needed, approximately two times. With each operator working on one to twenty

heads per shift, Whitt's greasing the side rollers was a regular and recurring activity (Tr. 31-33, 148). This shows that if Whitt was not complying with the work rules, Trinity's monitoring, if effective, should have detected the noncompliance. Trinity claims that supervisors did not see Whitt greasing the side rollers. The fact is that Whitt was injured while greasing the side rollers.

It is not enough for an employer to show that it warned employees to keep their hands out of unguarded pinch points. Where it is foreseeable that employees would be exposed to unguarded pinch points, the employer must establish that it made a real effort to enforce the warning, and that there were consequences when the rule was violated.

Trinity fails to show that it has a disciplinary program, written or verbal, at its Mosteller plant. Also, is not shown that employees actually were disciplined for safety rule violations, including exposure to pinch points. The record shows that in 1999, seven employees, including an operator, received pinch point injuries. However, there is no indication that the employees received any disciplinary action, if their injuries were the result of safety rule violations.

The only showing of potential discipline was the testimony of plant manager Lang and foreman Leman Calhoun that if they were aware Whitt was greasing the side rollers, they would have stopped and reprimanded him (Tr. 138-139, 195). Such testimony is speculative and not shown to be in accordance with a disciplinary program. Whitt has never been reprimanded or otherwise disciplined for greasing the side rollers (Tr. 60-61). Trinity did not show that Whitt or any other operator has ever received discipline for any safety violation, including greasing the side rollers (Tr. 145, 198).

Trinity's unpreventable employee misconduct is rejected.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases and must consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation in determining an appropriate penalty. Gravity of the violation is the principal factor to be considered.

Trinity is a large employer with in excess of 250 employees. Fifty-eight employees, including ten flange machine operators, are employed at the Mosteller plant. No credit for history is warranted because Trinity has received serious citations within the previous three

years. Based on the 1989 citation, Trinity showed good faith by installing a screen barrier guard in front of the control panel which reduced operators' exposure.

A penalty of $4,000 is reasonable for violation of § 1910.212(a)(1). Ten machine operators were potentially exposed when greasing the head. Trinity's instruction to avoid the pinch points was not sufficient. The possible injury from exposure to the side rollers is crushed or bruised fingers and hands such as received by Whitt. Applying grease to the head is a regular part of the operator's job. In 1999, another flange machine operator was injured by the in-running pinch point between the head and roller. He was attempting to measure the head while the machine was still running (Tr. 152-153, 157, 161).

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) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1, alleged violation of § 1910.212(a)(1), is affirmed and a penalty of $4,000 is assessed.

/s/

KEN S. WELSCH
Judge

Date: April 18, 2001