United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
SUPERIOR TANK AND TRAILER CO.
Respondent.

OSHRC DOCKET
NO. 95-0870

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 August 15, 1996. The decision of the Judge will become a final order of the Commission on September 16, 1996 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 September 4, 1996 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
Occupational Safety and Health
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. SKA

Date: August 15, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-0870

NOTICE IS GIVEN TO THE FOLLOWING:

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Ken S. Welsch
Administrative Law Judge
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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 95-870
THE SUPERIOR TANK & TRAILER CO., Respondent.	:	

APPEARANCES:

Patrick L. DePace, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Mr. Thomas Burkey, President
The Superior Tank & Trailer Co.
Sugarcreek, Ohio
For Respondent *Pro Se*

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

The Superior Tank & Trailer Company (STT) repairs commercial tanks and trailers at its workplace in Sugarcreek, Ohio. On April 5, 1995, Occupational Safety and Health Administration (OSHA) Compliance Officer Bruce R. Bigham conducted an inspection of STT's workplace in response to an employee complaint. As a result of Bigham's inspection, the Secretary issued a citation to STT on April 19, 1995. The Secretary alleges in the citation that STT committed serious violations of four standards of the Occupational Safety and Health Act of 1970 (Act): §1910.146(c)(1), for failure to determine whether the interiors of tanks and trailers were permit-required confined spaces (item 1); § 1910.146(c)(4), for failure to develop a written

permit space entry program (item 2); §1910.212(a)(3)(ii), for failure to guard the point of operation on a press brake (item 3); and §1910.215(a)(1), for failure to use safety guards on abrasive wheels on grinding machinery (item 4). STT contests all items and proposed penalties contained in the citation.

Background

STT repairs commercial tanks and trailers that have been used to haul a variety of products, including milk, eggs, meat, gasoline, soap, acids, and concrete mix (Tr. 18-20). Before the tanks and trailers are brought to STT's workplace, another company washes out the interiors with soap and water (Tr. 17, 54). STT uses several different contractors to wash out the units. The contractor gives STT a receipt for the washout of a unit, specifying what product the unit contained prior to the cleaning, and confirming that it has been washed out (Tr. 125-126).

After the unit is washed out, it is brought to STT's yard where it may sit for several days (Tr. 126). When STT is ready to service the unit, a supervisor checks the unit to see that it has actually been washed out. The supervisor opens the hatch or hatches on the unit and uses an oxygen meter to determine the level of oxygen in the tank (Tr. 127-128). The supervisor tests for oxygen by holding the oxygen meter in the manway opening of the unit (Tr. 130).

Once the supervisor has performed the initial check on the unit, it is brought into STT's shop. STT's shop can hold up to six units (Tr. 132). STT makes periodic oxygen checks and ventilates each unit with a fan (Tr. 129-130). The units vary in size and configuration. Some units are as long as 40 feet and contain several compartments. Some units have only one manway through which an employee can enter, and some have several manways (Tr. 50-53, 132).

The length of time needed to repair a unit varies. Edward Swihart, a welder formerly employed by STT, commented on the time needed for repairs: "If it's a roll-over, it could take up to a couple of months, or a month. If it's just to repair lights or repair a crack, it could take them as short as maybe a couple of hours" (Tr. 18). Repairs to the units usually require STT employees to weld and then sand and buff the interior of a unit (Tr. 32).

Item 1: Alleged Serious Violation of §1910.146(c)(1)

The Secretary alleges that STT committed a serious violation of §1910.146(c)(1), which provides:

> The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.
>
> NOTE: Proper application of the decision flow chart in Appendix A to section 1910.146 would facilitate compliance with this requirement.

The flow chart that appears in Appendix A asks at the top of the chart, "Does the workplace contain Confined Spaces as defined by §1910.146(b)?" Section 1910.146(b) defines a confined space as a space that:

> (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
>
> (2) Has limited or restricted means for entry or exit (for example,tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
>
> (3) Is not designed for continuous employee occupancy.

The Secretary and STT agree that the tanks and trailers which STT repairs are confined spaces within the meaning of §1910.146(b) (Tr. 133). If, as here, the answer to the first question in the flow chart is "yes," the chart directs the reader to proceed to the next question, which is, "Does the workplace contain Permit-required Confined Spaces as defined by §1910.146(b)?" That standard provides:

> "Permit-required confined space (permit space)" means a confined space that has one or more of the following characteristics:
>
> (1) Contains or has a potential to contain a hazardous atmosphere;
>
> (2) Contains a material that has the potential for engulfing an entrant;

(3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopesdownward and tapers to a smaller cross-section; or

(4) Contains any other recognized serious safety or health hazard.

The Secretary and STT disagree as to whether the tanks and trailers that STT repairs are permit-required confined spaces. The Secretary believes that the units contain, or have a potential to contain, a hazardous atmosphere and, thus, are permit-required confined spaces as specified in the first characteristic of the definition. Bigham testified that the units have a potential to contain a hazardous atmosphere resulting from toxic exposure, oxygen deficiency, or flammable vapors (Tr. 70).

> To establish a violation of a standard, the Secretary must show by preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. See, e.g., *Walker Towing Corp.*, 14 BNA OSHA 2072, 2074, 1991 CCH OSHD 29,239, p. 39,157 (No.87-1359, 1991). *Seibel Manufacturing & Welding Corporation*, 15 BNA OSHA 1218, 1221-1222 (No. 88-821).

STT argues that its evaluation process meets the terms of the standard. It evaluates each of the tanks and trailers that come into its workplace and determines whether or not they are permit-required confined spaces. The evaluation includes the determination that the units do not contain or have the potential to contain a hazardous atmosphere.

The Secretary contends that STT's evaluation process fails to meet the terms of the standard because STT does not properly evaluate the spaces. The Secretary asserts that STT incorrectly determines that the spaces do not contain, or have the potential to contain, a hazardous atmosphere.

STT president Thomas Burkey, representing his company *pro se*, testified that STT uses a three-step process to evaluate whether a unit contains, or has the potential to contain, a hazardous atmosphere: (1) a contractor washes out the unit; (2) an STT supervisor tests the unit with an oxygen meter and a flammability meter (explosimeter) after the unit is brought into its yard; and (3) STT employees test the unit periodically once it is brought into the shop (Tr. 151-152). In addition, STT ventilates the space with a fan while employees are working inside the unit (Tr. 130-131). STT

contends that by washing out the unit, STT eliminates the potential for a hazardous atmosphere, and that it confirms that the potential is eliminated by repeatedly testing the unit for oxygen content and flammability potential.

The Secretary asserts that STT has not provided adequate documentation to establish that its evaluation process eliminates the potential for a hazardous atmosphere. The Secretary refers to the preamble of §1910.146 to support his contention that the space must be hazard-free in order to avoid classification as a permit-required confined space. The Secretary also states that STT does not follow its own safety program because the company (Secretary's Brief, pg. 11):

> . . . [m]ust be able to document that the recognized potential hazards have been eliminated and [it] must further document that there is no likelihood of any hazard arising in the units once brought into STT. 29 C.F.R. §1910.146(c). STT has failed to make such a showing. In addition, STT did not make available to its employees the documentation regarding how the hazards were eliminated. 29 C.F.R. §1910.146(c).

Despite the Secretary's repeated references to §1910.146(c), nothing in that standard imposes the documentation requirement that the Secretary implies it does. STT was not cited because it failed to meet the terms of the standard's preamble or its own safety program. STT was cited for violating the terms of §1910.146(c), which requires that the employer evaluate spaces to determine whether they are permit-required confined spaces. Section 1910.146(c) does not specify what the evaluation process should consist of, but only that it be adequate to determine if a space is a permit-required confined space.

The Secretary also complains that STT "presented no evidence that the initial entry into the units was performed as if the space were known to be a permit space" (Secretary's Brief, pg. 12), and claims that such an entry was required by §1910.146(c)(7). The Secretary did not cite STT for the violation of §1910.146(c)(7), however, and even if it had, that section is inapplicable to the present case. Section 1910.146(c)(7) provides, "A space classified by the employer as a permit-required confined space may be reclassified as a non-permit confined space," and proceeds to specify the procedures for the reclassification. In the instant case, the employer never classified any spaces as permit-required confined spaces.

The Secretary's evidence directly addressing §1910.146(c)(1) is thin. The Secretary claims that STT's evaluation process is inadequate, but the Secretary failed to adduce sufficient evidence to support his claim. No expert witness testified regarding what conditions create the potential for a hazardous atmosphere.

The Secretary disputes STT's claim that it used ventilation in the units while employees were working in them, but Compliance Officer Bigham conceded that ventilation would eliminate any hazardous atmosphere in the units (Tr. 73). Former STT employee Swihart, testifying for the Secretary, stated that STT did not require ventilation in its units, but his testimony was vague (Tr. 29-30):

> Ventilation was never used unless an individual -- they had two little blower fans there you could hook up to. And, a lot of them I think used to remove smoke and to get cool air into the shop or into the tank whenever he was working there. But, as far as the ventilation system, there wasn't any to ventilate a tank.

Later in his testimony, Swihart again states that there was no ventilation, but he seems to be speaking of ventilation in the shop itself, and not in the individual units (Tr. 36):

> We had no such ventilation at all, no fan, no nothing, no anything. The building was too huge. It had a little fan at the top, but the building was so tall and so big, that it wouldn't create any air movement at all.

Brian Kovalske, part owner and "day-to-day operations man" (Tr. 197) of STT, testified regarding STT's ventilation procedure. STT introduced a photograph of a fan (Exh. R-2), which Kovalske explained is "a fan with forced air ventilation. It's something to move the fresh air inside a confined space" (Tr. 200-201). Kovalske stated that STT had ten to twelve fans and that they are used "whenever people are working inside a confined space" (Tr. 201). Kovalske's testimony is accepted regarding the ventilation procedure used by STT. His testimony is more specific and detailed than that of Swihart.

The Secretary has failed to establish that STT committed a violation of §1910.146(c)(1). STT used an evaluation process adequate to determine whether or not a confined space was a permit-required confined space.

Item 2: Alleged Serious Violation of §1910.146(c)(4)

The Secretary alleges that STT violated §1910.146(c)(4), which provides:

> If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. The written program shall be available for inspection by employees and their authorized representatives.

The spaces which STT's employees were required to enter were not permit spaces. Therefore, §1910.146(c)(4) is inapplicable to the cited conditions. Item 2 is vacated.

Item 3: Alleged Serious Violation of §1910.212(a)(3)(ii)

The Secretary cited STT for a serious violation of §1910.212(a)(3)(ii), which 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 therefor, 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.

STT uses its press brake to form metal pieces required for repair of certain units. The press brake is capable of forming pieces of varying sizes ranging from 2 inches square to 10 feet long (Tr. 140-142). When working on a piece of metal 2 inches square, the operator must place his hands in the danger zone while operating the press brake. Press guards were available for the press brake, but the press brake was operated routinely without guards (Tr. 38-39, 79).

STT does not dispute that its employees used the unguarded press brake while working on small pieces of metal. STT contends, however, that its operators cannot work on the smallest pieces of metal with a guard in place. STT argues that its safety training of the operators is sufficient to prevent injuries. Compliance Officer Bigham testified convincingly that the press brake could be used to work on small metal pieces with guards in place. STT stated that it could not use a light curtain as a guard because the guard would have to be adjusted constantly to accommodate the different sizes and configurations of the metal pieces (Tr. 204). Bigham explained at length how the light curtain could be used without extensive adjustments:

> The light curtain is just a series of light beams in front of the point of operation that would prevent the press from operating if the hands were in the point of operation, but it would allow the hands to be as close as they needed to be until the ram touches the material to be bent, and then the light curtain is deactivated and the material can bend without shutting the press off.

(Tr. 217)

> There should be no adjustments necessary at all. There might be a need to deactivate the lowest light beam if the material to be bent was thick enough to break that beam. But, normally, the thickness of the material is not going to be that large a variable, so that ordinarily no adjustments are necessary, and the light beam can be spread out as wide as the ram of the press.

(Tr. 218)

> [T]he operator can continue to hold the piece of metal as it's being bent if they wish to with the light curtain because as soon as the opening between the ram and the material to be bent is closed, the light curtain deactivates so that it continues to make the bend without breaking the beams because the light beam is deactivated at that point.

(Tr. 220)

Bigham also testified that pull-backs could be used to guard the press brake while still allowing the operator to work on small pieces of metal. Bigham stated the pull-backs do not pull the operator's hands "away from the point of operation until the ram is closing so that they can be adjusted to allow the hands to be as close as they need to be to do the work"(Tr. 218).

The Secretary has established that STT violated §1910.212(a)(3)(ii). The citation alleges a serious violation. A violation is serious under section 17(k) of the Act if "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324 (No. 86-351, 1991). An operator using the unguarded press brake risks amputation should his finger or fingers get caught in the point of operation (Tr. 79). The violation created the possibility of an accident with a substantial possibility that serious physical harm could result. The violation was serious.

Item 4: Alleged Serious Violation of §1910.215(a)(1)

The Secretary alleges that STT committed a serious violation of §1910.215(a)(1), which provides:

> Abrasive wheels shall be used only on machines provided with safety guards as defined in the following paragraphs of this section, except:
>
> (I) Wheels used for internal work while within the work being ground;
>
> (ii) Mounted wheels, used in portable operations, 2 inches and smaller in diameter; and
>
> (iii) Types 16, 17, 18, 18R, and 19 cones, plugs, and threaded hole pot balls where the work offers protection.

STT had several hand-held grinders available for its employees to use. Although the grinders were equipped with guards, at times the employees removed the guards and used the unguarded grinders to perform their work. STT argues that the grinders were used without guards only when they were used for "internal work while within the work being ground," as provided in exception (I) of the cited standard and, therefore, their use was not in violation of §1910.215(a)(1) (Tr. 137).

The Secretary maintains that the record establishes the grinders were used routinely to perform work regardless of whether the work was internal or external. He cites the testimony of Swihart and Bigham in support of his contention.

Swihart testified that STT employees used the grinders without guards, but he does not state that he observed the employees use the unguarded grinders for external work (Tr. 42-43):

> Q.: Now, would they [STT employees] use the grinder without the guards?
>
> Swihart: Yes.
>
> Q.: What would they use to grinder without guards for?
>
> Swihart: They would use with regular grinding wheels which required the guard but would use them because sometimes they could put special wheels onto these grinders and buff with them and stuff, and they were too big for the guards. So, you couldn't use them. It just took a special buffer wheel to put on them.

So, they would run them, but at that point, the guard would never get returned to the thing. If a guy needed to switch over and use grinding wheel, they would just switch over and use a grinding wheel. So basically, there were never any guards around.

Nowhere in his testimony does Swihart specifically state that he observed STT employees using unguarded grinders in a situation that was not excepted by §1910.215(a)(1)(I). Swihart himself used his personal grinder which was equipped with a guard that Swihart stated he had never removed "from the day that I bought it" (Tr. 65).

Bigham's testimony regarding the use of the unguarded grinders is similarly vague. Bigham testified that he did not observe any STT employees using the grinders but that he interviewed an employee who told him that the employee "used the grinder routinely without the guard in place" (Tr. 81). The compliance officer conceded that the grinders did not need to be guarded "[w]hen the work that is being grinded on would provide protection for the employees if the wheel would break" (Tr. 81-82). Bigham stated that Burkey told him that the grinders were used without guards "at times" but did not ask him if those times were covered by exception (I) (Tr. 82).

Later in his testimony, Bigham states the employee he interviewed told him the grinders were sometimes used for external work. This statement comes, however, in the midst of memory lapses and is accompanied by admissions that Bigham failed to ask crucial questions during his inspection (Tr. 106-107):

Q.: [Y]ou only saw one grinder?

Bigham: I only recall seeing one grinder. I did see some grinders that had guards on them.

Q.: You did?

Bigham: Yes.

Q.: Did you ask Mr. Burkey about this particular grinder, this Hitachi hand-held grinder; why there wasn't a guard on that grinder?

Bigham: No.

Q.: And, I think you testified that there was an exception to requiring a guard on a grinder; is that correct?

Bigham: Yes.

. . .

Q.: How did you know either one of those exceptions applied in this particular situation?

Bigham: Because I interviewed the operator, and he said that while sometimes those exceptions apply, at other times they grinded outside tanks, and there was no guard being used, and there was nothing between the wheel and him to protect him.

Q.: Did he indicate to you whether or not there was a guard for that; that he just wasn't using it or what?

Bigham: I don't recall.

Q.: Did you discuss that with Mr. Burkey about the guard on this grinder?

Bigham: Yes.

Q.: What did he say?

Bigham: I don't recall.

Aside from Bigham's statement that an employee told him unguarded grinders were used for external work, the Secretary adduced no direct evidence that a violation occurred. Swihart did not testify that he observed STT employees use unguarded grinders for external work. No other employee testified regarding this issue. Kovalske testified that STT had a specific work rule regarding the use of the grinders: "The rule is, if you're using a hard disk grinder, you should have a guard on it unless it's in such a tight space, it can't be used" (Tr. 215). Bigham's statement alone is insufficient to establish that STT violated the cited standard. Item 4 is vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under §17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" 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. The gravity of the violation is the principal factor to be considered.

STT employed approximately twenty employees at the time of the inspection (Tr. 86). The Secretary had previously cited the company for serious and repeat violations (Tr. 87). Bigham testified that STT had exhibited a lack of good faith by delaying his walk-around inspection (Tr. 117-118). The gravity of the violation of §1910.212(a)(3)(ii) is high. Operators of the press brake were required to place their fingers in the danger zone in order to work on small pieces of metal. Based upon these factors, it is determined that a penalty of $1,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Item 1 of the citation, alleging a violation of § 1910.146(c)(1), is vacated and no penalty is assessed;

2. Item 2 of the citation, alleging a violation of § 1910.146(c)(4), is vacated and no penalty is assessed;

3. Item 3 of the citation, alleging a violation of § 1910.212(a)(3)(ii), is affirmed and a penalty of $1,000.00 is assessed; and

4. Item 4 of the citation, alleging a violation of § 1910.215(a)(1), is vacated and no penalty is assessed.

KEN S. WELSCH
Judge

Date: August 5, 1996