



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5100

Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
DREXEL CHEMICAL COMPANY
Respondent.

OSHRC DOCKET
NO. 95-1532

**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 February 8, 1996. The decision of the Judge will become a final order of the Commission on March 11, 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 February 28, 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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.
Ray H. Darling, Jr.
Executive Secretary

Date: February 8, 1996

DOCKET NO. 95-1532

NOTICE IS GIVEN TO THE FOLLOWING:

Associate Regional Solicitor
Office of the Solicitor
Chambers Bldg., Highpoint Office
Center, Suite 150
100 Centerview Drive
Birmingham, AL 35216

Hunter Hanshaw, Esq.
Drexel Chemical Company
P.O. Box 13327
Memphis, TN 38113 0327

Ken S. Welsch
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 Peachtree Street, N.E., Suite 240
Atlanta, Georgia 30309-3119

Phone: (404) 347-4197

Fax: (404) 347-0113

SECRETARY OF LABOR,
Complainant,

v.

DREXEL CHEMICAL COMPANY,
Respondent.

OSHRC Docket No. 95-1532

(EZ)

Appearances:

Marsha L. Semon, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Hunter J. Hanshaw, Esquire
Drexel Chemical Company
Memphis, Tennessee
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Drexel Chemical Company's (Drexel) principal place of business is 1700 Channel Avenue, Memphis, Tennessee. At all times pertinent to this proceeding, Drexel maintained a plant at Industrial Park, Tunica, Mississippi, where it manufactures agricultural chemicals. Drexel stipulates that it is an employer engaged in a business affecting commerce within the meaning of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, *et seq.*), hereafter referred to as the Act.

During July 12 through 14, 1995, Industrial Hygienist Ivory Williams conducted a programmed health inspection of Drexel's Tunica plant pursuant to an administrative warrant. As a result of his inspection, Drexel was issued a serious citation for alleged violations of the confined

space standards at §§ 1910.146(k)(2)(ii) and 1910.146(k)(3)(ii); and the lockout\ tagout standards at §§ 1910.147(c)(7)(i)(A) and 1910.147(d)(4)(i). Total proposed penalties for the serious citation were \$1,650. Additionally, Drexel was cited for “other” than serious violations of §§ 1910.95(c)(1) and 1910.215(b)(9). Drexel timely contested the citations. The Secretary, pursuant to Commission Rules 30(e) and 34(a)(3), pleaded, as an alternative to the alleged violation of § 1910.146(k)(2)(ii), a violation of § 1910.146(k)(2)(i).

On October 31, 1995, the case was designated for E-Z Trial pursuant to Commission Rule 200. After a telephone conference with the parties, the court entered a prehearing conference order which set forth the agreed facts and a statement of issues. Also, at the prehearing conference Drexel withdrew its notice of contest as to Citation No. 2, item 1, a violation of § 1910.95(c)(1) (Prehearing Conference Order; Tr. 6). The prehearing conference order was amended on December 5, 1995, to include additional issues.

The E-Z Trial hearing was held on December 13, 1995, in Memphis, Tennessee. During the hearing, the Secretary moved to amend the alleged violation of §1910.147(d)(4)(i) to include as an alternative a violation of § 1910.147(f)(3)(i) (Tr. 239). There was no change in the underlying factual allegations. Also, Drexel moved to strike its prehearing conference order stipulation that “it did not have a mechanical device as interpreted by the Secretary to retrieve personnel from vertical type confined space more than 5 feet” (Tr. 242). These amendments were accepted by the court in that no prejudice was shown and the matters, as amended, were fully litigated by the parties.

ALLEGED VIOLATIONS

Serious Citation No. 1

A. Item 1(a) - Alleged Violation of § 1910.146(k)(2)(ii) or In The Alternative §1910.146(k)(2)(i)

The citation alleges that “employees were required to enter formulation tanks (permit required confined spaces) to perform cleaning and the employer had not ensured that practice rescue exercises were performed yearly, and that the outside rescue service (fire department) was provided access to permit spaces so that they can practice rescue operations and be informed of the hazards

of the permit space” in violation of §1910.146(k)(2)(ii).¹ In the alternative, the Secretary alleges that “respondent arranged to have persons other than respondent’s employees perform permit space rescue and respondent did not inform the rescue service (Tunica Fire Department) of the hazards they may confront when called on to perform rescue at respondent’s facility” in violation of §1910.146(k)(2)(i)² (Secretary’s Complaint).

Facts

As a manufacturer of agricultural chemicals, Drexel’s Tunica plant uses formulation tanks in the sand mill and attrition areas to mix chemicals for packaging and sale (Exhs. C-2, C-3, C-4; Tr. 13-14). The formulation tanks are vertical tanks with dish-shaped bottoms (Tr. 151). They range in capacity from 1,800 gallons to 5,400 gallons and are open at the top with a diameter of 8 to 12 feet. The depth of the tanks is 8 to 12 feet (Tr. 14, 161). The mixing of chemicals is done by agitator blades located at the bottom of the tank, run by an electrical motor at the top of the tank (Exh. C-2; Tr. 15). There are at least three formulation tanks in the sand mill and attrition areas (Tr. 170, 178).

Millworkers are required to enter the formulation tanks to clean them whenever Drexel changes the product being mixed (Tr. 21). According to one millworker, each tank is cleaned approximately every month (Tr. 217). Cleaning is done to parts-per-million level of contamination (Tr. 150). To clean the formulation tank, the tank is thoroughly high-pressured washed (Tr. 150-151). High-pressure washing removes most of the contamination. After washing,

¹/ Section 1910.146(k)(2) provides that “When an employer (host employer) arranges to have persons other than the host employer’s employees perform permit space rescue, the host employer shall:

(ii) Provide the rescue service with access to all permit spaces from which rescue may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations.

²/ Section 1910.146(k)(2)(i) provides that the host employer shall “inform the rescue service of the hazards they may confront when called on to perform rescue at the host employer’s facility.”

a millworker enters the tank to clean behind the baffles, in seams and crevices, and around the agitator blades. Before entering the tank, the tank's atmosphere is tested for oxygen levels and the circuit breaker, which provides electricity to the agitator blades, is locked out (Tr. 150, 153, 176). The millworker entering the tank is properly clothed and wears a full body harness (Tr. 114, 154). Upon completing the cleaning process, the millworker exits the tank and the circuit breaker is unlocked. Besides cleaning, occasionally a maintenance worker enters the formulation tanks to perform some repair work (Tr. 21). However, this does not occur very often (Tr. 158).

Drexel stipulates that the formulation tanks are permit-required confined spaces within the meaning of the standards at § 1910.146 (Prehearing Conference Order; Exhs. C-1, C-5; Tr. 159). This determination was personally made by Drexel's corporate regulatory manager when the confined space standards became effective in 1993 (Tr. 159). Each tank is labeled as a permit-required confined space (Exh. C-4; Tr. 18-19). Also, Drexel's written confined space program requires millworkers to obtain a permit before entering the tank for cleaning (Exhs. C-1, C-5).

As part of its confined space program, Drexel designated the Tunica Fire Department to perform confined space emergency rescue services, if necessary (Exh. C-1; Tr. 36, 152). To date, such rescue services have not been required (Tr. 148). The fire department has only been to Drexel's facility for routine inspections and for one minor chemical spill (Tr. 143-144). These inspections did not involve an evaluation of the formulation tanks as a confined space nor did the fire department practice rescue operations (Tr. 157, 185). Under the state right-to-know law, Drexel annually provides the fire department a chemical inventory report showing the chemicals present at the plant, their quantity, and location (Exh. R-3; Tr. 146). Williams testified the fire chief confirmed receiving the inventory reports. He also told Williams that, although he has made no evaluations nor has the fire department performed any confined space rescues, he believed he could perform such rescues at Drexel's plant depending on the size of the opening (Tr. 73). He was concerned that his equipment might not fit into a small opening (Tr. 73). The fire chief has worked at Drexel's plant as a welding subcontractor (Tr. 70, 72).

Mike Shankle, Drexel's corporate regulatory manager, testified that his responsibility included contacting the fire department. However, he never contacted the fire department prior to the OSHA inspection (Tr. 155). He also acknowledged that the unexpected startup of the agitator blades could result in death if a person were inside the tank (Tr. 158).

Discussion

Section 1910.146(k)(2)(ii) requires that if an outside entity is designated to provide emergency rescue services for an employer, the outside entity must be provided access to all permit spaces to develop rescue plans and practice rescue operations. There is no dispute that the formulation tanks are permit-required confined spaces within the meaning of the standard and that the standard permits Drexel to designate the Tunica Fire Department for emergency rescue services (Tr. 71, 106).³ Further, it is uncontroverted that the fire department has not developed any specific rescue plans for the formulation tanks or practiced emergency rescues. However, whether the fire department actually develops rescue plans and practices rescue operations is a matter within the discretion of the fire department. Drexel cannot be held responsible for the fire department's failure to perform evaluations or practice rescues. As explained by the fire chief, all the firemen are volunteers who have regular full-time jobs (Tr. 79). Drexel's responsibility under § 1910.146(k)(2)(ii) is to provide access to its confined spaces if the fire department wants to perform evaluations or practice rescue operations.

The issue in this case is whether Drexel failed to provide such access to the fire department. The Secretary maintains that the standard requires Drexel to take some affirmative action to provide the fire department with the opportunity for access. The court does not agree. There is nothing in the cited standard requiring any affirmative action by Drexel as long as access is provided. Other standards require notification to the fire department. See § 1910.146(k)(2)(i). Drexel's

³/ OSHA is proposing changes to § 1910.146(k)(2) which would require employers to retain outside rescue services that can respond adequately and in a timely fashion when summoned to perform rescue. 59 Fed. Reg. 60,735 (Nov. 28, 1994); 60 Fed. Reg. 39,281 (August 2, 1995). Although there is a question whether the Tunica Fire Department could adequately perform confined space rescues, these proposed changes do not have an impact on the issues in this case.

responsibility under §1910.146(k)(2)(ii) is to provide the fire department access to its plant. There is no evidence that such access was denied. In fact, the fire department was at Drexel's plant on a number of occasions. It may be assumed that the fire department knows at least the plant's layout and the nature and location of the chemicals being used. Thus, the Secretary failed to show that access was not provided. Accordingly, a violation of § 1910.146(k)(2)(ii) has not been established.

In the alternative, the Secretary alleges a violation of § 1910.146(k)(2)(i) which requires an employer to inform the outside rescue service of the hazards which may be confronted when performing confined space rescue operations. This standard does require Drexel to take affirmative action; *i.e.*, to notify the outside rescue service of the potential hazards. The definition of "permit-required confined space" at § 1910.146(b) identifies such hazards associated with confined space entries as hazardous atmosphere, material that has the potential for engulfing an entrant, internal configuration such that an entrant could be trapped, or any other recognized serious safety or health hazards. In terms of a potential hazardous atmosphere, the record establishes that Drexel annually notifies the fire department of the chemicals at its plant, their potential hazards, the quantities stored, and the location of storage (Exhs. R-3, R-4, R-5). The fire chief advised Williams he had access to the material safety data sheets (Tr. 75). However, chemical exposure is not the only hazard associated with cleaning the formulation tanks. At Drexel's plant, the configuration of the formulation tanks, their size, and the need to lock out the agitator blades also present hazards to those performing rescue operations. Williams described possible injuries to include slipping and falling, as well as possible death or serious injury from the agitator blades (Tr. 26, 37). The fire department needed to be informed of these potential hazards. There is no evidence it was provided this information. In his conversation with Williams, the fire chief showed a lack of familiarity with the formulation tanks or the hazards associated with them. Drexel's corporate regulatory manager admitted he never contacted the fire department prior to the OSHA inspection (Tr. 155).

The violation is considered serious. By not providing information as to the confined space hazards, the fire department was not informed of Drexel's reliance on it for emergency rescues. Drexel knew of this failure and, if an accident occurred, the consequences could result in serious injury or possibly death.

Accordingly, a serious violation of § 1910.146(k)(2)(i) is affirmed.

B. Item 1b - Alleged Violation of § 1910.146(k)(3)(ii)

The citation alleges that “employees were required to enter formulation tanks (permit required confined spaces) to perform cleaning and the employer had not ensured that the other end of the retrieval line used to facilitate non-entry rescue was attached to a mechanical retrieval device to retrieve personnel from vertical type permit spaces (formulation tanks) more than 5 feet deep” in violation §1910.146(k)(3)(ii).⁴ As explained by Williams, Drexel was cited for failing to have a mechanical retrieval device at the plant (Tr. 39).

Facts

Shankle, Drexel’s corporate regulatory manager, testified that the formulation tanks in the sand mill and attrition areas were vertical tanks measuring approximately 8 to 12 feet deep (Tr. 149, 162). During the inspection, Shankle and Gilbertson told Williams there were no mechanical retrieval devices at the plant (Tr. 112-113). Also, Williams did not observe any such devices (Tr. 113).

However, during the inspection Drexel had three come-alongs (winches) at the plant with a lifting capacity of 2,000 pounds (Exh. R-1; Tr. 197). Also, there was a permanent electric hoist at one formulation tank in the sand mill area (Exh. R-8; Tr. 158). Williams testified that a come-along qualifies as a mechanical retrieval device (Tr. 84). However, he was not shown the come-alongs during the inspection (Tr. 88). Gilbertson, plant manager, testified that he was not aware the come-alongs could be considered mechanical devices until after the OSHA inspection. He admitted that they were not specifically designated for rescue purposes and were generally used to lift heavy parts such as a motor from a forklift (Tr. 187). Gilbertson testified that he personally did not know if the come-alongs could be used for emergency rescue. Also, he said that workers were never told to use the come-alongs for rescue purposes (Tr. 188-189). Drexel’s written confined space

^{4/} Section 1910.145(k)(3)(ii) provides that “the other end of the retrieval line shall be attached to a mechanical device or fixed point outside the permit space in such a manner that rescue can begin as soon as the rescuer becomes aware that rescue is necessary. A mechanical device shall be available to retrieve personnel from vertical type permit spaces more than 5 feet (1.52 m) deep.”

program does not identify the come-alongs for non-entry rescue. However, its program does state that “a hoist or other mechanical device for personnel removal will be used” (Exh. C-1).

Discussion

The standard requires that a mechanical device needs to be available if the confined space is vertical and more than 5 feet deep. The formulation tanks at Drexel's plant are vertical and in excess of 8 feet. Thus, for non-entry rescues from the formulation tanks, Drexel is required to have a mechanical device available. Under the definition of retrieval system at §1910.146(b), a mechanical device is defined as a lifting device. The three come-alongs are lifting devices.

Thus, the record establishes that the come-alongs qualify as mechanical devices. Williams agreed they were suitable. Also, the record establishes that they were available at Drexel's plant. The fact that Gilbertson was not aware of the come-alongs during the inspection, nor were they specifically designated for rescue purposes, does not mean they were not available. The standard requires only that such devices be available. The come-alongs were available and could have been used for emergency rescue if necessary. Thus, Drexel was in compliance with the standard.

Accordingly, a violation of §1910.146(k)(3)(ii) is not established.

C. Item 2a - Alleged Violation of § 1910.147(c)(7)(i)(A)

The citation alleges that “employees performed cleaning inside formulation tanks with blending blades, met the definition of an “authorized employee” as defined in paragraph (b) of the standard and were not provided with training and information as required by the standard” in violation of §1910.147(c)(7)(i)(A).⁵ Based on Williams' testimony, the issue is whether the mill workers received lockout/tagout training.

^{5/} Section 1910.147(c)(7)(i)(A) provides that “each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.”

Facts

It is uncontroverted that during the OSHA inspection, Drexel's lockout procedure for cleaning the formulation tanks involved both the millworker who enters the tank and the maintenance worker who attaches the lockout device at the energy source. The millworker identifies the tank to lock out. The maintenance worker attaches the lockout device to the appropriate circuit breaker and keeps the key. After locking out the circuit breaker, the agitator blades were checked to ensure they are no longer energized. The maintenance worker then continues with his regular work. The millworker using appropriate equipment cleans the inside of the tank. After completing the cleaning process, the millworker locates the maintenance worker who removes the lock from the circuit breaker (Tr. 35, 183, 201, 213-214). Since the OSHA inspection, Drexel changed its procedure to require the millworker to keep the key to the lockout device until the cleaning process is completed (Tr. 207).

Williams testified that millworkers in the sand mill and attrition areas told him they did not receive lockout training (Tr. 42, 95-97). Before cleaning the tanks, they knew only to notify a maintenance worker who locked out the appropriate circuit breaker. Drexel presented no evidence that its millworkers were provided specific lockout training. Gilbertson testified that during weekly safety meetings, Drexel's lockout procedure was occasionally discussed. Also, it was discussed as part of the millworkers' confined space training (Exh. R-10; Tr. 190-191). It is not disputed that maintenance workers did receive appropriate lockout/tagout training.

Discussion

Pursuant to §1910.147(b), an authorized employee is defined as "a person who locks out or tags out machines or equipment in order to preform servicing and maintenance on that machine or equipment." It goes on to provide that "an affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section." The definition of "affected employee" at § 1910.147(b) includes "an employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance covered under this section."

Based on the record, both the maintenance worker who locks out the circuit breaker and the millworker who cleans the formulation tanks are authorized employees within the meaning of §1910.147(b). Further, Drexel recognizes in its written lockout procedures that mechanical equipment such as agitators need to be “made safe for personnel to work on before such work commences so that personnel will not be jeopardized by the equipment accidentally starting” (Exh. C-14). Therefore, like the maintenance workers, millworkers need the training required by §1910.147(c)(7)(i)(A).

There is no evidence millworkers receive such training. The standard specifically requires training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available, and the methods and means necessary for energy isolation and control. Knowing to contact the maintenance worker is not sufficient. The record shows that millworkers do not receive training in the hazards from energy sources, the type and magnitude of energy, and the methods of energy isolation and control (Tr. 118, 121). The maintenance foreman acknowledged the millworkers rely on him to perform a correct lockout (Tr. 206). Under Drexel’s procedure, it is the maintenance worker's responsibility to perform the lockout. However, it is the millworker who is exposed to the danger of an unexpected startup of the agitator blades. The discussions of lockout procedure during weekly safety meetings is not shown by Drexel to satisfy the specific training requirements of the standard (Exh. R-10). Gilbertson, plant manager, described the weekly safety meeting as “generic” involving several topics and lasting twenty to thirty minutes (Tr. 179, 192). He acknowledged that a training program at Drexel is different. Such training programs are in-depth training on a single topic (Tr. 192-193). Drexel offered no evidence that such lockout training is provided to millworkers. Although training records were requested by Williams during his inspection, none were provided (Tr. 122, 140). Also, Drexel’s failure to train the millworkers is considered a serious violation. The lack of training made the millworkers totally dependent on the maintenance worker to perform an adequate lockout.

Accordingly, a violation of § 1910.147(c)(7)(i)(A) is affirmed.

D. Item 2b - Alleged Violation of § 1910.147(d)(4)(i) or In The Alternative § 1910.147(f)(3)(i)

The citation alleges that “employees performed cleaning inside formulation tanks with blending blades, met the definition of an ‘authorized employee’ as defined in paragraph (b) of the standard and did not affix an energy isolating device” in violation of §1910.147(d)(4)(i).⁶ At the hearing, the Secretary was permitted to allege, in the alternative, a violation of § 1910.147(f)(3)(i).⁷ The Secretary described the violation as Drexel's failure to have millworkers affix their own lockout devices as part of the lockout procedure (Tr. 234).

Facts

As discussed, Drexel’s lockout procedure at the time of the OSHA inspection required only the maintenance worker to place the lockout device on the energy source (circuit breaker). The maintenance worker kept the key, thus maintaining control over the lockout device. The millworker who entered the formulation tank to clean it did not place his own lockout device or keep the key. Williams testified that the millworker who enters the tank to clean must also apply his own lockout device (Tr. 43). Subsequent to the OSHA inspection, Drexel’s procedure changed to require the millworker to keep the key during the cleaning process.

Discussion

The standard at § 1910.147(d)(4)(i) requires a lockout device on each energy source. By placing the lockout device on the appropriate circuit breaker, Williams agreed that the energy source for the formulation tank was locked out. Thus, each energy source was locked out (Tr. 43). However, according to Williams, Drexel was cited for not placing lockout devices for each authorized employee (maintenance worker and millworker). The standard cited does not address

^{6/} Section 1910.147(d)(4)(i) provides that “lockout or tagout devices shall be affixed to each energy isolating device by authorized employees.”

^{7/} Section 1910.147(f)(3)(i) provides that “When servicing and/or maintenance is performed by a crew, craft, department or other group, they shall utilize a procedure which affords the employees a level of protection equivalent to that provided by the implementation of a personal lockout or tagout device.”

the number of lockout devices that are necessary based on the number of authorized employees. It only requires that each energy source be locked out, which Drexel was doing. Thus, § 1910.147(d)(4)(i) does not apply to the condition cited by the Secretary.

In the alternative, the Secretary alleges a violation of § 1910.147(f)(3)(i). This standard requires equivalent protection as provided by a personal lockout device if a crew or other group is performing the servicing or maintenance. Thus, the millworker who is cleaning the formulation tanks must be provided the equivalent protection of a personal lockout device. By not having control over the key to the lockout device, or having his own lockout device, the millworker under Drexel's procedures was not provided the equivalent protection of a personal lockout device. The millworker who enters the tank was exposed to the hazard of an improper lockout. The millworker is in greater need for control over the lockout device than the maintenance worker. Therefore, the millworker is required to have at least the equivalent of his own personal lockout device. Drexel acknowledges that the unexpected startup of the agitator blades in the formulation tanks could result in an employee's death inside the tank (Tr. 158). By changing its procedure after the inspection to require the millworker to keep the key to the lockout device, Drexel is currently providing equivalent protection of a personal lockout device. However, by not providing such protection at the time of the inspection to the millworkers who were exposed to the hazard, the violation was properly classified as serious.

Accordingly, a serious violation of § 1910.147(f)(3)(i) is affirmed.

"Other" Than Serious Citation No. 2

A. Item 1 - Alleged Violation of §1910.95(c)(1)

Drexel withdrew its contest as to this violation at the prehearing conference.

B. Item 2 - Alleged Violation § 1910.215(b)(9)

The citation alleges that the "Dayton bench grinder, located in Maintenance Shop, was not equipped with an adjustable tongue guard" in violation of § 1910.215(b)(9).⁸

⁸/ Section 1910.215(b)(9) provides that "safety guards of the types described in subparagraphs (3) and (4) of this paragraph, where the operator stands in front of the opening shall be constructed so that the peripheral protecting member can be adjusted to

Facts

It is uncontroverted that at the time of the inspection, the bench grinder in the maintenance shop did not have a tongue guard. Williams testified that he saw the grinder without a tongue guard, which he described as a guard designed to adjust to the decreasing diameter of the wheel and deflect the wheel from hitting the operator if it shattered (Exh. C-16; Tr. 49-50). Although not observed in operation, Williams testified that the grinder was plugged in and appeared to have been used (Tr. 49). The maintenance foreman told Williams that the grinder was used but infrequently (Tr. 130). Also, according to Williams, the grinder appeared to be “practically new” (Tr. 101). Initially, the maintenance foreman told Williams that he did not think the tongue guard came with the grinder when it was purchased. However, Williams observed the tongue guard laying on the building’s framing (Tr. 101-102, 131). This guard was installed and the violation abated during the inspection (Tr. 103). In reviewing the OSHA 200 injury report, Williams noted no injuries from the grinder (Tr. 135).

The maintenance foreman testified that the grinder was approximately two weeks old at the time of the OSHA inspection (Tr. 202). Prior to the inspection, he admitted using the grinder to grind down a bolt (Tr. 208). He was not aware if other employees had used the grinder but conceded that it was available for use (Tr. 208). According to the foreman, the grinder was “not used very much” (Tr. 208). The foreman testified that when assembling the grinder, the tongue guard was left off due to “an honest mistake” (Tr. 203). He testified that he was not aware the guard was not on the grinder until Williams’ inspection. The guard was installed within an hour (Exh. C-15; Tr. 203).

Discussion

The record establishes that § 1910.215(b)(9) required the installation of the tongue guard; that failure to have the tongue guard on the bench grinder violated the standard; that employees,

the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle as specified in paragraphs (b)(3) and (4) of this section shall never be exceeded, and the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch.”

including the maintenance foreman, were exposed to the condition by their use of the grinder without the installed tongue guard; and that Drexel knew of the condition. The foreman was involved in assembling the grinder; he used the grinder; and the guard was laying on the wall in apparent plain view. A mistake in not installing the guard does not negate Drexel's knowledge of the condition. Knowledge is established by the foreman's use of the grinder without the tongue guard.

As an affirmative defense, Drexel asserts employee misconduct or an isolated incident. An employer, defending on unpreventable employee's misconduct, must show that:

The action of its employee represented a departure from a work rule that the employer has uniformly and effectively communicated and enforced. *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1981 CCH OSHD ¶ 25,129 (No. 76-4627, 1981); *Merritt Electric Co.*, 9 BNA OSHC 2088, 1981 CCH OSHD ¶ 25,556 (No. 77-3772, 1981); *Wander Iron Works*, 8 BNA OSHC 1354, 1980 CCH OSHD ¶ 24,457 (No. 76-3105, 1980); *Mosser Construction Co.*, 15 BNA OSHC 1408, 1414, 1991 CCH OSHD 29,546, p. 39,905 (No 89-1027, 1991).

However, "when the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." *Archer Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017, 1991 CCH OSHD ¶ 29,317, p. 39,378 (No. 87-1067). In the *Archer Western* case, the Commission stated that "where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax."

In that the maintenance foreman testified that he was involved in assembling the grinder and used the grinder for work, the record fails to establish employee misconduct or isolated incidence. Also, Drexel offered no evidence as to work rules or the enforcement of work rules. However, based on the newness of the grinder and the infrequency of use, the violation was properly classified as "other" than serious.

Accordingly, an "other" than serious violation of §1910.215(b)(9) is affirmed.

PENALTY DETERMINATION

Section 17(j) of the Act, 29 U.S.C. 666(j), requires that when assessing penalties, the Commission must give “due consideration” to the size of the employer's business, the gravity of the violation, good faith, and prior history of violations. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032; *Hern Iron Works, Inc.*, 16 BNA OSHC 1247, 1994 CCH OSHD ¶ 30,155 (No. 88-1962, 1994).

Drexel has three formulation plants and employed approximately 150 employees at the time of the inspection. There were forty to fifty employees at the Tunica plant (Tr. 165). Thus, part credit is given. Because the Tunica plant was not cited for serious violations in the last three years, credit is also given for history (Tr. 106). In addition, credit is given for good faith in that Drexel has according to OSHA safety and health programs showing its attempt to comply with the standards. The record reflects that Drexel was also cooperative during the inspection (Tr. 105).

In considering gravity of the confined space violation of §1910.146(k)(2)(i), at least four millworkers in the sand mill and attrition areas were involved in cleaning the formulation tanks (Exh. C-5; Tr. 121, 123). The court concurs with Williams’ finding that the probability of an accident was low in that millworkers were provided proper protective clothing and a full body harness. Also, the tank’s atmosphere was tested for oxygen levels. The fire department was provided information about the chemicals in use at the plant and conducted inspections at the plant. The record also reflects there has never been an emergency situation from any of the confined spaces. There was no record of injuries. After considering the credit factors and gravity, a penalty of \$400 is reasonable.

With regard to the lockout requirements of §§ 1910.147(c)(7)(i)(A) and 1910.147(f)(3)(i), the gravity is also considered low in that millworkers seemed to understand and follow Drexel's lockout program. The agitator blades were properly locked out at the energy source, and the motor was properly checked to ensure there was no stored energy before cleaning the tank. There was no record of injury to employees due to failure to lock out. Although not adequate, Drexel's lockout procedures were discussed during weekly safety meetings and as part of the confined space training. Thus, after considering the credit factors and gravity, a combined penalty of \$825 is reasonable.

The violation of §1910.215(b)(9) was correctly characterized as "other" than serious, and no penalty is assessed.

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 ORDERED that items cited be disposed of as follows:

SERIOUS CITATION NO. 1:

Item 1a - A violation of § 1910.146(k)(2)(ii) is vacated. The alternative violation of § 1910.146(k)(2)(i) is affirmed with a penalty of \$400 assessed.

Item 1b - A violation of § 1910.146(k)(3)(ii) is vacated.

Item 2a - A violation of § 1910.147(c)(7)(i)(A) is affirmed.

Item 2b - A violation of § 1910.147(d)(4)(i) is vacated. The alternative violation of §1910.147(f)(3)(i) is affirmed, and combined with item 2a, a total penalty of \$825 is assessed.

“OTHER” THAN SERIOUS CITATION NO. 2

Item 1 - A violation of § 1910.95(c)(1) is not considered in this decision since Drexel withdrew its notice of contest.

Item 2 - A violation of § 1910.215(b)(9) is affirmed with no penalty assessed.



KEN S. WELSCH
Judge

Date: January 29, 1996