
SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 00-0226
	:	
TRINITY INDUSTRIES, INC.,	:	
and its successors,	:	
	:	
Respondent.	:	

APPEARANCES:

For the Complainant:

Aaron R. Ramirez, Esq. & Stephen E. Irving, Esq.,
Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Robert Rader, Esquire, Rader and Campbell, PC, Dallas, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

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

Respondent Trinity Industries, Inc., and its successors (Trinity), at all times relevant to this action maintained a place of business at 4100 Washington Street in Houston, Texas, where it fabricated structured steel bridge girders. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 11, 1999, the Occupational Safety and Health Administration (OSHA) conducted an inspection at Respondent’s workplace in response to a report of a

fatal accident. As a result of that investigation, Trinity was issued a citation alleging two violations of the Act together with proposed penalties. By filing a timely notice of contest, Trinity brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On September 26, 2000 a hearing was held in Houston, Texas. The parties have submitted briefs and this matter is now ready for disposition.

Background Facts

On October 11th, 1999 after OSHA received notice of maintenance mechanic Richard Moreno's death at Trinity, Juan Padron, an OSHA compliance officer, conducted a fatality investigation (Tr. 15-16). On October 9, 1999, Mr. Moreno and his partner, Shane Garley, were connecting a welding machine to a circuit breaker at Trinity's site as they had been instructed to do by Chip Rhodes, maintenance supervisor at Trinity (Tr. 25; Exh. 5). Prior to beginning the work, the two turned the power off and Mr. Moreno opened the circuit breaker box and checked the bus bar with a voltmeter to make sure that electricity was not live (Tr. 25). He then removed the two connected fuses in the box and checked again for electricity on the bus bar and found that there was no power flowing through (Tr. 25-26). He did not check a third fuse, which was also lying inside the box (Tr. 25). Garley took the wires from the welding machine and placed them through the opening of the circuit box and Mr. Moreno pulled the wires through (Tr. 26; Exh. 2, 4). As there was no lock nut for the grommet, which was needed to attach to the fuses, Garley went to the maintenance shop to retrieve one (Tr. 26). After he returned, Garley placed the nut on the grommet and then Mr. Moreno (having never tested the third fuse) connected all three fuses to the bus bar, placed them back into the circuit box and closed the box (Tr. 27). After closing the box, Mr. Moreno turned the switch to the "on" position and was fatally injured (Tr. 27). At the time of his death, Mr. Moreno was sitting in a tight space on the metal platform that held the welding machine (Tr. 19, 22, 40; Exh. 5). His back was up against the welder and he faced the circuit breaker. His legs were resting on top of a steel beam and he was soaking wet from perspiration (Tr. 19-20, 22, 24, 27, 42, 96; Exhibit 5).

Alleged Violation of § 1910.332 (b)(1)

Serious Citation 1, item 1, as amended, alleges:

29 CFR 1910.332 (b)(1): Employees were not trained in and familiar with the safety related work practices required by 29 CFR 1910.331 through 29 CFR 1910.335 that pertained to their respective job assignments:

- (a) On or about October 9, 1999, employee(s) were exposed to electrical hazards when connecting electrical equipment such as, but not limited to, cranes and welding machines.

Discussion

Under the first item, set forth above, the Secretary alleges that Trinity violated 29 CFR 1910.332 (b)(1) by failing to train its employees in electrical safety related work practices. In order to prove that a standard has been violated, the Secretary must show (1) that the cited standard applies; (2) non-compliance with the terms of the standard; (3) employee exposure or access to that hazard created by the non-compliance; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the condition. *ASTRA Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129, 1981, CCH OSHD ¶25, 578 (No.78-6247, 1981); *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1991-1993, CCH OSHD ¶29,546 (No.89-1037, 1991).

Respondent concedes that the cited standard requires employees to be trained in the electrical safety related work practices set forth in Sections 1910.331 through 1910.335. Trinity notes, however, that the required training may be either classroom training or on-the-job training. Most importantly, Respondent states that the standard does not impose any requirement to document such training. (Respondent's brief, pg.5). I agree. In addition, all parties agree that this case arises from a tragic accident. My task is to evaluate the facts, circumstances and law and determine whether Trinity failed to comply with the cited standards. The fact that an accident occurred does not, standing alone, establish that a violation occurred.

Against this backdrop, the record establishes that Mr. Moreno had received several months of on-the-job training with a Class A mechanic. (Tr. 30-31). Safety

meetings were conducted by Trinity at least monthly. (Tr. 32). Respondent had a written lockout/tagout program and documentation indicating Mr. Moreno had been trained on the program's requirements. His new-hire orientation covered approximately 31 separate areas of safety and included some electrical training. (Tr. 29, 32, 43-44, 55). All of Trinity's maintenance mechanics were trained by means of on-the-job training, which, as the Respondent notes is specifically authorized by the cited standard. (Tr.47-49). A fair reading of the record establishes that Mr. Moreno had also been trained on how to determine whether a piece of equipment or a part thereof was live or not . He also had been trained on procedures for de-energizing live parts. (Tr. 49-50).

The Secretary has not established by a preponderance of the evidence that Trinity employees were not trained with proper procedures for handling electrical matters. Stated another way, the Secretary has failed to establish with any certainty that they did not receive the required training. In fact, the Secretary's Compliance Officer candidly acknowledged on cross-examination that he cited Trinity because it had no documentation to provide him on Mr. Moreno's training other than the lockout/tagout training. He conceded that the standard cited specifically authorizes on-the-job training and that there was no requirement to document such training. Consequently, the Secretary has failed to carry her burden of proof, and the cited violation must be vacated.

Alleged Violation of § 1910.333 (a)

Serious Citation 1, item 2, as amended, alleges:

29 CFR 1910.333(a): Safety related work practices were not employed to prevent electrical shock or other injuries resulting from either direct or indirect electrical contacts, when work was performed near or on equipment or circuits, which were or could be energized:

(a) On or about October 9, 1999, employee(s) was (were) sitting on metal plate bench and leaning on welder while throwing the disconnect switch to the open position.

Discussion

The Secretary has indicated she continues to believe that a demonstration of actual or constructive employer knowledge of a violation is not properly an element of her *prima facie* case of violation but rather is relevant as providing an exception to the characterization of a violation as “serious” under 29 USC § 666(k). However, the Secretary recognizes that the Commission continues to apply a different test. (Secretary’s brief, pg. 3) In fact as noted above, knowledge is an essential element of the Secretary’s *prima facie* case. To meet the burden of establishing employer knowledge, the Secretary must show that Trinity either knew or with the exercise of reasonable diligence, could have known of the presence of the violative condition. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1991-93, CCH OSHD ¶29, 807 (No.87-692, 1992); *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1991-93, CCH OSHD ¶29, 546 (No. 89-1027, 1991).

Respondent has acknowledged that Mr. Moreno’s actions were unsafe. (Respondent’s brief, pg. 9). It is not contended otherwise. However, the initial burden of proof appropriately remains with the Secretary to show that Trinity had actual or constructive knowledge of the unsafe conditions. To carry this burden she must, in the first instance, establish that Trinity’s training program, under the cited standard 1910.333(g) was in fact inadequate. For the reasons discussed above, including Trinity’s new hire orientation and on-the-job training, the Secretary has failed to carry her burden.

Mr. Moreno’s actions were unforeseeable under the facts and circumstances of this case. Consequently, Citation 1, item 2 is vacated.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR 1926.332 (b)(1) is VACATED.
2. Citation 1, item 2, alleging violation of 29 CFR 1926.333(a) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated: