

Secretary of Labor,
Complainant,

v.

OSHRC Docket No. 00-1277
EZ

Trinity Industries, Inc.,
Respondent.

APPEARANCES

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

Robert E. Rader, Jr., Esq.
Rader & Campbell
Dallas, Texas
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Trinity Industries, Inc. (Trinity), fabricates sheet metal at its facility in Girard, Ohio. Occupational Safety and Health Administration (OSHA) compliance officer Danelle Jindra arrived at Trinity's facility on June 6, 2000, to conduct an inspection in response to an employee complaint. As a result of Jindra's inspection, the Secretary issued a two-item citation to Trinity on June 23, 2000.

Item 1 of the citation alleges a serious violation of § 1910.212(a)(1) for failing to provide machine guarding on a mill. Item 2 of the citation alleges a serious violation of § 1910.212(a)(2) for failing to affix a guard to the mill.

This case was assigned for E-Z proceedings. The hearing was held on November 1, 2000, in Cleveland, Ohio. The parties stipulate jurisdiction and coverage (Tr. 5). Trinity denies employee exposure. For the reasons discussed, items 1 and 2 are vacated.

Background

Trinity manufactures highway guardrails at its Girard, Ohio, plant (Tr. 102). Trinity uses a highway guardrail rolling mill (HGR mill) to shape the coils of sheet metal into guardrails. The approximately 140 foot HGR mill, in one continuous process, takes a coil of metal, forms it into corrugated highway guardrail, cuts it to length, and stacks it onto loading tables (Exhs. R-1 through R-6; Tr. 13, 22-30).

The HGR mill is automatic; the operator operates the mill from behind a control panel 8 feet from the machine (Exh. R-1, R-3; Tr. 34). A helper unloads the finished, stacked guardrail from the loading tables with a forklift. The helper also uses a control panel from which he can control the run out and stacking functions of the mill separately when necessary. The operator and the helper are the only employees who work in the area around the HGR mill (Tr. 17, 32-33, 84).

On June 6, 2000, OSHA compliance officer Danelle Jindra inspected the HGR mill in response to an employee complaint (Tr. 10). Based upon her inspection, Jindra recommended that Trinity be cited for the two alleged violations that are at issue here.

The Citation

The Secretary has the burden of proving her case by a preponderance of the evidence.

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 applicability of the cited machine guarding standards to the HGR mill, but argues that the Secretary failed to show that its employees were exposed to hazards created by rotating parts.

Item 1: Alleged Serious Violation of § 1910.212(a)(1)

The Secretary alleges that Trinity committed a serious violation of § 1910.212(a)(1), which 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.

The citation specifies that the run out roll of the HGR mill was not guarded. Jindra stated that the hazard was created by the rotating roller (Tr. 43).

The roller and shaft of the run out machine were not guarded (Exhs. R-1, R-5, R-6; Tr. 13, 15). The roller is inset 31 inches from the outside of the machine (Tr. 83-84). The roller and shaft are approximately 4 to 5 feet above the ground (Tr. 45).

Jindra testified that during her inspection she observed the helper leave his control panel and walk by the run out machine “to see if everything was lining up correctly. Then, he would get on the tow motor, and the material would already be stacked. So, he would operate the tow motor then and remove the material from the area” (Tr. 18). The helper’s control panel is located 13.5 feet from the run off machine (Exh. R-1). Jindra stated that when the helper walked over to the run off machine he was “[a]bout six inches” from the machine (Tr. 18). She did not observe him put his hands in the zone of the roller (Tr. 45).

W. Dennis Panzo, Trinity’s safety and environmental coordinator, accompanied Jindra during her inspection. He testified that the helper did not approach the run out machine and did not come within 6 inches of the machine. Panzo contended that there is no operational necessity for the helper to go near the roller. “When the helper leaves his station to go to the tow motor, he would be walking away from the roller and going around the back to the front of the conveyor to pick up his tow motor and his guardrail to take outside” (Tr. 82).

Section 1910.212(a)(1):

requires the Secretary to prove that a hazard within the meaning of the standard exists in the employer’s workplace. *Armour Food Co.*, 14 BNA OSHC 1817, 1821, 1987-90 CCH OSHD ¶ 29,088, p. 38,883 (No. 86-247, 1990). In order to meet this 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. *Id.*; *Rockwell International Corp.*, 9 BNA OSHC 1092, 1097-98; 1980 CCH OSHD ¶ 24,979, p. 30,846 (No. 12470, 1980).

Jefferson Smurfit Corp., 15 BNA OSHD 1419, 1421 (No. 89-0553, 1991).

Panzo testified convincingly that there is no operational reason for an employee to come in contact with the run out machine. He disputes Jindra's contention that the helper came within 6 inches of the machine. Panzo stated that the helper actually walks farther away from the machine when he leaves his control panel to get the tow motor. "[E]xposure to a hazard is not established where employees have sufficient space to walk past unguarded machinery such that contact with the hazardous nip points, while possible, is unlikely." *Jefferson Smurfit*, 15 BNA OSHC at 1422.

At the hearing the Secretary attempted to expand item 1 to include the shaft of the run out machine, which extends to the edge of the machine. Jindra initially told the court that the roller, and not the shaft, was the basis for citing item 1 (Tr. 42).

Robin Medlock, OSHA's area director for its Cleveland, Ohio, office, testified that the shaft creates a hazard because an employee's loose clothing could get caught on the rotating shaft and be pulled into the machine (Tr. 61). Medlock had not visited Trinity's facility and had not observed the roll out machine in operation (Tr. 68). It is unclear from Jindra's testimony whether or not the shaft actually rotated (Tr. 50). Jindra did not estimate the closest distance she observed between the helper and the shaft.

Based upon the record, the court finds that the Secretary failed to establish that any of its employees were exposed to hazards created by the unguarded rotating parts of the run out machine. Even accepting as accurate Jindra's testimony that she observed the helper within 6 inches of the machine, the roller was recessed 31 inches from the outside of the machine. There was no reason for an employee to deliberately insert his hands into the roller's zone of danger. The Secretary also failed to establish that the shaft of the run out machine rotates and she did not adduce evidence of how close the helper came to the shaft.

Item 1 is vacated.

Item 2: Alleged Serious Violation of § 1910.212(a)(2)

The Secretary alleges that Trinity committed a serious violation of § 1910.212(a)(2), which provides:

Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible. The guard shall be such that it does not offer an accident hazard in itself.

The citation states, “Guards on the gate were not affixed or interlocked to the mill to prevent employees from getting into the point of operation.” The citation also notes, “One guard swung in and out, and the other guards could be pulled out while the mill was in operation.”

Trinity had installed a screen guard along the rolling mill and the cut-off sections of the HGR mill (Exh. R-1). Jindra recommended citing Trinity for a violation of § 1910.212(a)(2) because there are three gates in the screen guard that can be opened while the mill is running (Tr.36). The screen guard is welded and bolted to the mill (Tr. 85). The gates can be opened and they swing outward (Tr. 96).

Medlock explained why the Secretary believes the condition of the gates violated § 1910.212(a)(2) (Tr. 59):

Because the intent of the standard is that the guards are not easily removable to allow access by an employee or maintenance or anyone so that it has to be a conscious, authorized-by-management procedure that employees would not open guards, remove them, take them off and bypass their effectiveness.

So, if they want to fix the machine, secure it, normally, they would take a tool or something to get the guard off so that there would be some authorization or interlocked, whereas when you open to access a machine, there is an electrical interlock that would automatically shut the machine off.

The court disagrees with the Secretary’s position. The cited standard requires that guards be affixed to the machine. There is no requirement that the guards be locked down or removable only with a tool.

Furthermore, the Secretary failed to establish that Trinity’s employees were exposed to a hazard during the normal operation of the mill. Jindra testified that Panzo and Trinity’s regional safety manager Darren Radkowski told her during her inspection that Trinity employees open the

gate while the machine is running when they have to make frequent adjustments to the machine (Tr. 19, 38-39).

Panzo disputed Jindra's testimony. He stated that the gates are used to provide access to the mill when maintenance is necessary (Tr. 90). Trinity locks out the mill before its maintenance employees are permitted to enter the gates (Tr. 100).

Panzo testified that the only place adjustments are made while the mill is running is on the last two "stands" before the guardrail goes into the cut off section. The adjustments are made with a long-handled wrench. The operator slides a piece of 51-inch long pipe onto the end of the wrench handle (Exh. R-7; Tr. 88-89, 96, 99, 106-107). Panzo stated that adjustments are required once or twice a year and that it takes only a few seconds to make the adjustments (Tr. 91, 108). When he makes these adjustments, the operator is at least 51 inches from any moving part. At the hearing, Medlock conceded that if an employee made adjustments on the mill while it was running using the 51-inch long pipe, "I don't think there would be an exposure enough for a violation" (Tr. 71).

The Secretary argues that Trinity's position is "suspect" because the company did not mention that its employees use the pipe to reach the stands for adjustments either during Jindra's inspection or during the informal settlement conference. While the court agrees with the Secretary that Trinity could have saved both parties time and expenses if it had explained its use of the 51-inch pipe prior to the hearing, Trinity's evidence on this point is unrefuted. Jindra did not observe any employee make adjustments on the machine, and she did not inquire as to how adjustments are made (Tr. 36-37, 39).

The Secretary has failed to establish that the gates to the screen guard were not affixed to the mill and that any employee was exposed to hazards created by rotating parts of the mill. Item 2 is vacated.

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

1. Item 1 of the citation, alleging a serious violation of § 1910.212(a)(1), is vacated and no penalty is assessed; and
2. Item 2 of the citation, alleging a serious violation of § 1910.212(a)(2), is vacated and no penalty is assessed.

/s/

KEN S. WELSCH
Judge

Date: December 8, 2000