

Secretary of Labor,

Complainant,

v.

Formica Corporation,

Respondent.

OSHRC Docket No. 00-2212 (E-Z)

Appearances:

Elizabeth R. Ashley, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Peter E. Tamborski, Esq.
Joan Gates, Esq.
Thompson, Hine & Flory
Cincinnati, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Formica Corporation (Formica) manufactures surfacing products, such as tabletops, flooring, and sheeting. In response to a formal complaint, Occupational Safety and Health Administration (OSHA) investigator Leonard Zielinski conducted an inspection of Formica's facility in Evendale, Ohio. As a result of that inspection, the Secretary issued Formica a three-item citation on October 31, 2000. Item 1 asserts that Formica violated § 1910.146(c)(2) by failing to post danger signs near the entrance of a pit beneath a movable platform in the collation department. The Secretary contends that the pit was a permit-required confined space. Item 2 asserts that Formica violated § 1910.146(c)(4) by failing to develop a written entry program for the pit. Item 3 asserts that Formica violated § 1910.146(g)(2)(i) by failing to provide confined space training for entrants into the pit. Formica denies that the pit is a permit-required confined space and thus that the cited standards apply.

This case was assigned to the E-Z Trial track. A hearing was held on April 3, 2001, in Cincinnati, Ohio. The parties have filed their briefs, and the case is ready for decision. For the reasons discussed below, the area need not be classified as a permit-required confined space.

Background

In Formica's collating department employees "built" laminated table tops and other coverings by layering laminate and filler materials together. To keep the collation

assemblers/operators from bending over too far as they combined the materials, the assemblers used two adjacent, vertically adjustable tables to hold the materials (Tr. 17, 25). The assemblers controlled the upward and downward movement of the platforms by pushing on buttons at control panels near the platforms. The adjacent platforms were raised or lowered to the preferred height of the assemblers. A common pit beneath the floor accommodated the platforms at the lower levels (Tr. 28).

Approximately every 6 months, employees in the collating department suspended their regular duties so that the department could be cleaned. Employees bid by seniority for the available cleaning jobs. Because small pieces of laminate and filler materials often broke off and fell beneath the platforms into the pit area below, cleaning the pit area was one of these jobs. In August 2000 employees Linda Estes and Paula Tolkis stepped through the platforms' trap door into the pit below to gather up and remove the pieces of material. It took the women their full shifts to clean the pit area (Tr. 16, 18, 21, 26, 30, 105).

Discussion

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) employees access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1741, 1994). The primary issue in the case is whether the Secretary met the first element of her proof, *i.e.*, the applicability of the standards. If it is determined that the pit area is a permit-required confined space (PRCS) within the meaning of § 1910.146, Formica concedes that it failed to comply with the terms of the cited standards.

The Pit

The collating tables measured 17 feet long by 10 feet wide, and the pit beneath the tables had the same dimensions and was 4 feet deep. The mechanical equipment inside the pit raised and lowered the platforms (Tr. 6, 48-49). Each of the adjacent platforms had two trap doors; but when employees cleaned the pit, they opened (and were apparently aware of) only one of them. The platforms were leveled, the trap door opened, and the employees stepped into the pit without the aid of a ladder. The trap door remained open during cleaning (Tr. 38-41).

The mechanical equipment was located inside the pit. A motor in the approximate middle of the pit connected to two smaller shafts extending in opposite directions outward into gear boxes. From either side of each gear box, longer 6-foot drive shafts connected to vertical

screw jacks in the four corners of the pit. This mechanism, which was installed 4 or 5 inches above the floor, formed a rough letter-H on the pit floor. The motor, all the gear boxes, and the screw jacks were enclosed. The drive shafts were smooth and had no nip points, but they revolved at a speed of 300 rpm (Exh. C-1; Tr. 82, 128-130, 145). Entrants could make contact with the revolving shafts if the equipment was energized.

Is the Pit a Permit Required Confined Space?

The parties agree that the pit area beneath the collating tables met the standard's definition of a "confined space." A confined space is considered to be "permit required" (PRCS) if it has: (1) hazardous atmospheres, (2) materials which could engulf an entrant, (3) hazardous internal configurations, or (4) "any other recognized serious safety or health hazard" (§1910.146(b)). The parties stipulate that only the fourth criteria could apply. According to the Secretary, the pit contained "recognized serious" safety hazards because of the potential operation of the mechanical equipment and the resulting movement of the platform.

Formica had a lockout-tagout (LOTO) program in place for the facility, and the control for the mechanical equipment in the pit was de-energized and locked at all times while the employees cleaned the pit in August 2000 (Tr. 6, 19).¹ For this reason and because of its LOTO program, Formica contends that it had already eliminated any exposure to a hazard in the pit.

As Zielinski testified, relying on controls to prevent movement of mechanical equipment does not remove the hazard from a confined space. Controls bring with them the possibility that the control system could fail and injure an entrant. The potential exists that entrants might not use LOTO or might not use it correctly, thus allowing someone unknowingly to reactivate the equipment. The existence of a hazard from mechanical equipment is not dependent upon whether the equipment was de-energized before entry. Use of LOTO cannot serve permanently to reclassify a PRCS to non-PRCS status unless the mechanism was permanently locked out.²

While temporarily de-energizing mechanical equipment does not negate a PRCS classification, the mere existence of mechanical equipment in a confined space does not

¹ The method used to de-energize and lock the collating tables did not comport with either the Secretary's LOTO standard or Formica's LOTO policy because the entrants did not have control over locks to the start-up connection which moved the platforms (Tr. 88, 136).

² This position is bolstered by the language of the preamble for the confined space standard which addresses reclassifying a PRCS as non-PRCS under § 1910.146(c)(7)(i). It concludes that this procedure "will apply primarily to spaces containing hazardous energy sources or containing engulfment hazards" (Exh. C-2, p. 4490).

automatically yield the PRCS classification. In May 1995, the Directorate of Compliance Programs for OSHA published CPL 2.100 (“Application of the Permit-Required Confined Space (PRCS) Standard, 29 C.F.R. 1910.146”) (Exh. C-3). The CPL addresses the circumstances under which a confined space may be classified as PRCS because of “recognized serious safety or health hazards.”³ The CPL is organized in question and answer form. The pertinent section provides (Exh. C-3, p. 25, boldface in original, italics added):

10. The definition of permit-required confined space contains the phrase “and recognized serious safety and health hazard” as one of its hazard characteristics which would result in a confined space being classified as a permit space. The “Types of Hazards” listing in the Confined Space Hazards section of OSHA’s Confined Space Entry Course No. 226 identifies hazards. *Does the mere presence of] non-specific hazards such as physical hazards (e.g. grinding, agitators, steam, mulching, falling/tripping, other moving parts) . . . which do not pose an immediate danger to life or health or impairment of an employee’s ability to escape from the space constitute a hazard which would invoke this characteristic?*

When a hazard in a confined space is immediately dangerous to life or health, the “permit space” classification is triggered. The list referenced above is only illustrative of the general range of confined space hazard which could, but not necessarily always, constitute a hazard which would present an immediate danger to life or health, such that “permit Space” protection would be required. **The determination of whether the resulting exposure to a hazard in a confined space will impair the employee’s ability to perform self-rescue is the aspect that must be addressed by the employer.**

In order for [a] “serious safety and health hazard” to be recognized as being an impairment to escape, its severity potential for resulting physical harm to an employee must be considered.

The Secretary foresees the following hazards: (1) the entrant’s clothing becoming entangled in the rotating shaft thus crushing a part of the body; (2) the platform descending on entrants, hitting or even crushing them; or (3) entrants attempting to exit through a gap made between one platform at its uppermost limit and the other at its lowest level (rather than through the trap door) causing a crushing injury if the platforms unexpectedly moved in opposite directions.

OSHA’s scenarios do not translate into a serious hazard that is also recognized. The

³ While OSHA’s CPLs and other directives generally are not binding on the Commission, the Commission has adopted the reasoning of CPL 2.100, as noted in *Drexel Chemical Co.*, 17 BNA OSHC 1908, 1910, footnote 3 (No. 94-1460, 1997).

conjectures do not present a realistic potential for the type of harm which could impair escape from the collating pit. The collating platforms moved only so long as an operator continued to depress the pressure sensitive switch (Tr. 28). Since the trap door remained opened during the cleaning process, materials would not be placed on the opened table. Potential operators would thus have no reason to move the table. But if they did, the operators would be within 3 to 12 feet of the trap door, depending on where the operators stood. They could be in voice contact with an entrant even while the machinery ran, or they could have the entrant in sight (Exh. C-1; Tr. 6-7).

The platforms moved at only 10 inches per minute. Entrants would not be crushed by the descending platform even if their clothing were caught by the shaft. Not only did the platform have a limit switch; but if that failed, a metal skirt around the pit stopped the platform 2 inches below the limit switch cutoff. The platform could not descend fully to the floor (Tr. 126, 133, 142). Formica's safety manager Michael End testified credibly that when the platform was stopped at the lowest point, the space between the platform and the mechanism was 18 inches and between the platform and the floor was 26 inches. If an entrant's arm or leg was trapped on top of the mechanism, a distance of 18 inches remained and the limb would not be crushed. Even if injured and alone (which was not how the work was done) entrants could boost themselves by standing on the enclosed parts of the mechanism and pulling themselves out of the pit.

The possibility of employees crawling between adjacent platforms raised and lowered to opposite limits was extremely remote. The platforms were never placed in that position (Tr. 32). Apparently, an operator would have to seek intentionally to injure the entrant for it to occur. Such a possibility does not even rise to the level of Zielinski's "long shot" (Tr. 94).

It is concluded that the configuration of the mechanism in the pit and the circumstances of its operation do not realistically present a hazard. To the extent that a hazard could exist, it would not significantly impair self-rescue. Since the pit did not contain a "recognized serious safety hazard," it need not be classified as a PRCS. The cited standards, which apply only to a PRCS space, do not apply to the collating pit. The Secretary failed to prove an element of her prima facie case, and the violations are 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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED that items 1, 2, and 3 of Citation No. 1 are VACATED.

/s/
NANCY J. SPIES
Judge

Date: May 9, 2001