

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,

v.

TRINITY YACHTS, LLC
And its Successors
Respondent.

OSHRC DOCKET NO. 09-1123

APPEARANCES: Dolores G. Wolfe , Esquire
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U.S. Department of Labor
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Dallas, Texas 75202
For the Complainant.

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One Hancock Plaza
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For the Respondent.

BEFORE: G. Marvin Bober,
Administrative Law Judge

DECISION AND ORDER ON SECOND REMAND FROM COMMISSION

This proceeding arises under the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 *et seq.* (“the Act”) as a result of a fatality at the worksite of Trinity Yachts (“Trinity” or “Respondent”) in New Orleans, Louisiana, when an employee fatally inhaled argon gas. It is before this Court on a second remand from the Occupational Safety and Health Review Commission (“the Commission”) following its review of a decision rendered by this Court. On October 29, 2010, this Court issued its initial decision in this case. In that decision, Citation 1, item 1 was vacated, while Citation 1, items 2 and 3 were affirmed. Finding certain clerical errors, the Commission issued its first remand in this matter to enable this Court to correct those errors. On February 22, 2011, this Court issued its second decision affirming only Citation 1, item 2 which alleged that Trinity’s training program failed to ensure that employees in an enclosed or confined space were trained to “[a]nticipate and be aware of the hazards that may be faced during entry” as required by 29 CFR §1915.12(d)(2)(ii).

At the trial, Trinity called its human resources administrator to testify about the actions she personally took to ensure that the decedent, who had trouble reading and writing English,

understood company policies and procedures. Finding the administrator's testimony unnecessary, this Court refused to allow her to testify. Trinity's counsel concurred that the testimony was unnecessary if the Court was otherwise satisfied that the facts provided by its proffered testimony had already been established. Nonetheless, the item was affirmed because the Court found that Trinity failed to establish that the decedent understood the risks associated with working with argon gas and the requisite safety precautions that needed to be taken.

On review, the Commission found that this Court erred in concluding that the administrator's testimony was unnecessary to determine the sufficiency of the decedent's training. The Commission found that "because the present record suggests that the decedent had difficulty with reading, the sufficiency of his training cannot be fully evaluated by only considering Trinity's written training materials and its safety manager's general discussion of the program." Therefore, the Commission remanded this matter with directions to re-open the record for the limited purpose of allowing the parties to adduce testimony from Trinity's human resources administrator, Julie Griffin, regarding the decedent's training, and to provide the Secretary with an opportunity to respond to this evidence. The Commission also instructed this Court to reconsider its entire decision in light of this new evidence.

Pursuant to the Commission's instruction, the trial was reopened for the limited purpose of allowing Trinity to adduce the testimony of its human resources administrator. The reopened trial was held in New Orleans, Louisiana on September 8, 2011.

Testimony of Julie Griffin

Ms. Julie Griffin works at the human resources department of Trinity Yachts. Her responsibilities include hiring, firing, interviewing prospective employees, payroll and occasionally issuing company safety policies. (Tr. 559).

Ms. Griffin testified that, after Hurricane Katrina, she became responsible for conducting employee orientations. (Tr. 560). The orientation consisted of having the new employee watch a video (Ex. R-18) and take a test. (Tr. 561). Afterwards, she would go over the test with the employee and talk to him about company procedures. (Tr. 561).

Ms. Griffin testified that the decedent started and stopped employment with Trinity on several occasions. She specifically recalled four times that he was hired. On each occasion the decedent was required to undergo the orientation procedure. (Tr. 561, 569). He previously was

required to view the orientation video when first hired, and each time he was rehired. (Tr. 569). After the last time he was hired, the decedent watched the video and Ms. Griffin administered a test that covered the material he just watched. Because the decedent had difficulty reading and writing English, Ms. Griffin read the questions to him. (Tr. 571).

Ms. Griffin testified that they discussed everything on the safety orientation check list. (Tr. 570, Ex. R-2). However, because he had difficulty reading and writing, he didn't check the items on the page, so they discussed the items and he signed to confirm that they went over them. (Tr. 570). The decedent was also given a handbook (Ex. R-22), which she read to him. (Tr. 571) The reading took approximately 45 minutes. (Tr. 585). Although this was the first time she personally read the handbook to him, he became upset because it had been read to him before and he asserted that he knew everything in it. (Tr. 571, 585). Ms. Griffin informed the decedent that she had to read it to him every time he was rehired. (Tr. 572).

Ms. Griffin also went over the Material Safety Data Sheet (MSDS) for argon with the decedent. (Tr. 579). She could not remember how many MSDS she read to the decedent and could remember only the MSDS for argon. (Tr. 586-589). Ms. Griffin admitted that she is not a welder, never worked with argon, and was not trained in the hazards of working with argon. (Tr. 583). She was aware that argon is a type of welding gas and that it is odorless. (Tr. 583). She also was aware that argon sinks to the ground because she read about it in safety books found in the office. (Tr. 584). She could not remember if the MSDS for argon addressed drowsiness or whether it addressed whether argon would cause burning if it came into contact with the eyes. (Tr. 594).

The decedent told Ms. Griffin that he knew what to do and asked her to let him return to work. She replied that she couldn't let him go back to work without finishing the orientation. (Tr. 579). Ms. Griffin testified that the decedent understood the handbook section dealing with confined spaces. She also read the section involving the welding and cutting practices of Trinity and the section involving blowers and ventilation. Again, the decedent asserted that he knew the material and that the orientation was not necessary. (Tr. 581). When asked, the decedent stated that he didn't have any questions. He was told that if any questions did arise, he should contact his foreman or safety official. (Tr. 582).

Ms. Griffin testified that she learned what to teach by being around the shipyard "and watching the video and stuff: (Tr. 600). She testified that she was not trained to perform training,

and stressed that she was not conducting training. Rather she characterized her job as “orienting.” (Tr. 600). She explained that training entails taking someone and leading them. She was just reading procedures and policies. (Tr. 600).

Discussion

The cited standard provides:

§1915.12 Precautions and the order of testing before entering confined and enclosed spaces and other dangerous atmospheres .

* * *

(d) Training of employees entering confined and enclosed spaces or other dangerous atmospheres.

* * *

(2) The employer shall ensure that each employee who enters a confined space, enclosed space, or other areas with dangerous atmospheres is trained to:

* * *

(ii) Anticipate and be aware of the hazards that may be faced during entry;

The citation alleges that:

The employee working in the starboard side vent trunk on TO48 was not trained in the hazards associated with working in the enclosed space with argon. This condition exposed the employee to an asphyxiation hazard.

To comply with the cited standard, Respondent was obligated to train the decedent to “[a]nticipate and be aware of the hazards that may be faced during entry” into the starboard side vent trunk due to employee exposure to argon gas.

The hazards associated with argon gas as set forth in its Material Safety Data Sheet (MSDS) include:

- In high concentrations, may cause asphyxiation;
- Gas/vapour [is] heavier than air. May accumulate in confined spaces, particularly at or below ground level;
- Exposure to fire may cause containers to rupture/explode;
- In confined space use self-contained breathing apparatus;
- Accidental Release Measures: wear self-contained breathing apparatus when entering area unless atmosphere is proved to be safe;
- Handling: keep container below 50C in well ventilated area; and
- Compressed gas. Colourless. No odour warning properties.

The testimony of Ms. Griffin establishes that she read both the company safety handbook and the MSDS for argon to the decedent, had him watch an orientation video, and had him take a test on its contents. Respondent asserts that these steps qualified as training sufficient to satisfy the requirements of the cited standard that employees be trained to “[a]nticipate and be aware of the hazards that may be faced during entry.” This Court disagrees.

In the Preamble to the Shipyard standards, the Secretary set forth her view of a proper training program:

The primary objective of final §1915.12(d) is to ensure that employees will be familiar with the subjects listed under paragraphs (d)(1) through (d)(3). There may be wide variations in the *combinations of classroom and on-the-job training* that may be necessary for different work sites, configurations, and control measures. On the other hand, OSHA shares IBEW's concern that *some employers might try to comply with the standard through simple briefings that impart little knowledge to employees*. In enforcing final revised Subpart B, the Agency will determine whether employees have learned the subject matter addressed by the standard by interviewing employees and reviewing the employer's procedures for dealing with communicating hazard information and ensuring employees have the skills necessary to do their jobs.

59 FR 37816, 37839 (1994)(emphasis added).

The Preamble makes it clear that effective training encompasses a combination of classroom and on-the-job training. However, the evidence demonstrates that Trinity sought to comply with the training standard through the type of “simple briefings that impart little knowledge to employees” that was warned against in the Preamble.

The only thing that Trinity points to that could constitute class room training was the viewing of the orientation video by the decedent and Ms. Griffin’s reading of the safety handbook and the MSDS to the decedent. The evidence demonstrates that neither the training video nor the company safety handbook specifically address the hazards of argon.

Respondent points to the orientation video as an important part of its orientation/training process. The video is titled “Shipyard Safety Orientation.” This video gives an overview of several general safety topics, such as fall protection, confined spaces, chemical hazards and personal protective equipment. At the 27 minute mark (27:00), the video explains how to obtain information about chemicals that may be used by employees. For example, it explains the nature of an MSDS. At 27:30, the video states that you “*will be*” trained on how to read an MSDS. This demonstrates that the video was intended only to make employees aware the basics of an MSDS,

not train them on how to read them. Immediately thereafter it states that if the employee has any questions about a hazardous substance, he should discuss it with his supervisor or safety department.

That the video was intended only as an overview of the hazards to be found in shipyards can be found at time mark 37:14 where the video states that “You are not permitted to work in a confined space or enclosed space until you have received *additional* training.” At 34:48 the video states that, if you feel dizziness or nausea when working in a confined or enclosed space, you should exit the space immediately and report your condition to your supervisor. However, as found in this Court’s earlier decision, the deceased’s supervisor, Mr. Nguyen, who was largely unknowledgeable about the nature and dangers of argon gas, only advised employees who became dizzy after exposure to splash water on their face. (Tr. 130-131, 154).

Finally, the video itself recognizes that it constitutes only the beginning of the necessary training. At 35:20 it states that training does not mean only attending the training sessions, but also learning what is being taught and proving it by taking tests. The video then states that, depending on the job assignment, training might include various topics including hazard communication and confined space entry.

Although Ms. Griffin read the MSDS¹ for argon to the deceased, that document simply points out the hazards in general terms and does not instruct employees on the skills necessary to perform their job in the presence of those hazards. To compensate for the decedent’s difficulty in reading and writing English, Trinity had Ms. Griffin read the handbook and MSDS to him. This material is part of the orientation process and is provided to all employees. However, Ms. Griffin testified that the decedent resented having the material read to him because he had heard it before. (Tr. 579, 581). The decedent’s attitude toward the orientation was hardly an environment conducive to effective training. Also, as noted, Respondent’s safety handbook did not specifically

¹ The Secretary points out that the MSDS introduced at the trial was obtained from the internet and was not the one used by Trinity during its orientation program, (Tr. 591, 593, 586-587), and that Respondent did not introduce the version used during the orientation. However, under 29 C.F.R. §1910.1200(b)(3)(ii), employers shall maintain any MSDS that is “received with incoming shipments of hazardous chemicals.”. While there is no set format for an MSDS, requirements for an MSDS are set forth at 29 C.F.R. §1910.1200(g). For example, an MSDS is required to include the physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity; the health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical. Although the MSDS for argon used by Trinity was not introduced in the record, Respondent was not cited for, and there is no evidence to suggest that its MSDS for argon fell short of OSHA requirements.

address the hazards associated with argon. After the orientation, Ms. Griffin had the deceased sign the “Safety Orientation Checklist.” (Ex. R-2). Although the checklist was signed, none of the items were checked off. Ms. Griffin testified that the items were not checked because the deceased could not read or write. (Tr. 598-599). She failed to explain why he could not check off the items as she read the checklist to him, as she did the various safety documents. In any event, none of the items on the checklist pertained specifically to argon.

An employer's instructions must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them," *O'Brien Concrete Pumping*, 18 BNA OSHC 2059, 2061(No. 98-0471, 2000); *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6 & 7 (No. 90-1106, 1993). Trinity's instructions to the deceased fell short of this standard.

Ms. Griffin admitted that she was not trained about argon and that everything she knew about argon was picked up by being around the shipyard “and watching the video and stuff.” (Tr. 600). She was not a welder, never worked with argon, and had no chemical background. (Tr. 583). She did not know if the decedent would be working with pure argon, or some mixture. (Tr. 592-593). She defined training as taking someone and leading them and admitted that she was not trained to perform training. (Tr. 600). Indeed, she denied that she was training the decedent, but rather characterized her role as “orienting”. (Tr. 600).

Although Trinity was not cited for violating C.F.R. §1915.12(d)(5), this standard requires the employer to certify that the employee was trained. According to the standard, the certification must contain “the employee's name, the name of the certifier, and the date(s) of the certification.” 29 C.F.R. §1915.12(d)(5)(i). In the Preamble the Secretary noted that:

In paragraph (d)(5), OSHA is requiring that the employer certify that the training required by paragraphs (d)(1) through (d)(4) has been accomplished. The rule also lists the information that must be provided on the certification: the employee's name, *the name of the trainer*, and the date or dates of the training.

59 FR at 37839 (emphasis added).

By Ms. Griffin's own admission, during the orientation, the decedent was never instructed by a “trainer.”

Ms. Griffin testified that she told the decedent that if he had any further questions, he should direct them to his supervisor. (Tr. 582). However, the evidence demonstrates that Trinity's supervisors themselves were not sufficiently trained to render on-the-job training. As this Court

discussed at length in its earlier decision, the evidence established that the decedent's supervisor was seriously uninformed about many of the aspects of argon. For example, while the decedent's supervisor recognized that argon could make a person sleepy, he thought the hazard could be alleviated by having the employee splash water on his face. He expressed no awareness that this "sleepiness" was caused by oxygen deprivation, requiring immediate exit from the enclosed space. (Tr. 130-131). Therefore, rather than warn employees of the potential for argon asphyxiation, he testified that he would tell employees to wash up if they became sleepy. (Tr. 154). The supervisor's instructions failed to imbue employees with the sense of urgency necessary for them to protect themselves in the face of potential argon asphyxiation. *See, Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016 (No. 90-2668, 1992). Certainly, a supervisor who is uninformed about the hazards of a substance is in no position to provide effective on-the-job training to his employees. Also, the two employees who entered the vent trunk to rescue the deceased were not wearing airline respirators. (Tr. 372) Respondent's safety officer, John McFarland, explained that they do not have such respirators because there is no area that requires them. (Tr. 372) Again, this demonstrates the general lack of training on the hazards of argon gas and the proper methods of working safely around it.

To establish noncompliance with a training standard, the Secretary must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances. *N & N Contractors, Inc.* 18 BNA OSHC 2121, 2126 (No. 96-0606, 2000); *See El Paso Crane and Rigging Co.*, 16 BNA OSHC at 1424. If the employer rebuts the allegation of a training violation "by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided." *N & N Contractors, Inc.* 18 BNA OSHC at 2126-7; *American Sterilizer Co.*, 18 BNA OSHC 1082, 1086 (No. 91-2494, 1997). The Secretary established that Trinity's "training" of the deceased was deficient. To satisfy its duty to train the decedent Trinity had an untrained administrator, largely uninformed about the hazards of argon, conduct an orientation by showing a video and reading prepared materials that did not specifically address the recognition and avoidance of hazards associated with argon. If the decedent had any questions, he could not be expected to have them answered by the administrator who, by her own admission was not a trainer and whose only knowledge about argon came from being around the shipyard and reading the same

materials provided to the decedent. Rather, he was to take his questions to his supervisor, who himself demonstrated a severely limited knowledge about argon and its potential effects.

While there is nothing that prohibits an employer from conducting training during the orientation process, the orientation must be sufficiently specific to train the employee in the recognition and avoidance of unsafe conditions encountered on the job. *E.g. Danis Shook, Joint Venture XXV*, 19 BNA OSHC 1497, 1500 (No. 98-1192, 2001), *aff'd* 319 F.3d 805 (6th Cir. 2003); *Valley Interior Systems, Inc.* 21 BNA OSHC 2224, 2229 (No. 06-1395, 2007), *aff'd* 288 Fed. Appx. 238 (6th Cir. 2008); *Phillips Getschow Co.*, 20 BNA OSHC 1479, 1481 (No. 02-0529, 2003). The evidence demonstrates that Trinity's efforts fell short of this standard.

Accordingly, Citation 1, Item 1 for a violation of 29 CFR §1915.12(d)(2)(ii) is affirmed.

In assessing penalties, the Commission must give due consideration to the employer's prior history and good faith, the size of the employer's business, and the gravity of the cited violations. Section 17(j) of the Act, 29 U.S.C. §666(j); *S&G Packaging Co.*, 19 BNA OSHC 1503, 1509 (No. 98-1107, 2001). For reasons this Court set forth in the earlier decision, this Court finds that the Secretary properly considered the statutory factors and that the proposed penalty of \$4500 is appropriate.

Items 1 and 3

In its Order of Remand, the Commission directed this Court to reconsider its entire decision in light of the new evidence presented by Trinity's human resources director.

Citation 1, Item 1, as amended alleges that Trinity violated 29 CFR §1915.12(a)(1)(iii) on the grounds that:

The employer did not ensure that the starboard vent trunk space on the TO48 hull was visually inspected and tested by a competent person to determine the atmosphere's oxygen content prior to the employee entering the space. The starboard vent trunk on the TO48 hull contained argon. This condition exposed the employee to an asphyxiation hazard.

Citation 1 Item 3 alleges that Respondent violated 29 CFR §1915.51(f)(1) on the grounds that:

The employer failed to ensure that mechanical ventilation was being used in the enclosed starboard vent trunk on the TO48 hull. This condition exposed the employee to an asphyxiation hazard.

In the corrected decision in this matter, dated February 22, 2011, this Court vacated both

Items 1 and 3. This Court has reconsidered its disposition in light of the new evidence presented in this trial and finds that none of the evidence presented was relevant to either of these two items. Therefore, this Court finds nothing in the record to warrant alteration of that disposition.

ORDER

- Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that
- (1) Citation 1, item 1 for a violation of 29 CFR §1915.12(a)(1)(iii) is **VACATED**;
 - (2) Citation 1, item 2 for a violation of 29 CFR §1915.12(d)(2)(ii) is **AFFIRMED** and a penalty of \$4500 is **ASSESSED**;
 - (3) Citation 1, item 3 for a violation of 29 CFR §1915.51(f)(1) is **VACATED**.

SO ORDERED.

/s/

The Honorable G. Marvin Bober
U.S. OSHRC Judge

Dated: April 2, 2012
Washington, D.C.