United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Trinity Marine Products, Inc., Respondent.	OSHRC Docket No.: **16-0931 & 16-0932**

Appearances:

Thomas J. Motzny, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

McCord Wilson, Esq., Rader & Campbell, P.C.
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

Trinity Marine Products, Inc., (Trinity) operates a barge building facility in Ashland City, Tennessee. In October of 2015, the Occupational Safety and Health Administration inspected Trinity's facility and conducted personnel monitoring for noise and welding fumes. As a result of the inspection, on April 6, 2015, the Secretary issued two citations to Trinity, one alleging violations of OSHA's safety standards (which the Commission later docketed as Docket No. 16-0931) and the other alleging violations of OSHA's health standards (docketed as Docket No. 16-0932). Trinity timely contested the citations. I consolidated the cases by order issued November 18, 2016.

Prior to the hearing in this proceeding, the parties settled all items alleged by the Secretary under Docket No. 16-0931 and all but Items 2a and 2b under Docket No. 16-0932. (*Stipulation of Partial Settlement and Motion to Withdraw Notice of Contest with Regard to Settled Items*).[1]

The remaining items at issue, Item 2a and Item 2b, allege serious violations of 29 C.F.R.

[1] In the attached order, I approve the parties' partial settlement agreement.

§§ 1915.1000(d)(1)(i) and (2)(i), for exposing employees to an accumulation of air contaminants in excess of the exposure limits set out in Subpart Z of OSHA's standards. The Secretary proposes a grouped penalty of $5,000.00 for Items 2a and 2b.

I held a hearing in this matter on August 9 and 10, 2017, in Nashville, Tennessee. The parties filed briefs on October 27, 2017. For the reasons that follow, I **VACATE** Items 2a and 2b. No penalty is assessed.

BACKGROUND

OSHA Compliance Safety and Health Officer (CSHO) James Provins worked at OSHA's Nashville, Tennessee, area office in 2015 (he has since left OSHA for a position in the private sector) (Tr. 15). CSHO Provins stated the Nashville area office has "a listing of federal sites and maritime sites that we're responsible for through the state of Tennessee and Kentucky. The Area Director prepares a list of the sites that we will inspect each year and [Trinity's facility] was one of the ones that was on the list to be inspected for [2015]." (Tr. 18-19) CSHO Provins conducted the health portion of the health and safety inspection. After his first day at the facility in October of 2015, he determined sampling for noise and welding fumes was indicated, and he returned a few days later to conduct the sampling (Tr. 19-20).[2]

The day of the sampling, CSHO Provins calibrated small volume air pumps and placed them on three employees selected by Trinity (Exh. C-1; Tr. 21-22). He explained how the sampling was conducted:

> [The employees] would place the pump on their belt[s], it's got a tube or a hose that the sample media connects to that comes up around their back. And it's attached to the shoulder. In welding processes we try to get it inside the hood so that when the hood comes down it's mimicking or actually sampling their breathing zone issues. And then that's set on the employees for the shift, for the day. And then collected at the end of the day and post-calibrated.

(Tr. 22)

The three employees worked in the "bottoms" area of the facility, shown in Exhibits C-1

[2] There is a discrepancy both within the text of Items 2a and 2b of the Citation (the inspection date is listed as "10/28/15" but each of the four instances listed in the alleged violation descriptions (AVDs) starts "On or about October 25, 2015.") and with the parties' *Joint Prehearing Statement* ("An inspection was conducted on or about October 29, 2015." (p. 3)). CSHO Provins answered, "Yes," to the question, "Did you conduct a work place inspection of Trinity Marine's facility on or about October 25, 2015?"(Tr. 18) OSHA's paperwork for the sampling indicates it took place on October 29, 2015 (Exhs. C-1, C-6, C-7, C-8). It is undisputed OSHA's inspection and sampling were conducted in late October of 2015.

through C-4 (Tr. 27). CSHO Provins sampled the employees for approximately eight hours (Tr. 33). He explained that the eight-hour time period is

> the sampling protocol that was dictated to me by the Salt Lake City laboratory [i.e., OSHA's Salt Lake Technical Center (SLTC),] when I conferred with them on collecting the samples for this particular work task under the sample methodology. The exposure limits established for the different metals for welding is based on an eight-hour work shift. . . .At the end of the day when the employees were done, I basically collected the pumps from them and explained to them what would happen with – the samples at that point would be processed and sent to Salt Lake for analysis. … I took the samples back to the Nashville Area Office where I processed the paperwork into the computer, put tape on the sample cassette itself and then packaged them and shipped them to Salt Lake overnight for analysis.

(Tr. 33-34)

The results from the SLTC of each of the sampled employees showed overexposures to air contaminants listed in Subpart Z (as set out in the instances listed in the AVDs of Items 2a and 2b) (Exhs. C-6, C-7, C-8; Tr. 35-41). Based on these results, CSHO Provins recommended the Secretary issue the Citation alleging violations of OSHA's health standards, docketed as Docket No. 16-0932. Items 2a and 2b of the Citation remain at issue.

JURISDICTION AND COVERAGE

Trinity timely contested the Citation and Notification of Penalty on April 29, 2016. The parties stipulate the Commission has jurisdiction over this action and Trinity is a covered business under the Act (*Joint Prehearing Statement*, p. 4). Based on the stipulations and the record evidence, I find the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Trinity is a covered employer under § 3(5) of the Act.

THE CITATION

Items 2a and 2b: Alleged Serious Violations of § 1915.1000(d)(1)(i) and (2)(i)

Item 2a: 1915.1000(d)(1)(i)

Item 2a of the Citation alleges,

> a) On or about October 25, 2015, at the Trinity Marine facility located at 1050 Trinity Rd, Ashland City, TN, an employee was welding steel plates and was exposed to an 8 hour Time Weighted Average concentration of 11.1140 mg/m3 of zinc oxide which is 2 times the permissible exposure limit of 5 mg/m3. The sample was taken over 462 minutes and zero exposure was assumed for the

remaining 18 minutes.

b) On or about October 25, 2015, at the Trinity Marine facility located at 1050 Trinity Rd, Ashland City, TN, an employee was welding steel plates, in the Bottoms Sections, and was exposed to an 8 hour Time Weighted Average concentration of Particulates Not Otherwise Regulated (Total Dust) at an 8 hour calculated Time Weighted Average (TWA) of 16.9210 milligrams grams per cubic meter of air which is 1.128 times the 8 hour time weighted average PEL of 15.0 milligrams per cubic meter of air.

c) On or about October 25, 2015, at the Trinity Marine facility located at 1050 Trinity Rd, Ashland City, TN, an employee was welding steel plates, in the Bows and sterns Section, and was exposed to an 8 hour Time Weighted Average of Particulates Not Otherwise Regulated (Total Dust) at an 8 hour calculated Time Weighted Average (TWA) of 22.2490 milligrams grams per cubic meter of air which is 1.483 times the 8 hour time weighted average PEL of 15.0 milligrams per cubic meter of air.

Section 1915.1000(d)(1)(i) provides:

The cumulative exposure for an 8-hour work shift shall be computed as follows:

$E = (C_a T_a + C_b T_b + ... C_n T_n) \div 8$

Where:

E is the equivalent exposure for the working shift.

C is the concentration during any period of time T where the concentration remains constant.

T is the duration in hours of the exposure at the concentration C.

The value of E shall not exceed the 8-hour time weighted average specified in subpart Z of 29 CFR part 1915 for the material involved

Item 2b: 1915.1000(d)(2)(i)

Item 2b of the Citation alleges,

On or about October 25, 2015, at the Trinity Marine facility located at 1050 Trinity Rd, Ashland City, TN, an employee was welding and was exposed to an 8 hour Time Weighted Average concentration of 11.1140 mg/m3 of zinc oxide and 0.057 mg/m3 of copper. Inputting these results into the mixture formula gives a value of E(m) greater than 1 indicating overexposure.

Section 1915.1000(d)(2)(i) provides:

In case of a mixture of air contaminants an employer shall compute the equivalent exposure as follows:

$E_m = (C_1 \div L_1 + C_2 \div L_2) + ... (C_n \div L_n)$

Where:

E_m is the equivalent exposure for the mixture.
C is the concentration of a particular contaminant.
L is the exposure limit for that substance specified in subpart Z of 29 CFR part 1915.
The value of E_m shall not exceed unity (1).

DISCUSSION

The Secretary's Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Cited Standard Applies

Section 1915.2(a) defines the scope of § 1915:

> Except where otherwise provided, the provisions of this part shall apply to all ship repairing, shipbuilding and shipbreaking employments and related employments.

Trinity builds barges at its Ashland City facility (*Joint Prehearing Statement*, p. 3). This activity is "shipbuilding employment" and is covered by part 1915. It would appear the cited standards, §§ 1915.1000(d)(1)(i) and (2)(i), apply to the cited conditions.

Trinity argues, however, there is a more specific standard that applies to the cited conditions.

> [Section] 1915.51, titled Ventilation and Protection in Welding, Cutting and Heating, tells employers how to protect their employees from unsafe accumulations of contaminants when welding in a marine environment. It states that Trinity had the choice of protecting its employees from contaminants by either providing mechanical ventilation *or* providing respirators. Trinity's choice of providing respirators to its employees was therefore in complete compliance with this directly applicable standard, and an acceptable method of protecting its employees. This directly applicable standard controls over the hierarchy of controls argument espoused by the Secretary.[3]

[3]Trinity argues the relevant subparagraphs of § 1915.51 are §§1915.51(d)(1) and (f)(1). Section 1915.51(f)(1) provides:

(Trinity's brief, p. 3) (emphasis in original)

While there may be merit to Trinity's argument that § 1915.51 is more specific to the cited conditions than § 1915.1000(d), that argument is an affirmative defense.

> Under Commission precedent, preemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer. 29 C.F.R. § 1910.5(c)(1); *see* Commission Rules 34(b)(3) and(4), 29 C.F.R. § 2200.34(b)(3) and (4); *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004); *Vicon Corp.*, 10 BNA OSHC 1153, 1157, 1981 CCH OSHD ¶ 25,749, p. 32,159 (No. 78-2923,1981) (describing a claim that a general standard was preempted by a more specific standard as an affirmative defense). Here, despite the Secretary's reference in the citation to a lack of specificity and similar testimony elicited at the hearing, Spirit neither raised this issue as a defense in its answer nor sought to amend its answer to add it. Therefore, we find that the argument was waived. *See Gen'l Motors Corp., Chevrolet Motor Div.*, 10 BNA OSHC 1293, 1296-97, 1982 CCH OSHD ¶ 25,872, p.32,361 (No. 76-5344, 1982).

Spirit Aerosystems, Inc., 25 BNA OSHC 1093, 1097, n. 7 (No. 10-1697, 2014).

In its answer, Trinity asserted one affirmative defense, that of unpreventable employee misconduct:

Affirmative Defenses

> The violations alleged in the citation and the Complaint were isolated instances of employee misconduct of which Respondent had no knowledge and which Respondent could not have reasonably foreseen. Respondent reserves the right to amend its answer to include additional defenses, should same be necessary.

(Answer, ¶ II)

Trinity did not subsequently amend its answer to include preemption of the cited standard by a more specific standard, nor did it raise the defense in the *Joint Prehearing Statement* or at the hearing. Accordingly, I find Trinity's argument is waived. Sections 1915.1000(d)(1)(i) and (2)(i) apply to the cited conditions.

The Secretary Failed to Prove the Terms of the Standard Were Violated

Item 2a

The Secretary cited three instances where the sampling of Trinity's employees showed they were overexposed to air contaminants. Instance (a) alleges overexposure to zinc oxide. Instances (b) and (c) allege overexposure to particulates not otherwise regulated (total dust).

Exhibit C-6 is a copy of the test results for the sampling taken from Employee #1. It

shows he was exposed to an eight-hour TWA concentration of 11.1140 mg/m³ of zinc oxide, which is two times the PEL of 5 mg/m³. Exhibit C-7 is a copy of the test results for the sampling taken from Employee #2. It shows he was exposed to an eight-hour TWA concentration of 16.9210 mg/m³ of particulates not otherwise regulated (total dust), which is 1.128 times the PEL of 15 mg/m³. Exhibit C-8 is a copy of the test results for the sampling taken from Employee #3. It shows he was exposed to an eight-hour TWA concentration of 22.2490 mg/m³ of particulates not otherwise regulated (total dust) which is 1.483 times the PEL of 15 mg/m³.

Item 2b

The Secretary cited one instance where the sampling of a Trinity employee showed he was overexposed to zinc oxide and copper. Exhibit C-6 is a copy of the test results for the sampling taken from Employee #1. It shows he was exposed to an eight-hour TWA concentration of 11.1140 mg/m³ of zinc oxide and of 0.057 mg/m³ of copper. When these values are input in the mixture formula, it resulted in a value greater than 1 (Tr. 57).

Paragraph D.6 of the *Joint Prehearing Statement* provides, "Respondent does not contest the chain-of-custody or procedures used by OSHA to analyze the atmospheric sampling done during the inspection at respondent's facility." Trinity does not dispute OSHA's test results show overexposure to the cited contaminants.[4]

The Secretary's Burden to Establish Feasible Means of Compliance

The maritime standards addressing overexposure to air contaminants do not prescribe a

[4] Nor can Trinity contest its employees had access to the cited hazard of overexposure. In their *Statement of Agreed Facts,* the parties stipulated, "One or more of respondent's employees had access to the conditions cited in Citation 1, Items 2(a) and 2(b)." (*Joint Prehearing Statement,* ¶ D.5; Tr. 9-10) Despite this stipulation, Trinity argues in its brief that the Secretary failed to establish employee access the hazard of overexposure to certain contaminants contending the Secretary's "sampling was inadequate because the CSHO did not place the sampling medium inside the welders' welding hoods." Having stipulated to this central fact, Trinity cannot now, post-hearing, deny it agreed its employees had access to the violative condition.

> This Court has accordingly refused to consider a party's argument that contradicted a joint "stipulation [entered] at the outset of th[e] litigation." *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 226, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). …[F]actual stipulations are "formal concessions ... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case." 2 K. Broun, *McCormick on Evidence §* 254, p. 181 (6th ed.2006) (footnote omitted). See also, *e.g., Oscanyan v. Arms Co.,* 103 U.S. 261, 263, 26 L.Ed. 539 (1881) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.").

Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 676–78 (2010).

method of compliance. "[W]here a standard imposes a duty without specifying the means of compliance, the Secretary has the burden of establishing the existence of a specific and technologically feasible means of compliance as an element of his showing that a violation has occurred." *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1333 (6th Cir. 1978). The Secretary takes the position the respiratory protection standard at 29 C.F.R. § 1910.134, made applicable to the maritime industry by 29 C.F.R. § 1915.154, requires an employer to first implement all feasible engineering and administrative controls before using respirators to protect employees who are exposed to air contaminants regulated under § 1915.1000. CSHO Provins testified the respiratory protection being used by the exposed employees was "the type of device that would control that type of exposure." (Tr. 75) He found no fault with the manner in which the respirators were being used by Trinity employees (Tr. 75-76).[5] The gravamen of the Secretary's theory of the violation is Trinity's failure to implement feasible engineering and administrative controls. The evidence presented by the Secretary fails to meet his burden to establish a violation of the cited standard under that theory.

The Secretary called Glenn Lamson as his expert witness on the issue of feasibility of engineering controls. Lamson is an industrial hygienist with OSHA's Health Response Team (Tr. 103-104). Exhibit C-12 is a copy of his expert report.

After visiting the bottoms area of Trinity's facility, Lamson noted fans in the roof and at the end of the building provide general ventilation. There was no local exhaust ventilation (LEV) in the bottoms area. Based on his inspection, Lamson recommended three methods of engineering and administrative controls that could reduce the exposure of Trinity's employees to welding fumes (Tr. 117-118, 121-131). They are local exhaust ventilation, implementation of increased general exhaust ventilation, and rotation of employees.

Technological Feasibility

"A control is technologically feasible if it can be adapted to the employer's operation and is capable of producing a significant reduction in exposure to the particular toxic substance." *GAF Corp.,* 9 BNA OSHC 1451, 1455 (No. 77-1811, 1981).

[5] The Secretary argued there was not "reliable testimony" either way on whether one of the cited welders was wearing respiratory protection. CSHO Provins testified his air sampling worksheet indicated the welder was wearing a respirator and he had testified in deposition all three welders were wearing respiratory protection. He testified at the hearing his field notes were silent on the issue. It is the Secretary's burden to establish non-compliance. To do so, he would have to show the welder was not wearing respiratory protection. In failing to present "reliable testimony" on this issue, the Secretary has not met his burden.

> The Secretary bears the burden of proof in demonstrating the feasibility of administrative and engineering controls "when the compliance remedy is based upon a very general statutory or regulatory command that does not describe for the employer any specific methods for compliance." *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor,* 674 F.2d 1177, 1189 (7th Cir.1982); *Modern Drop Forge Co. v. Sec'y of Labor,* 683 F.2d 1105, 1113 (7th Cir.1982). As the Commission itself has noted, however, "[t]he test of whether administrative and/or engineering controls are technologically feasible is whether the controls are 'achievable' and capable of producing a significant reduction in exposure to air contaminants." *Sec'y of Labor v. G & C Foundry Co.,* 17 O.S.H. Cas. (BNA) 2137, 1997 WL 447196, *4 (Rev. Comm'n 1997). Although a significant reduction is required, it is not necessary to show that the control would achieve full compliance. *Id.* "The Secretary need not [ ] propose or prove the feasibility of a detailed abatement program. [She] need only show that some controls are feasible in an employer's plant." *Sec'y of Labor v. Great Falls Tribune Co.,* 5 O.S.H. Cas. (BNA) 1443, 1977 WL 8017, *3–4 (Rev. Comm'n 1977) (internal citation omitted). There is no magic percentage of reduction that is required; all that is required is that the administrative or engineering control be systemic—so that, unlike with respirators, an individual employee's mistake cannot eviscerate her protection—and that it produce a significant reduction in silica.

Chao v. Gunite Corp., 442 F.3d 550, 557 (7th Cir. 2006).

While there is no "magic percentage of reduction" required, it is still the Secretary's burden to demonstrate a significant reduction would result. Here, the Secretary failed to address this element of his burden. Lamson did not quantify any reductions that could result from his proposed controls.

> Q.: You didn't do any study or take any measurements or otherwise quantify in any way the reduction in exposure to employees that the LEV systems like you propose would bring, did you?
>
> Lamson: I did not.

(Tr. 191)

In *GAF Corp.,* the Commission vacated a citation for overexposure to airborne silver compounds, based on the Secretary's failure to present evidence his proposed controls would result in a significant reduction in overexposure.

> The record before us fails to indicate whether repair of the ventilation system and implementation of the other measures suggested by the compliance officer would result in a significant reduction in the excessive levels of airborne silver compounds. Because the record is devoid of evidence tending to establish the amount of reduction that could be expected from the controls suggested by the

> compliance officer, we conclude that the Secretary has failed to sustain his burden of proving technological feasibility.

Gaf Corp., 9 BNA OSHC at 1455.

The Secretary has similarly failed to present evidence establishing the amount of reduction to airborne contaminants that could be expected in this case. I find the Secretary has failed to meet his burden of proof on the issue technological feasibility of either engineering or administrative controls.

Economic Feasibility

The Court of Appeals for the Sixth Circuit, to which this case may be appealed, has held that, while there is no "rigid formula" by which economic feasibility is analyzed, the Secretary must "weigh the costs of compliance against the benefits expected to be achieved" by proposed engineering and administrative controls.

> [T[he benefits to employees should weigh heavier on the scale than the costs to employers. Controls will not necessarily be economically infeasible merely because they are expensive. But neither will controls necessarily be economically feasible merely because the employer can easily (or otherwise) afford them. In order to justify the expenditure, there must be a reasonable assurance that there will be an appreciable and corresponding improvement in working conditions. The determination of how the cost-benefit balance tips in any given case must necessarily be made on an ad hoc basis. We do not today prescribe any rigid formula for conducting such analysis. We only insist that the Secretary, and the OSHRC on review, weigh the costs of compliance against the benefits expected to be achieved thereby in order to determine whether the proposed remedy is economically feasible.

RMI Co. v. Sec'y of Labor, U. S. Dep't of Labor, 594 F.2d 566, 572–73 (6th Cir. 1979).

Here, the Secretary failed to conduct even a rudimentary analysis of the economic burden of the proposed engineering and administrative controls.

Lamson conceded he did not consider economic feasibility when proposing his engineering and administrative controls.

> Q.: In considering feasibility you did not take into account how many extra employees Trinity would have to hire in order to implement a solution, did you?
>
> Lamson: No.
>
> Q.: You didn't consider the extra time it might take to build a barge if one of your

solutions was implemented, did you?

Lamson: No.

Q.: Again, when you say something is feasible you're not saying it's economically feasible, are you?

Lamson: That is correct.

(Tr. 164-165)

Q.: You didn't consider the economic impact to Trinity of such a program when you said it was feasible, did you?

Lamson: No, I'm looking at feasible controls, not -- no, I did not.

Q.: So when you said that the job rotation program is feasible at Trinity, you do not mean that it was economically feasible, do you?

Lamson: I don't have the information to answer that.

Q.: All right, so you can't say that it was economically feasible, correct?

Lamson: No, I'm not an economist.

. . .

Q.: You cannot say that a job rotation program at Trinity would be economically feasible, can you?

Lamson: No.

(Tr. 149-150)

I find the Secretary failed to establish his proposed engineering and administrative controls are economically feasible.

The Secretary presented no evidence establishing the respirators used by Trinity employees were inadequate to protect them from the air contaminants to which they were exposed. To the contrary, CSHO Provins testified the respirators were adequate. Nothing in the language of the cited standards prohibits an employer from using respirators to meet its compliance obligation.[6] The Secretary has failed to meet his burden to establish Trinity did not

[6] Although other standards addressing exposure to air contaminants specify exposure levels are without regard to personal protective equipment (*see, e.g.,* 29 C.F.R. §§ 1910.1025(d)(1)(i); 1910.1027(a); 1910.28(b); and 1926.62(d)(ii)), the cited standards do not.

protect its employees from the cited air contaminants.

Trinity Did Not Have Knowledge of the Violative Condition

Had the Secretary successfully established Trinity was in violation of the cited standards, I would, nevertheless, vacate the citations because he failed to establish Trinity had knowledge of the violative conditions. In its brief, the Secretary relies solely on general statements made by CSHO Provins to establish Trinity knew of the violative conditions to which its employees were exposed.

> Basically these employees are employed by Trinity, they are given their work tasks to do the welding, Trinity provides -- purchases and provides the materials to fabricate the barges and oversees the work tasks that are being done.

(Tr. 55)

> [Trinity] had done previous monitoring. They are in and out of the job site through the course of the work day or work week. They know that the employees are doing these work tasks. And that this material is being produced and employees are exposed to them.

(Tr. 57-58)

This is not a particularly persuasive argument. Although Trinity was aware of the existence of the cited air contaminants at its facility, the Secretary presented no evidence Trinity had actual knowledge its employees were exposed to the cited air contaminants at levels that exceeded the permissible exposure limits. Nor did the Secretary show Trinity failed to exercise reasonable diligence such that it should have known of the violative condition.

> In cases involving employee exposure to air contaminants, the Commission has held:
>
> If an employer knows that a regulated air contaminant is present in its facility, reasonable diligence requires that it measure the amount of the contaminant to determine whether it is present in an excessive amount. *See North American Rockwell Corp.,* [2 BNA OSHC 1710 (Nos. 2692 & 2875, 1975)]. When the Secretary alleges that the contaminant is present in excessive amounts, but the employer shows that it had made measurements and determined that the concentration was not excessive, the burden is on the Secretary to show that the employer's failure to discover the excessive concentration resulted from a failure to exercise reasonable diligence.

General Electric Co., 9 BNA OSHC 1722, 1728 (No. 13732, 1981); *see also Milliken & Co*., 14 BNA OSHC 2079, 2083 (No. 84-767, 1991).

Trinity provided evidence of its sampling history and absence of any test results over the past decade showing overexposure to air contaminants. Michael Stripe is Trinity's vice-president of safety (Tr. 298). He testified Trinity had hired ESIS, "a third party consulting group," to perform "industrial hygiene work" for the company (Tr. 299). That has included, for the past ten years, "probably ten industrial hygiene surveys throughout" the Ashland City facility (Tr. 300). ESIS conducts sampling for overexposure to air contaminants, including in the bottoms area at issue (Tr. 301). Stripe receives copies of all the test results from ESIS. He has never seen a report showing contaminant exposure above the PEL for a welder at Trinity (Tr. 302). The Secretary presented no evidence to rebut this testimony.

Here, Trinity hired a third party consultant to monitor air contaminant exposure in the bottoms area. Trinity provides welders with respirators and requires the welders to use them (Tr. 243, 258-59, 303).[7] Trinity has a written respiratory protection program (Tr. 63). Trinity's actions demonstrate it inspected the work area, anticipated hazards to which employees may be exposed, and took measures to prevent the exposure. Trinity exercised reasonable diligence with regard to the exposure of its welders to air contaminants.

I find the Secretary failed to establish Trinity had either actual or constructive knowledge of the violative condition.

Having failed to prove either that Trinity was not in compliance with the cited standards or had knowledge of the alleged violative conditions, the Secretary has failed to establish Trinity violated the cited standards. Items 2a and 2b are vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

1. The parties' *Stipulation of Partial Settlement and Motion to Withdraw Notice of*

[7] CSHO Provins testified employees he interviewed told him wearing respirators was not mandatory (Tr. 63-64). I do not credit this testimony. CSHO Provins was no longer working for OSHA at the time of the hearing. His memory of the inspection he conducted almost two years before appeared hazy. He initially testified the three employees he sampled were not wearing respirators at the time of the sampling. After being confronted with which deposition and the air sampling worksheets he had filled out, he changed his testimony (Exhs. C-6, C-7, C-8; Tr. 71-75).

Contest with Regard to Settled Items is approved, and

2. Items 2a and 2b of Citation No. 1, Docket No. 16-0932, are **VACATED**, and no penalty is assessed.

SO ORDERED.

/s/

Judge Heather A. Joys
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Date: January 16, 2018