

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

TRINITY INDUSTRIES, INC. -- PLANT 22, and its
successors,

Respondent.

OSHR DOCKET NO. 99-1110

APPEARANCES:

For the Complainant:

Suzanne Dunne, Esq., Sheryl Vieyra, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Robert E. Rader, Jr., Esq., Rader, Campbell, Fisher & Pyke, Dallas, Texas

Before: Administrative Law Judge: James H. Barkley

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. -- Plant 22, and its successors (Trinity), at all times relevant to this action maintained a place of business at 1000 NE 28th St., Fort Worth, Texas, where it was engaged in constructing tanks from steel plate (Tr. 179). Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

After a fatality accident was reported in February 1999, the Occupational Safety and Health Administration (OSHA) initiated an inspection of Trinity's Plant 22 work site (Tr. 47-48). As a result of that inspection, Trinity was issued citations alleging 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 May 17, 2000, a hearing was held in Arlington, Texas. The parties have submitted briefs on the items at issue, and this matter is ready for disposition.

FACTS

Trinity manufactures steel tanks, rolling and welding steel plates into rings, which are then welded together and fitted with a head (Tr. 84-85,179-80). During his inspection of Trinity's Plant 22, CO Benito Soto Mercado observed and photographed partially completed tanks stored outside the girth welding station (Tr. 50; Exh. C-1 through C-14). Mercado testified that employees, including production foreman David Perez (Tr. 179), told him that production frequently backs up; partially finished tanks awaiting the next step in the manufacturing process are stored on the workroom floor for an indeterminate period (Tr. 66). Ernest Moreno, an outside girth welder with Trinity (Tr. 117), testified that the tanks could be on the workroom floor for between half a day to a day (Tr. 131). CO Mercado stated that he understood the tanks could be placed on the workroom floor for as little as half a day up to a week (Tr. 80).

The tanks are placed nose to end in rows, each approximately 7 to 12 inches behind the other (Tr. 62, 64-65, 188; Exh. C-4 through C-14). Moreno testified that Trinity did not have any rules about the spacing between the tanks (Tr. 120; *see also* testimony of Jim Stewart, Tr. 219). Moreno stated that the tanks are often placed so close together that you cannot walk through them (Tr. 121, 124, 132). Moreno testified that in early February he complained to his supervisor, David Perez, and to LeRoy Harper, who was in charge of safety meetings, that the workroom floor was dangerous when the tanks were too crowded (Tr. 129-30). Moreno's concern was that the crane operator could not see other employees on the floor (Tr. 129). Moreno was not worried about the tanks rolling off their chocks; it never occurred to him that such a thing could ever happen (Tr. 139-40). Perez testified that when he received complaints, he stopped production in back, allowing the welders in front to catch up and start moving the tanks off the workroom floor (Tr. 189, 195). Perez testified that Trinity did not have a rule addressing the spacing of the tanks on the floor, and did not perceive the complaints about crowding as a safety issue (Tr.189, 197).

The tanks on the workroom floor are "blocked," *i.e.*, or raised off the ground, by placing them on two 4 x 4s, one at the front and one at the rear of the tank (Tr. 67, 73, 90). The tanks are "chocked," or secured, with wedges or blocks of wood placed on top of the 4 x 4s (Tr. 73, 90, 113; Exh. C-1, C-2). Mercado testified that David Perez told him it was company policy to chock the tanks at all four corners, but that it was general practice to chock only one end of the tanks (Tr. 74, 78). Luis Gonzales, the welding lead man (Tr. 170), confirmed that in approximately 80% of the cases, the tanks are chocked at only one end, despite Trinity's policy (Tr. 74-75, 174; *See also*, testimony of Giver Tovar, Tr. 157-58). At the hearing Perez stated that he was unaware of any company policy requiring the tanks to be chocked at all four corners (Tr. 192).

When the welders are ready to work on a tank, cables are run underneath the tanks (Tr. 62, 67). The tanks are then lifted with an overhead crane and placed on trunnions, or rollers where their seams are welded (Tr. 62, 67, 110-11). CO Mercado testified, and employee Moreno confirmed, that the tanks tend to swing as they are lifted, and frequently bump other tanks on the workroom floor as they are hoisted (Tr. 62, 65, 121-22). Moreno testified that he has often seen chocks fall off when a tank is bumped, though in the more than 20 years he has worked at Trinity prior to February 26, 1999 he had never seen a tank completely dislodged (Tr. 123, 133, 135). Luis Gonzales told Mercado that although the tanks frequently bump into each other, he

had never perceived it as a problem (Tr. 110-11). Gonzales stated that he had never dislodged a chock (Tr. 172-73). He believed the chocking practice was safe; no tank had ever rolled prior to February 26, 1999 (Tr. 110-11, 172-73).¹

Jim Stewart, Trinity's division safety director, testified that Trinity has invited Texas OSHA Consulting Service (OSHCON) to audit Plant 22; OSHCON did not find Trinity's chocking methods deficient (Tr. 211). Stewart further stated that Trinity's Plant 22 has been inspected "wall to wall" by OSHA, as have their five other manufacturing plants (Tr. 214). In no instance has their method of chocking been cited (Tr. 214-15). Finally, Stewart testified that chocking with wooden wedges is standard in the industry (Tr. 215). Stewart stated that it would take 3,000 pounds of force to knock one of their tanks over a 4 x 4 wedge (Tr. 218). Stewart opined that a tank bumping against another during hoisting would not dislodge a properly chocked tank (Tr. 218, 221, 223).

On February 26, 1999, an incomplete tank rolled off its chocks (Tr. 147; Exh. C-3). Gonzales testified that the two tanks involved had been placed on the workroom floor approximately six inches apart, and had been there since the night before (Tr. 171-72). Moreno testified that the tank that rolled was chocked with two blocks in front (Tr. 147). Perez stated that the tank had three wedges (Tr. 192-93). The tank had an open back end, and the tank behind already had a head on it (Tr. 147). When the rear tank was hoisted, the head of the rear tank briefly caught the open end of the forward tank and lifted it up, dislodging a chock and causing the tank to roll (Tr. 147).

CO Mercado stated that the proximity of the tanks increased the probability that a tank in storage would be struck by a tank being moved, and dislodged from its chocks (Tr. 80-82, 101). Mercado stated that he would have cited Trinity even if the company policy of using four chocks had been the usual or even uniform practice (Tr. 95, 114). Mercado stated that chocking the tanks was unsafe where, as here, the tanks were stored in close proximity and could be struck by other tanks being hoisted by crane (Tr. 95-96, 114). Mercado stated that the use of a cradle system, in lieu of chocks would abate the problem (Tr. 97, 99). Mercado admitted that the probability of a chocked tank rolling was relatively low (Tr. 92).

Alleged Violation of §1910.176(a)

Serious citation 1, item 1 alleges:

29 CFR 1910.176(a): The work room floor of the Outside Girth Welding Station located in Bay One of Trinity Industries Plant #22 was not marked as to provide sufficient safe clearances between stored rail-car tanks where mechanical handling equipment was used.

The cited standard provides:

(a) *Use of mechanical equipment.* Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no

¹ Giver Tovar, a repair welder with Trinity (Tr. 152), testified that he had seen a tank roll off the trunnions, and from the outside girth (Tr. 164), but never on the workroom floor.

obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

Discussion

As a threshold matter, in order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that the cited standard applies. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The Secretary maintains that the cited standard is applicable because Trinity used mechanical overhead cranes for material handling, and because employees worked around the tanks (Secretary's Post Hearing Brief, p. 2). The plain language of the cited standard, however, as well as this judge's examination of the cases arising under the cited standard, makes it clear that §1910.176(a) is intended to ensure that aisles used for moving materials be of sufficient size that material handling equipment, such as forklifts, be able to turn, and that passageways used for moving materials be clear of obstructions.

As CO Moreno stated at the hearing, the clearance between stored tanks in citation 1, item 1, reproduced above, refers to the 7 to 12 inches between the end of one tank and the front of the tank stored behind it. That space was never intended as an aisle or passageway, either for employees (Tr. 121), or to accommodate material handling equipment. The Secretary has failed to show, by a preponderance of the evidence, that the cited standard is applicable to the cited conditions, and the citation is, therefore, vacated.

Alleged Violation of §1910.176(b)

Serious citation 1, item 2 alleges:

29 CFR 1910.176(b): Manufactured rail-car tanks located on the workroom floor of the outside girth welding station were not adequately secured or interlocked to prevent rolling or movement.

The cited standard provides:

(b) *Secure storage*. Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

Discussion

As noted above, in order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that the cited standard applies. In addition, the Secretary must prove that the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Walker Towing Corp., supra*.

Applicability. Mercado opined that so long as the tank was on the floor, waiting, without any work being performed on it, it was “in storage” for purposes of the cited standard (Tr. 87, 89). It is noted that the interpretation of a standard by the promulgating agency is controlling unless “clearly erroneous or inconsistent with the regulation itself.” *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). See; *Nooter Construction Co.*, 16 BNA OSHC 1572, 1994 CCH OSHD ¶29,729 (No. 91-237, 1994). The Supreme Court has held that, when embodied in a citation, the Secretary's litigating position before the Commission is an exercise of her delegated lawmaking powers and so is entitled to deference. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991).

The record establishes that the cited tanks were neither in use, nor being manufactured during the time they were placed on the workroom floor. The tanks were being held for future manufacturing steps. In this context, the tanks were in “storage.” This judge finds the standard applicable, in that the Secretary’s interpretation of “storage” is neither clearly erroneous nor inconsistent with the purpose of the regulation.

Knowledge. In general the employer's lack of knowledge is a defense to an established violation only when the employer was unaware of the conditions in their workplace. *Ormet*, 14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (85-531, 1991). Most occupational safety and health standards, however, include requirements or prohibitions that by their terms must be observed whenever specified conditions, practices or procedures are encountered. These standards are predicated on the existence of a hazard when their terms are not met. With those standards the Secretary is not required to prove that noncompliance with these standards creates a known hazard in order to establish a violation. *Austin Bridge Company*, 7 BNA OSHC 1761, 1979 CCH OSHD ¶23,935 (76-93, 1979). Other standards promulgated by the Secretary, such as the standard at issue in this item, contain only general requirements that “hazards” related to a given activity be avoided. With those standards, a violation is established only when the employer has actual knowledge of a hazard, or when a “reasonable person” familiar with the situation, including any facts unique to the particular industry, would recognize a hazard warranting the abatement measures prescribed by the Secretary in her citation. See; *Armour Food Co.*, 14 BNA OSHC 1817, 1987-90 CCH OSHD ¶29,088 (No. 86-247, 1990).

It is clear, in retrospect, that Trinity’s method of storing the tanks on the workroom floor did pose a hazard to employees. The tanks were stored so closely together that they frequently bumped into one another when being moved with the overhead crane. Trinity’s method of chocking the tanks with blocks or wedges of wood proved inadequate when a tank head lifted the incomplete tank in front of it, dislodging the tank from its chocks, and causing it to roll. Nonetheless, though there was ample

evidence of tanks being bumped by other tanks being hoisted with the overhead crane, the Secretary failed to introduce evidence of a single prior instance of a tank being knocked off its chocks.² None of the Trinity employees testifying anticipated that a tank in storage could be knocked off its chocks. Trinity's safety consultant did not notify them that their chocking method was deficient, and Trinity was never cited for its chocking method though OSHA has conducted wall to wall inspections of their tank manufacturing plants. Finally, Trinity's division safety director testified, without contradiction, that Trinity's method of chocking was standard in the industry.

The Commission has specifically noted that in the Fifth Circuit, where this case arises, an employer cannot be required to implement protective measures in excess of those that are customary in that industry, unless the Secretary introduces evidence of actual knowledge of a hazard which could be abated by the safety measures, *i.e.* the cradle system, suggested by the Secretary. *Con Agra Flour Milling Co.*, 16 OSHC 1137, 1142, fn 3., 1993 CCH OSHD ¶30,045 (No. 88-1250, 1993); *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1991-93 CCH OSHD ¶29,770 (No. 90-998, 1992).

The Secretary failed to carry its *prima facie* burden, and the citation must be vacated. This judge notes, however, that the accident which gave rise to the citation in the above captioned matter provides Trinity with the actual knowledge required by Commission precedent. Trinity is now on notice that chocking does not eliminate the rolling hazard posed by tanks stored on its workroom floor. Trinity is expected to implement abatement measures as necessary to eliminate the described hazard.

ORDER

1. Citation 1, item 1, alleging violation of §1926.176(a) is VACATED.
2. Citation 1, item 2, alleging violation of §1926.176(b) is VACATED.

/s/

James H. Barkley
Judge, OSHRC

Dated: July 24, 2000

² At the hearing, much was made of Trinity's failure to have a policy specifying the number of chocks necessary to secure a tank (Secretary's Post Hearing Brief, p. 7). However, CO Mercado stated that he and Trinity's safety director determined that the appropriate abatement of the rolling hazard was a cradle system, and that he would have cited Trinity no matter how many chocks had been used (Tr. 95, 114). The number and/or type of chocks used, therefore, appears to be irrelevant.