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

Secretary of Labor, Complainant, v. Trinity Marine Products, Inc., Respondent.	OSHRC Docket No. **05-0302**

Appearances:

Tina Campos, Esq., and Michael D. Schoen, Esq., U. S. Department of Labor,
Office of the Solicitor, Dallas, Texas
For Complainant

Robert Rader, Jr., and McCord Wilson, Esq., Rader & Campbell, Dallas, Texas
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Trinity Marine Products, Inc. (a division of Trinity Industries), operates a barge-building facility in Madisonville, Louisiana. On February 3, 2005, the Secretary issued two citations to Trinity following a disputed inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officers Robert Harrington and Steve DeVine. Previously, Trinity had denied entry to the compliance officers. Trinity allowed the inspection on December 8 and 9, 2004, only after OSHA procured a search warrant and the United States Marshals Service enforced it.

Citation no. 1 alleges five serious violations of the Occupational Safety and Health Act of 1970 (Act). Item 1 alleges a violation of § 1910.184(i)(9)(iii) for failing to remove a damaged sling from service. Item 2 alleges a violation of § 1910.212(a)(1) for failing to guard mechanical and hydraulic press brakes. Item 3 alleges a violation of § 1910.215(b)(9) for failing to properly adjust the tongue guards of two grinder wheels. Item 4 alleges a violation of § 1910.303(b)(2) for improperly using a junction box as an extension cord receptacle. Item 5 alleges a violation of § 1915.112(c)(2) for failure to inspect chains and chain slings on a quarterly basis.

Citation no. 2 alleges three "other than serious" violations of the Act. Item 1 alleges a violation of § 1910.178(q)(i) for permitting the operation of an industrial truck without markings on the control levers. Item 2 alleges a violation of § 1910.179(g)(1)(iv) for failing to properly support a pendant control box. Item 3 alleges a violation of § 1910.303(f) for failing to label the disconnecting means of equipment at an electrical panel box.

The undersigned held a hearing in this matter on August 23 through 25, 2005, in New Orleans, Louisiana. The parties have filed post-hearing briefs. Prior to the hearing, Trinity filed a motion for summary judgment, on which ruling was deferred. Post-hearing, Trinity reiterates the arguments set out in its motion, claiming that the manner in which OSHA secured the warrant and conducted the inspection violated Trinity's Fourth and Fifth Amendment rights. Trinity also contests all items of the citations and the proposed penalties.

For the reasons more fully explained below, the motion for summary judgment is denied; items 3, 4, and 5 of citation no. 1, and items 1and 3 of citation no. 2 are affirmed; and items1and 2 of citation no. 1, and item 2 of citation no. 2 are vacated.

Facts

Trinity's barge-building facility covers 200 acres in Madisonville, Louisiana. Most of the production work, however, takes place in a fifty-acre area. Trinity's facility comprises four production shops, one pipe shop, and one maintenance shop. Trinity employed about 275 production workers at the facility in late 2004.

OSHA compliance officers Harrington and DeVine first arrived at Trinity's facility around 8:00 a.m. on October 21, 2004, where they met with plant manager Wilton Carlan, the highest ranking management official on site. The compliance officers informed Carlan they were there to conduct an inspection under the Local Emphasis Program (LEP) for the shipbuilding and repair industry within the jurisdiction of OSHA's Baton Rouge Area Office. Trinity's regional safety manager Malcolm Fontenette was infrequently at the plant and was not there that day. Carlan reached Fontenette by telephone. Fontenette asked the compliance officers to come back the next day when he could be at the facility. The compliance officers declined the request, explaining that this would constitute prior notice of an inspection, something they were prohibited from giving. Fontennete was put in touch with Harrington and DeVine's supervisor, OSHA's assistant area

director David Doucet. Following their conversation, Fontenette called Carlan at Trinity, and his call was placed on a speaker phone for the compliance officers to hear. Fontenette informed the compliance officers that Trinity was denying them entry. The compliance officers contacted Doucet, who instructed them to return to the OSHA office. With the assistance of the Secretary's attorneys, Doucet began processing the paperwork necessary to obtain a warrant. Following established procedures, OSHA presented the warrant package to the Office of the United States Attorney. On November 29, 2004, Assistant United States Attorney (AUSA) Fred Hinrichs, accompanied by Harrington, presented the warrant request to United States Magistrate Judge Louis Moore, Jr., on behalf of the Department of Labor. The probable cause stated for the warrant was the LEP conducted in OSHA's Baton Rouge area office. Judge Moore signed the warrant on November 30, 2004, and ordered OSHA to conduct an inspection within 10 days under the parameters set forth in the warrant (Tr. 133-137).

On December 8, 2004, Harrington and DeVine returned to Trinity's Madisonville facility to serve the warrant. They again met with plant manager Carlan, who took them to the conference room where they also spoke with Trinity safety manager Thomas Vallee and assistant safety manager Rick Badon.

Harrington presented Carlan with a copy of the warrant. Carlan stated he had instructions to fax a copy of the warrant to Trinity's legal counsel. The compliance officers were asked if they had copies of the warrant's supporting documentation. They replied they did not. Harrington called Doucet, who told Harrington it was not their office's policy to provide supporting documentation. Vallee then told the compliance officers they would not be allowed to conduct the inspection without providing the supporting documentation.

Harrington telephoned AUSA Hinrichs to inform him what had happened. Hinrichs called Trinity's counsel Robert Rader and discussed the warrant issue with him, advising that the U. S. Marshals could be called in. Rader countered that the proper procedure to enforce a warrant was to commence a civil contempt proceeding, not to call the U.S. Marshals. In the meantime, Doucet told Harrington and DeVine to leave the facility but to stay in the area and await further instructions (Tr. 137-141).

Sometime later, a U.S. Marshal telephoned Harrington on his cell phone. They agreed to meet between noon and 1:00 p.m. near Trinity's facility. Harrington and DeVine met three U.S. Marshals, who instructed them where to park, to follow the Marshals into the facility, and not to speak to anyone while the Marshals handled the situation. When the group entered the facility, one of the Marshals spoke with plant manager Carlan. Eventually, Carlan agreed the compliance officers could conduct the inspection. The Marshals left after giving Harrington a telephone number where they could be reached if need be.

Harrington and DeVine then were directed to a conference room where they met Charles Latiolais, who had just arrived. Latiolais was not currently employed by Trinity, although he was a former safety director for the corporation who agreed to travel to Madisonville. Trinity recruited Latiolais to act as its corporate representative for the OSHA inspection. When the compliance officers asked if they could begin the inspection, Latiolais told them they could not, noting Trinity's lawyers had not had an opportunity to look at the warrant's supporting documentation. Harrington called the cell phone number left to him by the U.S. Marshalls. He explained what had happened. The Marshal asked Harrington to put Latiolalis on the phone. After Latiolais spoke outside on the phone for 10 to 15 minutes, he returned and told the compliance officers they could proceed with the inspection, but it was being conducted under protest. Harrington and DeVine began the inspection, returning the next day to complete it (Tr. 141-154).

Trinity's Motion for Summary Judgement

Trinity claims it is entitled to summary judgment based on three grounds:

1. OSHA conducted its inspection by "excessive force," depriving Trinity of its right to a civil contempt hearing in the United States District Court on the validity of the warrant before the inspection proceeded, thus violating Trinity's due process rights under the Fifth Amendment and OSHA's own guidelines;

2. The warrant obtained by OSHA was not based on adequate probable cause and was overbroad in scope, violating Trinity's Fourth Amendment right to be free from unreasonable searches and seizures; and

3. OSHA violated § 8(a)(2) of the Act, by failing to conduct the inspection "at reasonable times, and within reasonable limits and in a reasonable manner."

As discussed below, Trinity's claims are not well founded.

Use of Force

Trinity argues an administrative search warrant can only be enforced via a civil contempt proceeding, and not by implied physical force, as with a criminal warrant. As the undersigned noted in her April 29, 2005, order denying Trinity's motion to suppress evidence, Trinity is incorrect on this point.

Although a civil contempt proceeding or a hearing on a motion to quash the warrant are possible options, nothing precludes the use of U. S. Marshals to enforce a warrant.

The Fifth Circuit Court of Appeals addressed the use of physical force in the context of an OSHA case involving an administrative search warrant in *Marshall v. Shellcast Corporation,* 592 F. 2d 1369, 1372, footnote 7 (emphasis added):

> We see a search warrant as a full and complete judicial authorization for a search – potentially subject to a presearch attack on constitutional grounds of course, . . . but otherwise binding on the employer who does not consent to the search. *If necessary, physical force is available for the execution of the warrant.*

Trinity cites several cases, claiming each supports its position that an administrative search warrant can only be enforced by a civil contempt proceeding.[1] All those cases involve administrative search warrants, but none of them states that a civil contempt proceeding is the only way to enforce an administrative warrant. The threat of physical force was never at issue, and so was not addressed, in any of Trinity's cited cases. The cited cases are inapposite to the instant situation, and regardless of how Trinity characterizes their holdings, Trinity's reliance on them is misplaced.

Upon being served with an inspection warrant, Trinity believes it may, as its right, elect among many choices other than honoring the warrant. Trinity may require OSHA to wait to inspect until Trinity's designated representative travels to the facility. (Former employee and re-designated representative Latiolais arrived with contrary instructions for OSHA, although the plant manager

[1] The cases cited by Trinity are:
Baldwin Metals Company, Inc. v. Donovan, 642 F. 2d 768 (5th Cir. 1981) (discussion of rule of exhaustion of remedies); *Marshall v. Huffhines Steel Company*, 488 F. Supp 995 (ND Tex, 1981), *aff'd sub nom Donovan v. Huffhines Steel Company*, 645 F. 2d 288 (5th Cir. 1981) (employer refused access despite administrative search warrant; in civil contempt proceeding the court held employer has no available administrative remedy to exhaust prior to inspection actually taking place; discussion of ex parte warrants); *Brock v. Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir. 1985) (employer refused access despite administrative search warrant; in civil contempt proceeding the court found application inadequate and warrant "improvidently issued"); and *In the Matter of Establishment Inspection of Skil Corporation*, 846 F. 2d 1127 (7th Cir. 1988) (order entered in civil contempt proceeding, upholding inspection warrant, was "injunction" for appealability purposes).

agreed with the Marshals to allow OSHA to inspect.) Trinity may require OSHA to wait until it forwards all supporting documents considered by the Magistrate to its counsel and counsel has reviewed them.[2] In Trinity's opinion if the warrant application fails fully to describe its motivation for its initial refusal to OSHA, or if the supporting documents contain an inconsistency such as a reference to a "safety" inspection in one place but "safety and health" inspections in others, Trinity may refuse to honor the warrant.[3] It may present its rationale to the U. S. District Court in an enforcement action, but that action is limited to a civil contempt proceeding. Trinity sees an array of options for itself when served with a warrant, but wishes to stringently restrict the government's attempts to enforce it.

Trinity also contends involvement of the U. S. Marshals violated OSHA's own inspection procedures as set out in its Field Inspection Reference Manual (FIRM) (Exh. C-15). Trinity cites Chapter II (Inspection Procedures), section A.2.c.(8)(b), which provides:

> If the employer refuses to comply or if consent is not clearly given, the CSHO shall not attempt to conduct the inspection but shall leave the premises and contact the Assistant Area Director concerning further action. The CSHO shall make notations (including all witnesses to the refusal or interference) and fully report all relevant facts. Under these circumstances the Area Director shall contact the Regional Solicitor and they shall jointly decide what further action shall be taken.

It is somehow lost on Trinity that compliance officers Harrington and DeVine followed the guidelines set out in the quoted section of the FIRM. They contacted assistant area director Doucet, who told them to leave the premises and await further instructions. The compliance officers did not seek to enter the premises again until they were contacted by the U. S. Marshal, who instructed them to meet near the facility. The compliance officers acted in accord with the guidelines set out in section A.2.c.(8)(b).

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[2] Trinity did not receive the requested supporting warrant application until late on the first day of the inspection. OSHA's Baton Rouge area office did not serve the supporting documents, only the warrant (Tr. 138, 592). Other OSHA area offices provide both the warrant and the application documents. Although a national policy would offer consistency, the undersigned finds no support for the proposition that the warrant application must be presented before a warrant issued by the court is considered valid.

[3] The warrant authorizes a safety and health inspection. The introductory paragraph of the LEP that formed the basis for the warrant refers to safety inspections, but the body of the LEP refers to safety and health inspections and safety and health hazards. The warrant application requests a warrant allowing a safety and health inspection and provides supporting documentation for a safety and health inspection. The scope of the warrant mirrors the scope of the LEP and the warrant application (Exhs. R-2 and R-3).

Further, section A.2.c.(7) of the FIRM, immediately preceding the above quoted section instructs OSHA personnel (Exh. C-15, p. 8):

> **Federal Marshal Assistance.** A U. S. Marshal may accompany the CSHO when the compulsory process is served.

OSHA did not violate its own inspection procedures. The compliance officers proceeded with the inspection in the manner prescribed by the FIRM.

Adequate Probable Cause

Trinity next argues the warrant was not based on probable cause and was overbroad in scope. An employer's Fourth Amendment rights against unreasonable searches and seizures are protected when a warrant shows the employer was selected for an OSHA inspection "on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources." *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 321 (1978). The U. S. Magistrate in this case specifically found OSHA chose Trinity for inspection based on a general administrative plan derived from neutral sources (Exh. R-3).[4] When a magistrate determines probable cause exists, great deference should be paid to that determination. *Illinois v. Gates*, 462 U. S. 213, 236 (1983).

Probable cause is determined solely on the basis of evidence presented to the issuing magistrate. *Sarasota Concrete Company*, 9 BNA OSHC 1608 (No. 78-5264, 1981), *aff'd*, 693 F. 2d 1061 (11th Cir. 1981). In order to invalidate a warrant, the evidence must show an intentional or reckless misrepresentation in the information supporting the finding of probable cause. *Marshall v. Milwaukee Boiler Mfg. Co.*, 626 F. 2d 1339, 1346 (7th Cir. 1980); *U. S. McCarty*, 36 F.3d 1349, 1356 (5th Cir. 1994). The employer may attack the magistrate's probable cause finding only if it carries its burden of showing the Secretary's application contained either deliberate falsehoods or showed reckless disregard for the truth regarding allegations essential to the probable cause finding.

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[4] Trinity argues OSHA must set forth certain information to the magistrate, as in *Brock v. Gretna Machine & Ironworks, Inc.*, 769 F2d 1110, 1113 (5th Cir. 1985). In holding an OSHA search warrant invalid, the court in *Gretna* characterized the information provided by OSHA as only a "simple statement" that the employer was "selected pursuant to a plan" without explanation of the selection. Here, the warrant package included detailed information concerning the selection procedures under the LEP and specific information about Trinity's selection based on Harrington's affidavit. OSHA attached the CPL documents referred to in the affidavit. The CPL documents explained how the industry rank list was compiled, the methodology of the selection of the employer, and the scheduling system used for programmed inspections (Exh. R-2).

Tri-State Steel Constr. Co., Inc., 15 BNA OSHC 1903 (Nos. 89-2611 and 89-2705, 1992). Trinity has failed to identify any material misrepresentation in OSHA's request for a warrant in this case.

Without such representations, the magistrate's determination of probable cause is not within the scope of the Commission's authority. *Brooks Woolen Co.,* 12 BNA OSHC 1233, 1234, footnote 2 (Nos. 79-45 and 79-128, 1985). Similarly, a claim the warrant is overbroad is outside the scope of the Commission's authority. Trinity's arguments the warrant was not based on probable cause and was overbroad in scope are rejected.

Violation of § 8(a)(2) of the Act

Trinity contends the Secretary violated § 8(a)(2)'s requirement to conduct inspections at "reasonable times, and within reasonable limits and in a reasonable manner." Trinity bases this argument on the Secretary's supposed violation of the company's Fourth and Fifth Amendment rights. Because it is determined the Secretary did not violate these Constitutional rights, such violation cannot be used as grounds to find the Secretary in violation of § 8(a)(2).

Without evidence, Trinity speculates that AUSA Hinrichs was the party responsible for sending the U. S. Marshals. Trinity dwells at length on this point in its brief, stating, "Although that 'evidence' [Harrington's declaration that he understood it was the Magistrate who sent the U. S. Marshals] was immaterial to the legality of the inspection by force, the [ALJ] was swayed by that statement, and denied Trinity's Motion to Suppress Evidence" (Trinity brief, p. 10). The actual basis for the undersigned's pre-hearing order was the fact that no case law prohibits the use of physical force to enforce an administrative warrant, but case law supports it.[5]

[5] Trinity also misreads other court orders. Trinity appends an order issued by U. S. Magistrate Judge Jeffrey Manske in *Chao v. Hobbs Bonded Fibers,* Civil No. W-05-185M (W.D. Tex., November. 7, 2005), stating the magistrate held "it is well recognized that when an employer challenges the warrant the Magistrate Judge *must* afford a hearing prior to the inspection" (Trinity's brief, pp. 7-8, emphasis in original). The magistrate's order does not, in fact, hold this. As with other cases cited, that inspection did not go forward once entry was denied, despite the warrant obtained by OSHA. The magistrate quashed the warrant on the grounds that it was based on an employee complaint, which requires a heightened scrutiny that the evidence there failed to meet. Trinity neglects to quote the magistrate's pertinent observation for the instant facts:

> In cases of scheduled, regulatory inspections, magistrate judges need not be especially concerned with the reliability of the evidence presented and the likelihood of a violation before issuing a search warrant. *Marshall v. Horn Seed,* 647 F.2d 96, 100 (10th Cir. 1981). This is because warrant applications under those circumstances are based on "neutral criteria derived from reasonable legislative or administrative standards." *Id.* at 101.

Trinity failed to show OSHA acted in violation of the Constitution, case precedent, the Act, the FIRM, or any binding law, rule, or guideline. OSHA's application for the warrant, its service of the warrant, its officers' return to Trinity's facility accompanied by U. S. Marshals, its conduct of the inspection, and its issuance of the citations were in accord with applicable law.

Trinity's motion for summary judgment is denied.

Citation No. 1

The Secretary alleges Trinity committed serious violations of five of OSHA's standards.

> 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) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Item 1: Alleged Serious Violation of § 1910.184(i)(9)(iii)

The Secretary contends Trinity violated § 1910.184(i)(9)(iii), which provides:

> Synthetic web slings shall be immediately removed from service if any of the following conditions are present: . . .
>
> (iii) Snags, punctures, tears, or cuts.

It is undisputed the cited standard applies to the slings used by Trinity. Shop 4 is Trinity's pipe department, where Trinity fabricates all of the pipes and pipe parts for the facility. Trinity uses slings to lift and move the pipes. Employees in the pipe department use slings several times a day. When Harrington was in Shop 4, he observed a sling lying on top of a welding machine (Tr. 20-21).

Harrington examined the sling and observed an exposed red thread on one of the lifting eyes. Manufacturers weave red threads beneath the surface of the slings to warn when the strength of the sling has become compromised (Tr 72-73). Harrington considered the sling to be available for use (Tr. 72, 80). He testified the sling created a struck-by hazard because it was so worn the eye could fail, and the material or pipe carried by the sling could strike an employee (Tr. 74-75).

Trinity argues the sling was removed from service. Trinity trains its employees to inspect the slings before each use and to set a worn sling aside so the supervisor can take it to the tool room and get a replacement (Tr. 325-326, 329-330, 502-503). The sling at issue was not in use nor, Trinity argues, is there any evidence it had been used in its worn condition (Tr. 198-199, 332,

500-504). Trinity also contends the red thread was not visible until Harrington used a pen to dig into the fabric of the sling to expose the thread (Tr. 16, 390, 431-433, 456, 500, 529-531). Harrington denies he manipulated the thread so as to expose it (Tr. 73).

Based on the record, the undersigned determines the sling was available for use. Pipe department supervisor Tim Fussell testified Trinity's procedure was for employees to inspect slings before use and, if the sling is worn or damaged, to set it aside, and he would take it and show it to Dennis Glass. Glass would then authorize Fussell to get a replacement sling (Tr. 329-330). When asked why the sling in question was found lying on a welding machine, Fussell testified, "Well, the procedure is if they're not using the sling, lay it on the crane or in the box. If I have to change the sling out, they set it off to the side. I'm assuming it was set off for me to look at" (Tr. 331). The standard requires the sling "shall be immediately removed from service." The worn sling was lying on a welding machine in the pipe department, accessible to anyone who chose to use it. Setting it aside is not equivalent to removing it from service.

The Secretary failed to establish, however, that the sling met any of the conditions cited to required its removal from service. The standard requires removal of slings with "snags, punctures, tears, or cuts." Although Trinity's employees understood a visible thread meant the sling is seriously compromised and should not be used, there is no evidence the sling was snagged, punctured, torn, or cut. Deterioration caused by use over time is different from damage caused by a specific event that immediately compromises the strength of the sling. OSHA recognizes this difference. The longshoring standards provide at § 1918.62(g)(2):

> Synthetic web slings shall be removed from service if they exhibit any of the following defects:
> . . .
> (iii) Snags, punctures, tears or cuts;
> . . .
> (vi) Display of visible warning threads or markers designed to indicate excessive wear or damage.

OSHA distinguishes between snags, punctures, tears or cuts on the one hand, and visible warning threads on the other. The Secretary failed to prove the sling was damaged in any of the ways enumerated in the cited standard or that the visible thread should be considered an equivalent. Item 1 is vacated.

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

Section 1910.212(a)(1) 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 alleges two instances where it charges Trinity violated this standard:

> a) Employees were using a Mechanical Press Brake located in Fab Shop 1-A without a guard to protect their body parts from entering the danger zone during machine cycle. This condition exposed the employees to a caught between hazard.
>
> b) Employees were using a Hydraulic Press Break in Fab Shop 1-A without a guard to protect their body parts from entering the danger zone during machine cycle.

The cited standard applies to the press brakes cited in item 2. Section 1910.212(a)(1) requires the Secretary to prove the existence of a hazard. She "must show that employees are in fact exposed to a hazard as a result of the manner in which the machine functions and is operated." *Jefferson Smurfit Corp.,* 15 BNA OSHC 1419, 1421 (No. 89-0553, 1991). 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.

Harrington did not observe either press brake in operation. He based his recommendation to cite this item on an interview he conducted with employee Bobby Houillon, who operates the equipment (Tr. 202).

Trinity uses the mechanical press brake to bend and shape the metal and steel plates that are used in the barges. The operator inserts a metal plate into the press and uses a foot pedal control to bring the top of the press down to bend the metal (Tr. 28). Trinity uses the hydraulic press to form the large pieces of metal plates used for the bottoms and sides of barges. The plates are 10 to 20 feet wide and 30 to 40 feet long (Tr. 33).

When operating the presses, the operators move the foot pedal control behind a yellow line painted on the floor 3 or 4 feet from the press brake. The operator performs a visual check to see that the helper is clear, then steps on the pedal and starts the brake. The mechanical press takes only 3 seconds to descend and rise to complete the cycle. The ram on the hydraulic press descends more

slowly, taking 25 seconds to reach the point of operation. If the operator removes his foot from the pedal, the ram stops immediately and does not complete its cycle (Tr. (Tr. 287-291).

Harrington stated the hazard created by the unguarded press brakes was amputation (Tr. 88). Houillon testified that, in his 3 years at Trinity, he had not seen nor heard of any injuries caused by the unguarded press brakes (Tr. 291-293). Vallee confirmed Trinity had no record of injuries associated with the two press brakes (Tr. 509).

> The occurrence or absence of injuries caused by a machine is probative evidence of whether the machine presents a hazard. If, however, the objective facts concerning the operation of the machine show the presence of a hazard, then the existence of the hazard is not negated by a favorable safety record which an individual employer may have experienced.

A. E. Burgess Leather Company, Inc., 5 BNA OSHC 1096, 1097 (No. 12501, 1977), *aff'd*, 576 F.2d 948 (1st Cir. 1978).

The objective facts established in the record fail to show a hazard of amputation. Trinity trained its employees to operate the pedal control from behind a yellow line, thus removing them from the zone of danger. The operator does a visual check for the helper. Only then does the operator step on the pedal control.

In *Rockwell International Corp.*, 9 BNA OSHC 1092, 1097-1098 (No. 12470, 1980), the Commission held:

> The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury. Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.

The employer is not required to protect against every conceivable injury that could possibly occur during the use of a machine. The Commission has stated regarding another subsection of § 1910.212(a):

> [I]n order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. We emphasize that, as we stated in Rockwell, the inquiry is not simply whether exposure is theoretically possible. Rather, the question is whether employee entry into the zone of danger is reasonably predictable.

Fabricated Metal Products, Inc., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted).

Based on the evidence presented, there is no "operational necessity" requiring employees to be in zone of danger for either press brake. Nor is it reasonably predictable an employee would come close enough to the press brakes' zones of danger while the machines are being operated. The Secretary has failed to establish a hazard exists. Item 2 is vacated.

Item 3: Alleged Serious Violation of § 1910.215(b)(9)

Section 1910.215(b)(9) provides (emphasis added):

> Safety guards of the types described in Subparagraphs (3) and (4) of this paragraph, where the operator stands in front of the opening, shall be constructed so that the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle . . . shall never be exceeded, and *the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch.*

The Dayton 8-inch Bench Grinder located in shop 4 contains two grinding wheels and two tongue guards protecting the wheels (Exh. C-9). Harrington measured the distances between the guards and the two wheels of the bench grinder (Tr. 100). For the left wheel, a 1c inch space existed between the wheel and the guard, and for the right wheel, the space measured 1¼ inches. The standard applies to the Dayton Bench Grinder, and the space between the bench grinding wheels and the tongue guards exceeded ¼ inch. Vallee conceded the tongue guards exceeded the maximum distance allowed by the standard (Tr. 36).

The bench grinder is used primarily to grind drill bits and narrow pipe, as well as grinding other tools and some flatboard (Tr. 341-348, 567-568). Pipe department supervisor Fussell testified it was a simple matter to adjust the tongue guard (Tr. 347): "Loosen two bolts and just move it up in there."

Employees used the grinder several times a week. The bench grinder was available for use at the time of the inspection. Wear on the wheels was incremental. Fussell testified it could have taken a month or two for the wheels to wear down to the distances found at the time of the inspection (Tr. 343).

Harrington testified the improperly adjusted guards created two hazards: a struck-by hazard and a hazard of injury to the fingers of the operator (Tr. 101). The most probable injury is to the

operator's fingers, which could slip onto the wheel through the guard. The fingers could even become stuck under the guard while the wheel turned. The Dayton grinder provides significant torque. Injuries could range from cuts and scrapes up to the grinding off of finger parts. The struck-by hazard is less probable, but as Harrington explained (Tr. 101):

> Due to the distance in between the tongue guard and the grinding wheel, as you are sharpening a tool or getting an object, the fact that since the distance is so great, there's a very small possibility that the object that you're sharpening could actually fall down in between the tongue guard and the grinding tool, thus, causing the grinding wheel to shatter, or you could have your fingers shoved into it as the piece fell into the grinding wheel.

The improperly adjusted tongue guards were in plain view in Shop 4 (Exh. C-9). Trinity's safety department inspects grinders and the guarding on grinders as part of its daily safety audit (Tr. 57).

Trinity argues the Secretary failed to prove the grinder was operated while the tongue guards were out of adjustment. Jason Raiford testified he used the bench grinder once or twice a week and that he had never adjusted the tongue guard (Tr. 568). Fussell testified he had seen an employee use the grinder 10 to 14 days before the OSHA inspection (Tr. 334). Given Fussell's own testimony that it would take one or two months for properly adjusted tongue guards to reach the point they were at during the inspection, the record establishes employees used the grinders with tongue guards improperly spaced.

Trinity contends that, if a violation is found, it is the result of unpreventable employee misconduct on the part of Jason Raiford.[6] This defense is without merit. Neither Raiford nor any other employee was ever reprimanded for using the bench grinder with the guard out of position. Fussell testified the employee he saw using the bench grinder 10 to 14 days before the inspection was Jon Cryer, not Raiford (Tr. 348). Despite Trinity's asserted inspection schedules, no one noticed the tongue guards were out of adjustment for at least a month. In addition, § 1910.215(b)(9) does not

[6] In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

require the tongue guards be adjusted to the proper distance before each use. The standard states the exposure "shall never be exceeded" and the distance between the wheel and the tongue guard "shall never exceed one-fourth inch." This indicates the tongue guard should be adjusted as frequently as after each use, if necessary to close the gap caused by incremental wear on the grinding wheel.

The Secretary established a violation of § 1910.215(b)(9). The injuries likely to result from the operator's contact with the grinding wheel range from minor to loss of parts of fingers. Item 2 is classified as a low gravity serious violation.

Item 4: Alleged Serious Violation of § 1910.303(b)(2)

On August 17, 2005, the Secretary moved to amend item 4 to cite it under § 1910.303(b)(2), rather than § 1910.305(b)(2). According to Harrington, he inadvertently struck the "5" key rather than the "3" key when he was typing the citation (Tr. 278). This generated the language of the wrong standard. The undersigned granted the Secretary's motion to amend on August 18, 2005. Section 1910.303(b)(2) provides:

> Listed or labeled equipment shall be used or installed in accordance with any instructions included in the listing or labeling.

The description of the violation stated in the citation remains the same for both the original and the amended item 4 and reads:

> A flexible cord was wired into a metal junction box and this assembly was being used as a portable electrical extension cord to supply electrical power to a coffee maker in the file room. This condition exposed the employees to an electrical shock.

In the original citation, the Secretary cited item 4 as a violation of § 1910.305(b)(2), which provides:

> Covers and canopies. All pull boxes, junction boxes, and fittings shall be provided with covers approved for the purpose. If metal covers are used they shall be grounded. In completed installations each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

At the hearing, Trinity argued the amendment changed the legal theory of the case and prejudiced the company. The ruling on the motion was reconsidered, but the outcome was not changed (Tr. 106-108). In its post-hearing brief, Trinity again raises the issue of prejudice based on

the amendment. As stated, the description of the violation cited in item 4 did not change. Trinity always had notice of the allegedly hazardous condition. It does not appear to the undersigned that the originally cited standard could be violated by the corresponding specific description stated in the citation. Simply because Trinity may have researched application of the erroneous standard or could no longer argue the standard was inapplicable does not constitute actual prejudice. The amended standard corresponds to the description of the violation, and Trinity was not prejudiced by amending to that standard.

Compliance officer DeVine observed a metal conduit box, also known as a handy box, rigged as an electrical receptacle for an extension cord connected to a coffee maker. The coffee maker and the handy box sat on the top of a metal file cabinet in a storage room (Exh. C-10; Tr. 109-110, 113). The handy box is manufactured to be permanently installed behind a wall where it often is nailed to a wooden member behind a sheet-rock wall. When used as designed, the metal conduit box is stationary and protects the electrical cables within it from being pulled around or exposed to the elements. As Trinity used it, the metal conduit box did not offer those protections, and the metal box itself may more easily become energized. Vallee conceded the handy box should not have been used in this manner, although he did not consider it to be a danger (Tr. 39-40, 109-111). The Secretary has established the terms of the standard were not met.

The maintenance department keeps old maintenance records in the file room. Trinity characterizes the file room as a "low-traffic out-of-the-way file storage room that was not a work area" (Trinity brief, p.39). The coffee pot was in plain sight on the file cabinet. Maintenance supervisor Jerry Schmolke testified he knew employees used a coffee maker in the file room. He testified he was unaware the coffee maker was plugged into the handy box prior to the OSHA inspection. Had he known, he would have directed it to be removed from the handy box and taken to an approved outlet. Schmolke did not inspect the file room as part of his routine safety checks in his department, but he and others passed through the file room every workday through an outside door. The room itself was only 8 feet by 12 feet (Tr. 548). Schmolke knew two of his maintenance employees (Johnny Russell and Robert Vanderhoff) used the coffee maker because he saw them drinking coffee during the winter months (Tr. 352-356). Even if the handy box was behind or to the side of the coffee pot on top of the cabinet, the large black industrial cable (not a commercial-style extension cord) was plugged into an outlet which ran up to the file cabinet (Exh. C-10). The

Secretary established Trinity's employees had access to the violative condition. She further established that with reasonable diligence, Schmolke could have known of the improper receptacle. The Commission in *New York State Electric & Gas Corp.*, 19 BNA OSHC 1227, 1229 (No. 91-2897, 2000), noted:

> [W]here a supervisory employee is in close proximity to a readily apparent safety violation, the supervisor may be charged with constructive knowledge of the violation. *Hamilton Fixture*, 16 BNA OSHC 1073 (No. 88-1720, 1993) *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994). Such knowledge is imputable to the employer and is sufficient to make a prima facie showing of employer knowledge. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Using the make-shift electrical outlet presents the possibility that the metal box or even the metal file cabinet could become energized. The hazard created by Trinity's use of the handy box in this instance is electric shock or burn to employees. Water or coffee spilled on the filing cabinet could aggravate the hazard. Nevertheless, employees were not working from heights, carrying loads, or otherwise involved in work which increased the potential injury if the employee were startled by an electrical shock or burn. The hazard is considered to be "other than serious." The Secretary has established an "other than serious" violation of § 1910.303(b)(2).

Item 5: Alleged Serious Violation of § 1915.112(c)(2)

Section 1915.112(c)(2) provides (emphasis added):

> All sling chains, including end fastenings, shall be given a visual inspection before being used on the job. *A thorough inspection of all chains in use shall be made every 3 months.* Each chain shall bear an indication of the month in which it was thoroughly inspected. The thorough inspection shall include inspection for wear, defective welds, deformation and increase in length or stretch.

The citation alleges, "The various legged alloy steel chain slings located through[o]ut the facility were not inspected and tagged as to indicate the month it was inspected. This condition exposed the employee to a struck by hazard." The shipbuilding standards contain exacting requirements for chains and chain slings used in its industry (§ 1915.112 (c)(c)(1) through (c)(7)). Shipbuilders must thoroughly inspect all chains to determine if those specifications have been met. The time between thorough inspections is set at 3 months.

Trinity's maintenance department thoroughly inspected the chains and chain slings and documented the inspection with the intention of fulfilling the requirements of the standard on an

annual basis, not every three months as required by the shipbuilding standards (Tr. 114-116). Trinity's daily visual inspections of the chains were inadequate to detect the defects specified in the standard (Tr. 42-43).

Trinity used chains and chain slings throughout the facility to move equipment and parts of barges, including from one section of the facility to another (Tr. 115). Employees were exposed on a daily basis to the violative condition (Tr. 45).

Trinity concedes it was in violation of this standard (Trinity's brief, pp. 40-41). It contends, however, that this item should be reclassified as "other than serious," without penalty, because it was a "technical" violation (Trinity brief, p. 41). Trinity asserts the violation created no safety hazard. The Secretary disputes this. Harrington testified the failure to comply with the terms of the standard created a struck-by hazard. If a chain which should have been discovered as defective was not removed from service or repaired, even failure of one link could cause large objects to fall onto employees (Tr. 116-118).

The undersigned agrees. By reducing an inspection schedule by seventy-five percent, Trinity created the risk of serious injury to its employees. The Secretary has established Trinity committed a serious violation of § 1915.112(c)(2).

Citation No. 2

Item 1: Alleged "Other" Violation of § 1910.178(q)(1)

Section 1910.178(q)(1) provides:

> Any power-operated industrial truck not in safe operating condition shall be removed from service. All repairs shall be made by authorized personnel.

The citation alleges:

> The control levers on the Clark Industrial Truck Model CGP 30, Serial Number P365LI-084-9499FB, Company I.D. Number Y3462, which controlled the up and down tilting on the load was not marked as to indicate tilt up and tilt down.

The industrial truck referred to is a forklift Harrington observed in Trinity's shipping and receiving area being operated by employee Travis Miller. The labels marking the up and down controls were missing (Exh. C-11 and C-12; Tr. 119-122).

Trinity does not dispute that the cited standard applies to the forklift at issue, that the controls did not show directions, and that Miller was operating the forklift in this condition. The unmarked

forklift controls were in plain view. Vallee testified it takes several years for factory labels to wear off (Tr. 49-50). He stated that when factory labels wear off of its forklifts, Trinity's policy is to replace them with stick-on labels until it receives new factory labels (Tr. 46, 48-49). Trinity concedes it did not do this here.

Harrington testified the unmarked levers created an unsafe working condition. An operator not trained on that particular kind of forklift would not be certain of the function of the controls. If the operator were to tilt the forks the wrong way, the operator could drop the load, causing injuries (Tr. 120-122).

Miller's usual forklift was out of service. Trinity permits departments to borrow forklifts. Miller works for the warehouse, and the forklift belonged to the maintenance department. Other sizes of industrial trucks are available for material handling, with functions that are not identical. Harrington recommended the alleged violation be classified as "other than serious" because Miller, who operated the forklift during the inspection, was a licensed forklift operator who had been trained on that particular type of forklift (Tr. 47-48, 122-123).

Trinity argues it was not required to remove the forklift from service because Miller was the operator. It contends there is no proof any untrained employee or employees had access to the forklift. This argument is rejected. When the control mechanism for large machinery is unmarked, emergency conditions, temporary confusion of the operator, or a lack of familiarity with the specific equipment could make operating it unsafe. The Secretary is not required to show untrained and unlicensed employees had access to the forklift. The standard requires that a forklift "not in safe operating condition shall be removed from service." Trinity failed to remove the forklift with unmarked control levers from service. Item 1 is affirmed as an "other" violation.

Item 2: Alleged "Other" Violation of § 1910.179(g)(1)(iv)

Section 1910.179(g)(1)(iv) provides (emphasis added):

> Where multiple conductor cable is used with a suspended pushbutton station, the station *must be supported in some satisfactory manner* that will protect the electrical conductors against strain.

Harrington describes the pendant control box (the pushbutton station) of an overhead 10-ton crane which did not have satisfactory strain relief. The pendant control hung from an electrical cable attached to a power supply box at the ceiling level (Exh. C-12). The power cable ran down to the

pendant control buttons at the operator's level. Harrington testified the outer sheathing of the power cord had "pulled away from the strain relief device" at the overhead connection (Tr. 124). The slipped sheathing exposed about 2 to 5 inches of the multicolored internal conductors. Some of the multi-colored internal cables were taut; others were loose. Also running from the top of the control box, and separately supported from the power cable, was a small wire rope (Exh. C-12; Tr. 52, 124-125, 279). The wire rope was screwed into the overhead control box at one end, and ran down and through an opening in the pendant control at the other end (Exh. R-10;[7] Tr. 454). The wire rope served as strain relief.

Trinity argues the terms of the standard are not violated. It contends the separate wire rope, used only for support, adequately suspended the weight of the pushbutton station without strain on the multiple conductor cable. Vallee testified the multicolored wires themselves had not pulled out of the overhead pendant control box; only the outer shield had slipped down (Tr. 62, 455). Since Trinity had a separate support for the power cable running to the pendant control, Vallee considered Trinity complied with the standard. However, the standard requires the support to be "satisfactory" to achieve strain relief, not simply that support be provided. A wire support rope that was pulling away and was too long, for example, would not provide satisfactory strain relief.

Trinity claims the slipped outer shield is a separate issue from the issue of strain on the cable, but some force caused the outer shield to pull away. Latiolais attempted to explain the exposure of the wires visible in Exhibit C-12: "Our operators just through common usage and using it over an extended period of time, a lot of times – and that's something you will inspect for is again to hold the pendant control, and they hold an electrical cable and apply hand pressure that would cause a situation like this"(Tr. 455). That would appear to be the exact reason the standard requires satisfactory strain relief for pendant controls.

Exposure of the internal multiple conductors is strong evidence that the cable has been exposed to strain. However, the photograph of the item taken during the inspection shows only the top of the power cord. It thus cannot be determined whether or to what extent the cable was under strain throughout its length. The Secretary presented insufficient testimony or other evidence that the

[7] Trinity's Exhibit R-10 is a photograph taken shortly before the hearing and was admitted only to illustrate how the cable and wire rope came into the lower pendant control. The photograph does not reflect the tightness of the wire rope or the slack of the electrical cable at the time of OSHA's inspection.

strain relief was unsatisfactory for the suspended push button station. The Secretary failed to establish the terms of the standard were violated. The "other" violation of § 1910.179(g)(1)(iv) is vacated.

Item 3: Alleged "Other" Violation of § 1910.303(f)

Section 1910.303(f) provides (emphasis added):

> Each disconnecting means required by this subpart for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. *Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose,* unless located and arranged so the pupose is evident. These markings shall be of sufficient durability to withstand the environment involved.

The Secretary alleges that inside a 480-volt electrical panel on the west wall of Shop 3, three overcurrent devices (circuit breakers) were not marked to indicate the equipment to which they provided power. Trinity does not dispute § 1910.303(f) applies to the circuit breaker panel, nor does it deny the three circuit breakers were unmarked (Exh. C-14). Trinity denies it had knowledge, either actual or constructive, of the unmarked circuit breakers, and it argues the Secretary failed to establish any employees were exposed to a hazard.

The two witnesses who had personal knowledge of the unmarked circuit breakers gave conflicting accounts of how they were discovered. Compliance officer Harrington testified he was standing at the electrical panel, looking at the unmarked circuit breakers when Trinity welder Elmer Mason walked up to him and asked him if he was going to have the circuit breakers labeled. He informed Harrington the circuit breakers controlled welding machines located in the center of Shop 3 (Tr. 128-129). Mason told Harrington, "I've been trying to get them fixed for a couple of days" (Tr. 280). Mason stated he had told maintenance manager Dennis Glass about the unmarked circuit breakers and had asked him to take care of it (Tr. 131).

At the hearing Mason testified differently. He stated the day he spoke with Harrington was only his second day in that area of the plant. He was trying to turn on a welding machine he wanted to use. In Mason's version, he opened up the electrical panel for the first time when Harrington walked up to him (Tr. 361). When he opened the panel, he saw "some of the switches had numbers and some didn't. I guess the numbers fell off or something" (Tr. 361). Mason's account omits prior knowledge of the unmarked circuit breakers (Tr. 362):

> I'll tell you how it happened. I walked up and opened the switch box up and I'm talking to myself, wondering which machine that would be because some of the numbers were missing. And, I heard somebody say, "What are you doing?
>
> I turned around and I spoke to him, and I said, "I'm looking for the number to the welding machine."
>
> He said, "Let me see." So, he looked and I looked, and we closed the panel box back, and that was it. I couldn't find them.

Mason stated he did not know until that moment the circuit breakers were unmarked, and thus had never mentioned their condition to Glass (Tr. 359-360). Mason appeared to be a gregarious and talkative individual. His statements to Harrington were specific, but perhaps were an embellishment of the basic facts. In any event, it is undisputed when Mason could not start the welder he went to the panel box to see if its circuit was thrown. He could not tell if the welder was controlled by one of the three unmarked circuits.

Vallee agreed that all circuits in all switch boxes should be identified. Trinity has a work rule to that effect (Exh. R-17). When Trinity's attorney asked Vallee why, despite frequent inspections, a circuit breaker could be unlabeled, Vallee replied, "[i]t could be disconnected or deenergized, and in some cases the labels wear off or fall off" (Tr. 526). Vallee explained Trinity used sticky labels rather than a permanent marking, "Because in most areas of the shipyard, there's nothing permanent. Everything moves and changes overnight. So, they often have to reidentify circuits because of moving some machinery. So, a permanent marking would not be feasible" (Tr. 525-526).[8] Based upon Vallee's speculation that a circuit might not be labeled if "disconnected or deenergized," Trinity argues the Secretary failed to prove employee exposure to a hazard. The standard requires each circuit breaker be marked "to indicate its purpose," but if the circuit breakers were de-energized, Trinity posits, they served no purpose, and thus did not require marking.

A circuit is temporarily deenergized at the circuit panel box if the breaker is tripped, and is again energized when the breaker is returned. Being "deenergized" does not affect the need to identify the circuit. It is unclear if Trinity makes a different argument (Trinity brief, p.44). It is understood for a breaker to be "deenenrgized" at the panel box, Trinity would remove the circuit breaker from the panel, disconnect it, tie it off, and then replace the now redundant breaker to the electrical panel. The undersigned cannot credit the implausible scenario based on Vallee's bare

[8] In the subject panel box, however, many of the circuit breakers were permanently marked (Exh. C-14).

testimony. Trinity's maintenance personnel or electricians must identify the circuits controlled by the breakers, and they would be markedly slowed in that process. They could not easily determine which circuit breakers were energized and which deenergized. Further, having circuit breakers in an electrical panel which only appear to be energized, and which are not labeled "deenergized," fails to comply with the standard.

Employees should be able to tell which circuit breakers control the equipment. This is true for maintenance personnel, electricians, as well as for individuals responding to an emergency. Harrington considered the unmarked circuit breakers as an "other than serious" hazard for those using the equipment because if difficulties arose, "all someone would have to do would be to just come over to this electrical panel and start turning off breakers one by one to deenergize the circuit" (Tr. 132).

Trinity had constructive knowledge of the violation. As part of the safety department's daily safety audits, safety personnel conduct spot checks on the electrical panels to ensure they are "alright," including opening the boxes (Tr. 57). Three of the panel boxes were not labeled, or three labels fell off, presumably over time. Even though Vallee never determined what equipment may have been energized by the circuits, he testified that if he had known of the unmarked circuit breakers, "I would have had the maintenance department identify it immediately" (Tr. 526, 552). Trinity had the opportunity to discover the conditions. With the exercise of reasonable diligence, Trinity could have known of the existence of the unmarked circuit breakers.

Trinity asserts the affirmative defense of unpreventable employee misconduct on the part of Mason, arguing he violated the company's written workrule. The "Employee Safety Digest" provides, "Only qualified and authorized persons may service or repair electrical equipment" (Exh. R-12, p .48). The unpreventable employee misconduct defense requires the company to have an established workrule designed to prevent the violation. Trinity's rule prohibiting non-authorized employees from servicing or repairing electrical equipment is not designed to prevent the violation of § 1910.303(f). It is debatable whether merely opening an electrical panel to flip a switch is an attempt to "service or repair electrical equipment." The applicable workrule would relate to marking circuit breakers, and Mason did not violate that workrule. Finally, although Mason testified supervisors Stanley Taylor and Billy Jenkins verbally reprimanded him for opening the panel box, Valle had not realized Mason received the reprimand, and Mason did not realize that shortly before the hearing Valle issued him an oral reprimand concerning that earlier event (Tr. 366, 540). Trinity

failed to establish the employee misconduct defense. The defense having failed, Item 3 is affirmed as "other than serious."

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered, *i.e.*, the nature of the violative condition, whether employees worked in close proximity to the hazard or if it was only accessible, the numbers of employees exposed, the duration of the exposure, etc. The Secretary has devised a formula to calculate uniform proposed penalties that assigns certain percentages discounts to these factors, but that formula is not binding on the Commission. *Roberts Pipeline Constr. Inc.*, 16 BNA OSHC 2029, 2030 (No. 91-2051, 1994).

Trinity contends even if violations are found, no penalty should be assessed. The violations disclosed by the inspection are not life threatening, and some are minor when compared to those usually litigated. Yet, the conditions represented Trinity's failure to abide by specific requirements deemed necessary for a safe workplace. *See Quality Stamping*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994) ("The purpose of a penalty is to achieve a safe workplace").

Trinity employed approximately 275 production workers at its facility, and it is a large corporation. It has a history of previous serious violations of the Act within three years prior to the inspection. Trinity has a satisfactory written safety program and was credited with good faith (Tr. 83).

The gravity of the violation of § 1910.215(b)(9) (item 3) for failing to properly adjust the tongue guards on the bench grinder is moderate. The bench grinder was used regularly, but briefly, about once a week. A penalty of $1,750.00 is assessed. The gravity of the violation of § 1910.303(b)(2) (item 4) is classified as "other," and the gravity is low. A penalty of $100.00 is assessed. The gravity of the violation of § 1915.112(c)(2) (item 5) is moderate. Trinity uses chains and chain slings continually throughout the day and throughout the facility, at times to carry large, heavy parts. A potential failure to detect defects in the chains, which the more frequent inspection schedule may have disclosed, could cause injury to many employees. However, employees inspected the chains and chain slings for obvious defects before use, and made the more detailed inspection annually. A penalty of $1,200 is assessed. The gravity of the violations of §§ 1910.178(q)(i) and

1910.303(f) (items 1 and 3, respectively) of citation no. 2 is low, which is reflected in their classification as "other" violations. No penalty is assessed for these items.

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. Citation no. 1, item 1 is vacated, and no penalty is assessed;
2. Citation no. 1, item 2 is vacated, and no penalty is assessed;
3. Citation no. 1, item 3 is affirmed as serious, and a penalty of $1,750.00 is assessed;
4. Citation no. 1, item 4 is affirmed as "other," and a penalty of $100.00 is assessed;
5. Citation no. 1, item 5 is affirmed as serious, and a penalty of $1,200.00 is assessed;
6. Citation no. 2, item 1 is affirmed as "other," and no penalty is assessed;
7. Citation no. 2, item 2 is vacated, and no penalty is assessed; and
8. Citation no. 2, item 3 is affirmed as "other," and no penalty is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

September 1, 2006