UNITED STATES OF AMERICA
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SECRETARY OF LABOR
Complainant,
v.

TRW, INC.,
Respondent,

UAW, LOCAL 2400,
Authorized Employee
Representative.

OSHRC DOCKET
NO. 92-3102

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 7, 1993. The decision of the Judge will become a final order of the Commission on November 8, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before October 27, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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DOCKET NO. 92-3102

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /skw

Date: October 7, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3102

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

v.

TRW, INC.,
Respondent,

and

UAW, LOCAL 2400,
Authorized Employee
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OSHRC Docket No.: 92-3102

Appearances:

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Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Robert M. Walter, Esquire
Cleveland, Ohio
For Respondent

John Reichbaum
For Authorized Employee
Representative

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On August 26, 1992, the Secretary issued two citations to TRW, Inc. (TRW), alleging violations of the Occupational Safety and Health Act of 1970 (Act). The citations resulted from an inspection conducted on July 28, 1992, by Occupational Safety and Health Administration (OSHA) industrial hygienist Sharon Danann. Prior to the hearing, the parties settled item 1 of the Citation No. 1, which alleged a serious violation of

§ 1910.157(g)(4) (Exhibit J-1; Tr. 6). Still at issue is item 1 of Citation No. 2, which alleges a repeated violation of § 1910.22(a)(2).

THE STANDARD

Section 1910.22(a)(2) provides:

> The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places should be provided where practicable.

THE ALLEGED VIOLATION

Item 1 of Citation No. 2 alleges that TRW violated this standard in two instances:

(a) On July 28, 1992, cutting oil formed puddles on the floor near adjacent machines #34548 and #29808, Dept. 406, Bay G-8.

(b) On July 28, 1992, oil was dripping through the ceiling of the locker room and accumulating on the floor.

BACKGROUND: INSTANCE 1a

Danann inspected TRW's manufacturing plant located at 1455 East 185th Street in Cleveland, Ohio, in response to two employee complaints (Tr. 11-12). TRW manufactures valves and valve train assembly parts. The 185th Street plant consists of a single building covering approximately 18 acres (Tr. 108). After holding an opening conference, Danann conducted a walk-around inspection of the plant accompanied by several of TRW's representatives, as well as two union representatives (Tr. 13-14).

During the walk-around, Danann "saw puddles of coolant from two machines that were adjacent to each other, and . . . a puddle of oil on the locker room floor" (Tr. 14). TRW's maintenance welder, Timothy Mason, later referred to the liquid as grinding lubricant (Tr. 71). Exhibit C-1 is a photograph which shows a 4-foot-by-4-foot puddle of liquid around the base of the steps leading to the operating area of the Cincinnati machine, which grinds valves. An aisleway is about 1 to 1½ feet away to the right of the puddle (Tr. 15-16, 69). Exhibit C-2 shows liquid spilling out from an overflow pan around the base of a Gardener machine, which also grinds valves. The liquid is 2 to 3 feet long and is near a walkway between the machines (Tr. 16, 71). Danann testified that the operator of the machine was exposed to the hazard of slipping and falling in the liquid (Tr. 17-18).

THE VALIDITY OF THE INSPECTION OF INSTANCE 1b

Danann inspected the men's locker room #2 after being told by employees that there was oil on the floor in there (Tr. 18). At the hearing, TRW attempted to show that it had denied Danann permission to inspect the locker room, and that her inspection was thus invalid. Ken Hawley, supervisor of health and safety for TRW, accompanied Danann on the walk-around inspection (Tr. 13-14). He recounted what happened when Danann asked to inspect the locker room (Tr. 129):

> We stopped at the steps of the locker room, and she turned and said, "Can I go up there and look and see what they want to show me?"
>
> And, I said, "You're the investigator, and you know the law."
>
> She said, "If you don't give me permission, I won't go." And, I turned around and walked away from her.

Hawley testified that he intended his actions to indicate that he denied Danann permission to inspect the locker room (Tr. 129). Danann's recollection of the exchange is similar to Hawley's, except that she recalls Hawley shrugging and turning away, not walking away (Tr. 215-216). Danann interpreted Hawley's silence to mean that he granted her permission to inspect the locker room (Tr. 215-217).

Hawley later testified in more detail regarding the incident (Tr. 163-164):

Hawley:	And, I turned around and walked away.
Q.:	Okay.
Hawley:	Walked toward our destination. When I looked back, she was going up the steps.
Q.:	What did you do?
Hawley:	I ran up the stairs after her at that point.
Q.:	And, did you say, "I don't want you to go in there"?
Hawley:	No, I did not.
Q.:	And, you accompanied her while she was there, didn't you? As she said, you saw her take photographs, et cetera. So, you were there all the time during the inspection of that area, weren't you?
Hawley:	Yes, I was.

Danann interpreted Hawley's silence and his turning away in a manner different from what Hawley says he intended. Hawley's silence and his actions were ambiguous. When Danann proceeded with her inspection, however, Hawley failed to tell her that he was denying her permission to enter the locker room.

In Hawley's version of the incident, Danann explicitly said, "If you don't give me permission, I won't go." Not only did Hawley not tell Danann that she did not have his permission, he accompanied her on her inspection of the locker room without objection.

A reasonable person in Hawley's position would have simply said at the outset that he was denying the compliance officer permission to enter the locker room. And, if the compliance officer misunderstood or ignored the denial and proceeded with the inspection, a reasonable person would have stopped her and reiterated the denial. A reasonable person in Danann's position would have interpreted Hawley's accompaniment into the locker room without objection as evidence that its inspection was permitted. Based upon Hawley's own version of the incident, it is concluded that Hawley granted Danann permission to inspect the locker room.

BACKGROUND: INSTANCE 1b

Exhibit C-3 is a photograph of a tile floor at the doorway of the shower room. A patch of oil is visible on the floor (Tr. 19). Exhibit C-4 shows the area of the ceiling above the floor area depicted in C-3 from which the oil was leaking. Danann was informed that the leak was an ongoing problem, which occurred on a day-to-day basis (Tr. 20). Mason testified that the oil leak had been a problem for the fourteen years he had worked at the plant (Tr. 56). The leak originated from a fan room located above the ceiling (Tr. 21-22). During the day shift, 50 to 75 employees would use the locker room (Tr. 72).

INSTANCE 1a

> To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence.

Seibel Modern Manufacturing & Welding Corp., 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

There is no dispute that § 1910.22(a)(2) applies to the circumstances cited in instance 1a. The Secretary has established that the floor in the area of the Gardener and Cincinnati machines was not maintained in a clean and dry condition. Danann testimony, as well as Exhibits C-1 and C-2 demonstrate that puddles of liquid were spilled onto the floor around the two machines.

Larry Rush, TRW's maintenance supervisor testified that "[t]he operators are responsible for cleaning around their machinery, around their equipment, and it gets out of hand where it's a bigger spill than what they can handle with just a mop, then the maintenance people will go back with tanks and everything to help clean it up" (Tr. 179). TRW contends that only the Gardener machine was operating on the day of Danann's inspection (Tr. 112-113, 152). Hawley attempted to establish that the two large puddles of liquid pooled around the two adjacent machines both resulted from the Gardener machine. His explanation, however, was labored and unconvincing (Tr. 114-115, 149-153). Visual observation of Exhibits C-1 and C-2 leads to the conclusion that the two puddles of liquid are the result of two separate spills.

Furthermore, contending that it was the operator's duty to clean up the spill does nothing to relieve TRW of its duty to comply with § 1910.22(a)(2). TRW is not asserting an unpreventable employee misconduct defense, so the failure of the machine's operator to clean up the spill is imputed to TRW. The Secretary has established that the terms of § 1910.22(a)(2) were not met.

The Secretary also established employee access to the spills. The operator of the Gardener machine was exposed to the hazard, as well as anyone who happened to walk in the area of the machines. Exhibit C-1 shows a yellow line to the right of the photograph which marks a main aisleway (Tr. 15-16).

Mason commented on the frequency of use of the aisleway: "It's just a main aisle. It's a thorough fare where they're going to and from their work stations or whatever business, wherever they're going to. It's the main aisle" (Tr. 69-70). This testimony is sufficient to establish employee access to the hazard. Access to the cited hazard exists when employees are in the zone of danger while taking "their normal means of ingress-egress to

their assigned workplaces." *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,886 (No. 86-247, 1990).

The Secretary has also established that TRW could have known of the spills with the exercise of reasonable diligence. The spills were in an open area and were highly visible. The Secretary has proved the violation of § 1910.22(a)(2) with regard to instance 1a.

INSTANCE 1b

TRW argues that § 1910.22(a)(2) does not apply to the locker room cited in instance 1b. The standard refers to floors of "every workroom." TRW contends that the locker room was not a workroom within the meaning of the standard.

"Workroom" is not defined in the standards. The word is unambiguous, however, and is commonly understood as a room where work is done. TRW conceded that work was done in the locker room. Tyrone Drummer, supervisor of the maintenance department, testified (Tr. 198):

> A person on third shift, who we referred to as the matron, came up to each locker room and changed the paper towels and toiletries up there and also soap, and would mop the floor down.
>
> We also had a second shift, an outside firm, who also cleaned -- did the same things as the matron.

Hawley also conceded that the locker room was a work room (Tr. 161):

Q.:	And [the matron and the outside firm] were workers, weren't they?
Hawley:	Yes, they were.
Q.:	And that was their work room, wasn't it?
Hawley:	That was their room to -- the whole plant is their work room. They're janitorial workers.
Q.:	But that was part of their work room, wasn't it?
Hawley:	Yes, I would assume so.
A.:	And, it was part of the work room of the maintenance people who were sent up their to mop up, wasn't it?
Hawley:	Sure.

The Secretary has established that the locker room at issue was a workroom within the meaning of § 1910.22(a)(2). The standard applied to the locker room.[1]

The Secretary also established that the terms of the standard were not met. Danann observed and photographed the oil leak on the locker room floor. Timothy Mason and UAW, Local 2400, president John L. Reichbaum testified that the oil leak was an ongoing problem in the locker room, and the subject of numerous employee complaints (Tr. 56-57, 81).

TRW attempted to minimize the hazard, stating that the oil did not present any significant risk. This argument is without merit. Reichbaum testified that employees complained to him "and they would tell me about how many times people have slipped there and how they always slipped . . ." (Tr. 81). An oil spill does not have to be voluminous in order to pose a serious hazard to people. If a person inadvertently slips on a patch of oil, even if it is a small amount, he or she has a likelihood of falling and injuring himself or herself. The oil on the locker floor was in noncompliance with § 1910.22(a)(2).

The Secretary demonstrated that TRW's employees had access to the hazardous condition (Tr. 72).[2]

TRW also knew of the oil leak problem. During several of the monthly labor council meetings held between the UAW, Local 2400, representatives and TRW representatives, the problem was raised by the union (Tr. 57). Exhibit C-12 is a copy of the labor council's minutes for July 8, 1992. Page 2 of the minutes contains the following report:

> B. Harkness reported that locker room #2 is on a regular maintenance program of every two weeks to solve the oil leaking from the ceiling. T. Mason stated that some employees are still complaining about the situation. B. Harness to follow up.

The Secretary has established that TRW violated § 1910.22(a)(2) with regard to instance 1b.

REPEAT CLASSIFICATION

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[1] In his post-hearing brief, the Secretary moved to amend instance 1b of the citation to allege in the alternative a violation of § 1910.22(a)(1) (Secretary's brief, p. 9). That motion is denied.

[2] Subsequent to the inspection, the locker room was converted into a storage room (Tr. 201).

The Secretary alleged that item 1 of Citation No. 2 was a repeat violation of § 1910.22(a)(2). "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979).

The Secretary introduced Exhibits C-6 through C-11, which documented various previous violations of § 1910.22(a)(2), and the fact that Commission final orders were entered against TRW for the violations. TRW's violation of § 1910.22(a)(2) is classified as a repeat violation.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Based upon the relevant factors, a penalty of $3,400.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is

ORDERED: That the violation of § 1910.22(a)(2) is affirmed as a repeat violation with a penalty of $3,400.00 assessed.

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

Date: September 29, 1993