

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD**

**OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 97-3577  
OSHA INSPECTION NO. 301782736

v.

**ORDER**

TRINITY INDUSTRIES INC, PLANT 4

RESPONDENT.

**DECISION OF THE REVIEW BOARD**

This appeal was heard at or about 10:00 A.M. on the 12th day of March, 1999 in room 2115 of the Dobbs Building located at 430 North Salisbury Street, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, Member and Richard M. Koch, Designated Member of the North Carolina Safety and Health Review Board.

**APPEARANCES**

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

McCord Wilson of Rader, Campbell, Fisher & Pyke, PC, Dallas Texas and Michael C. Lord of Maupin, Taylor & Ellis, P.A. of Raleigh, North Carolina for Respondent.

**ISSUES PRESENTED**

1. Did Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 C.F.R.1910.147(c)(4)(ii) by failing to have machine specific lockout tagout written procedures for the machines in its plant that had more than one single energy source?

**SAFETY STANDARDS AND/OR STATUTES AT ISSUE**

1. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ... unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation".

2. 29 C.F.R.1910.147(c)(4) which provides:

*Energy Control Procedures.* (i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

Note: "Exception:" The employer need not document the required procedure for a particular machine or equipment, when all of the following

elements exist: [1] The machine or equipment has no potential for stored or residual energy or reaccumulation of stored energy after shut down which

could endanger employees: [2] the machine or equipment has a single energy source which can be readily identified and isolated: [3] the isolation and

locking out of that energy source will completely deenergize and deactivate the machine or equipment: [4] the machine or equipment is isolated from

that energy source and locked out during servicing or maintenance: [5] a single lockout device will achieve a locker-out condition: [6] the lockout

device is under the exclusive control of the authorized employee performing the servicing or maintenance: [7] the servicing or maintenance does not

create hazards for other employees; and [8] the employer, in utilizing this exception, has had no accidents involving the unexpected activation or

reenergization of the machine or equipment during servicing or maintenance.</P>

(ii)The procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, the

following:

(A) A specific statement of the intended use of the procedure;

(B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;

(C) Specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them; and

(D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.

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Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby affirms the order of the Hearing Examiner in part and modifies it in part as follows and makes the following Findings of Fact, Conclusions of Law, and Order:

### **FINDINGS OF FACT**

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).
4. The employer (Respondent) Trinity Industries, Inc, Plant 4 is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. From March 12, 1997 through April 15, 1997, Safety Compliance Officer Thomas Connell and Health Compliance Officer Tracy Stankiewicz conducted a general schedule inspection of respondent's plant located at 1549 Vance Street, Rocky Mount, North Carolina.

6. Respondent's plant is located on a site that encompasses 17,000 square feet. The site contains a metal and concrete structure used for construction of various size liquid petroleum tanks (LP tanks). The construction process includes receiving steel plates, cutting them to size, rolling the plates and tack welding the ends together to form the basic shape of the LP tank, placing steel caps on the sides, permanently welding the ends, placing footings on and piping in the tanks, hydro testing them for leaks, preparing them for painting and painting the tanks, drying the tanks and storing and shipping the tanks.

7. At the time of the inspection, respondent employed 15,000 people overall and 75 people at plant #4, which was the site of the inspection.

8. As a result of the inspection, the Safety Compliance Officer issued citations on May 30, 1997, alleging numerous serious and nonserious violations. All of the items in the citations were settled pursuant to a settlement agreement with the exception of Citation 1, Item 4a which alleged two serious violations of 29 C.F.R. 1910.147 (c)(4)(ii) (control of hazardous energy - lockout/tagout) as follows:

29 C.F.R. 1910.147 (c)(4)(ii): The energy control procedures did not clearly and specifically outline the scope purpose, authorization, rules and techniques to be utilized for the control of hazardous energy, including but not limited to Items A-D of this section." The specific instances cited were as follows:

a. no specific lock out tag out procedures for different types of overhead gantry and truck cranes used throughout plant operations.

b. no specific lock out tag out procedures for Cincinnati Shear, steel roller machinery, gas utilization equipment, welding equipment, air utilization equipment and metal press equipment.

9. The proposed penalty for the violations was \$1,375.00.

10. Respondent contested the above enumerated citation and on June 24, 1998, a hearing was held before the honorable Ellen Gelbin, Administrative Law Judge.

11. Respondent denied violating the regulation, however stipulated at the hearing that if it were found to be in violation of this regulation and the violations were determined to be serious, the proposed penalty was reasonable.

12. In its Complaint and Motion to Amend, Complainant more particularly described the violations as a failure to have "specific lockout/tagout procedures for different types of" machinery used throughout plant operations.

13. The Respondent filed a timely appeal of the Hearing Examiner's order and the Board assumed jurisdiction of the case.

14. On March 12, 1999, the issues on appeal were heard by the full Review Board.

15. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 12 and its conclusions of law numbered 1 through 3 and conclusion of law numbered 6.

16. Mr. O'Connell, the compliance officer, requested a copy of respondent's lock out/tag out program during the inspection. Respondent provided, " Lockout / Tagout Plant #04," which is a general lockout/tagout program. Respondent did not provide any completed written lockout/tagout procedures for the various types of respondent's machines with more than one potential power source, to wit: the overhead gantry cranes, truck cranes, the Cincinnati shear, steel roller machinery, gas utilization equipment, welding equipment, air utilization equipment and metal press equipment.

17. The machines had more than one potential energy source as follows:

- a. An overhead gantry crane has a hoisting system that picks up and sets down loads. The crane runs on rails which are located near the roof of the building. *Electrical energy* powers the crane. The cranes also have *potential energy* if the crane has a load on the hook or if the crane is bumped by another crane on the same rail. Employees in the maintenance department (maintenance employees) maintain and repair the overhead gantry cranes. The preventative maintenance report is the schedule of inspections that the plant carries out on a daily, weekly or monthly basis. Some of the preventative maintenance procedures require that the overhead gantry crane be locked out before the procedure is started.
- b. Truck cranes have *battery-powered electrical systems* and *potential energy* from the wire ropes of the hoist and the vehicle movement. The truck cranes are on wheels which allow the vehicle to move if not properly locked out. The wire rope has potential energy if it has a load. Maintenance employees perform maintenance on the truck cranes during 100-hour inspections which check the overall maintenance of the vehicle. Maintenance checks performed by the maintenance employees require that the vehicle be locked out.
- c. A Cincinnati shear is a metal cutting machine. A piece of metal is placed in the machine and a knife blade comes down and cuts the metal. The Cincinnati shear has *electrical energy* which operates the machine and *potential energy* from the knife blade that is raised and lowered. Maintenance employees check machine adjustments, flywheels, gaps of the knives and sometimes change the knives.
- d. Respondent has steel roller machinery in its facility. Steel roller machinery rolls a flat piece of metal into a cylindrical shape. Steel roller machinery has *electrical* and *potential energy*. The machinery is driven by electric motors. The machinery has potential energy from the end piece snapping back up and from the nip points created by the rollers. Maintenance employees perform maintenance on the steel roller machinery. The compliance officer observed a maintenance employee working on the stop bar of the steel roller machinery. No lockout/tagout procedures were implemented while the maintenance employee worked on the stop bar.
- e. Gas utilization equipment in the building include floor burners that are used to preheat the tanks and equipment used for hydro-testing tanks. The gas utilization equipment has *electrical* and *thermal* energy. The electrical energy initiates and controls the gas and the thermal energy is the gas being burned. Maintenance employees perform maintenance on the gas utilization equipment. The maintenance performed by respondent's employees include cleaning clogged or sooty burners.
- f. Respondent has arc welders and seam welders in its facility. The welding equipment is *electrically powered* and uses *liquid carbon dioxide* as a welding gas. Respondent's maintenance employees perform maintenance on the welding equipment, including changing the welding leads and changing the solder on the seam welders.
- g. Air utilization equipment at respondent's facility includes an air compressor. The air compressor supplies air throughout the plant. The air compressor has *electrical energy* and *potential energy* from the high pressure air. Respondent's maintenance employees perform maintenance on the air compressor.
- h. Respondent has metal press equipment, specifically a punch press, at its facility. A punch press is metal forming equipment that uses a die to bend and shape metal. The punch press has *electrical energy* and *potential energy* from the release of the die that forms the metal. Respondent's maintenance employees perform maintenance work on the punch press.

18. After officer O'Connell advised Respondent at the closing conference that it was being cited for violations of the lock out/tag out regulations, respondent did not provide any written machine-specific lockout/tagout procedures to Complainant. Also, Respondent did not provide any written machine-specific lockout/tagout procedures as evidence during the hearing.

19. At the time of inspection Respondent did not have up-to-date and completed, machine-specific lockout/tagout procedures for the machines listed in findings of fact numbered 17a through 17h, necessary to comply with 29 C.F.R. §1910.147 (4)(ii)(B) and (C).

20. The failure to provide the written machine specific lockout/tagout procedures to the employees operating and performing maintenance on the machines listed in findings of fact numbered 17a through 17h, created the hazard of the unexpected energization or activation of the machinery while the employees were operating the machines or performing maintenance on the machines.

21. The employees who operated or performed maintenance on the machines listed in findings of fact numbered 17a through 17h, were exposed to the hazard of the unexpected energization or activation of the machinery while operating or performing maintenance on these machines.

22. The hazard of the accidental energizing of the machines listed in findings of fact numbered 17a through 17h, created the possibility of an accident--than an employee or an employee's body part could come in contact with machine and be injured.

23. The substantially probable result of an accident involving the unexpected energization or activation of the machines listed in findings of fact numbered 17a through 17h, are as follows:

a. Overhead gantry crane--electrical burns, broken bones, body parts caught in machines and crushing injuries

b. Truck cranes--burns, cuts, scrapes and crushed bones

c. Cincinnati shear--electrical burns, electrical shock and the crushing of a body part such as the hand.

d. Steel roller machinery--electrical burns, electrical shock and the crushing of a body part.

e. Gas utilization equipment--thermal burns, electrical burns, and electrical shock.

f. Arc welders and seam welders--electrical burns, eye burns, low temperature "burns" from exposure to the liquid carbon dioxide.

g. Air utilization equipment--electrical burns, electrical shocks, embolisms from the high air pressure shooting through the skin, and bits of the machine or hose striking the employee.

h. Metal press equipment--electrical burns, electrical shocks and crushing injuries.

24. The injuries listed in findings of fact 23a through 23h are serious injuries.

25. Respondent knew or should have known that they had no written machine-specific lockout/tagout procedures for the machines listed in findings of fact numbered 17a through 17h.

26. Appendix A to 29 CFR 1910.147 in a non-mandatory guideline to assist employers in the development of a lockout/tagout procedure.

27. The Respondent stipulated and the Board finds that the penalty as assessed against the Respondent was calculated after giving due consideration to the size of respondent's business, the gravity of the violations, respondent good faith, and the history of respondent's violations.

## **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Board has jurisdiction of this cause and the parties are properly before this Board.

3. Complainant has met its burden of proving by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 C.F.R.1910.147(c)(4)(ii) by failing to have machine specific lockout tagout written procedures for the machines listed in findings of fact numbered 17a through 17h, which were in its plant and had more than one single energy source.

## DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schoss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be affirmed when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

In order to prove that the Respondent committed a serious violation of a specific standard the Commissioner of Labor must prove by a preponderance of the evidence the following elements:

1. A hazard existed;
2. employees were exposed;
3. the hazard created the possibility of an accident;
4. the substantial probability of an accident would be death or serious physical injury and
5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniels, supra) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above. See, Brooks v. Daniel Construction Company, 2 NCOSHD 299, at 305 (RB 1981), affirmed, 2 NCOSHD 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 NCOSHD 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

The Commissioner is required to prove each and every element of a violation by a preponderance of the evidence. A review of the record reveals that the Commissioner has met its burden on each of the elements necessary to prove a serious violation of 29 C.F.R.1910.147(c)(4)(ii). Respondent makes much of its argument that the Complainant has shifted the burden of proof to Respondent to prove that it is in compliance with the lockout/tagout standard. Respondent's argues that the Complainant's inspectors asked for the written program, that the Respondent produced it, and that the Complainant did not copy it. Since the inspectors did not copy it, Respondent argues, the Complainant does not have the written machine specific lockout/tagout procedures and cannot prove that they Respondent is not in compliance. Were we to accept Respondent's argument, we would be tacitly approving the "Catch 22" in which the Respondent could withhold its written lockout/tagout program (if it existed), and then argue that the Complainant cannot meet its burden of proof. We reject this argument, and decline to approve of this or any Respondent's escaping accountability by withholding documents. We find, however, that this decision is primarily a credibility determination.

There is conflicting testimony by Respondent's corporate safety officer and Complainant's safety officer about whether certain machine specific written lockout/tagout procedures were provided to the compliance safety officer, however, the Hearing Examiner heard the conflicting testimony and assigned greater credibility to the testimony of the compliance safety officer and so do we. Compliance Safety Officer O'Connell testified that the

written lockout/tagout program given to him by the Respondent did not contain any machine specific pages as required by 29 C.F.R.1910.147(c)(4)(ii). Respondent did not provide these machine specific pages at the hearing before the Hearing Examiner or the Board. Respondent did provide some pages to the Complainant during settlement negotiations but successfully objected to their introduction at the hearing before the Hearing Examiner. These facts are relevant evidence that a reasonable person would accept as adequate to reach the conclusion that the Respondent did not have the requisite written machine specific documents to comply with 29 C.F.R.1910.147(c)(4)(ii). This meets the requirement that the Hearing Examiner's decision must be supported by substantial evidence. The Hearing Examiner found that the Complainant has met its burden of proof that the Respondent did not have the machine specific pages as required by 29 C.F.R.1910.147(c)(4)(ii), the lockout/tagout standard, and so do we.

The Hearing Examiner found that the Respondent was in serious violation of Appendix A to 29 C.F.R.1910.147. Appendix A is a non-mandatory guide for employers to use to aid them in complying with 29 C.F.R.1910.147 and as such cannot be used as a basis for a violation. It was error for the Hearing Examiner to find Respondent in violation of Appendix A and we overrule that finding and do not use it in finding the Respondent in serious violation of 29 C.F.R.1910.147(c)(4)(ii).

## **ORDER**

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's September 14, 1998 Order in this cause be, and hereby is, **AFFIRMED** in that it affirmed Citation One, Item 4a as a serious violation of 29 C.F.R.1910.147(c)(4)(ii)(B) and (C) with a penalty of \$1,375.00 and it is hereby **OVERRULED** in that it found the Respondent was in serious violation of Appendix A to 29 C.F.R.1910.147. Respondent is ordered to pay the \$1,375.00 within 30 days of the date of this order.

This the 30th day of July, 1999.

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ROBIN E. HUDSON, CHAIR

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RICHARD M. KOCH  
DESIGNATED MEMBER

[Mr. Henry Whitesides, member, did not participate.]