BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

STERLING & ADAMS BENTWOOD, INC.,

RESPONDENT.

OSHANC NO. 2002-4105
OSHA INSPECTION NO. 305055725
CSHO ID NO. B0354

ORDER

THIS MATTER was heard by the undersigned on April 29, 2003, in Winston-Salem, North Carolina. Complainant was represented by Sonya M. Calloway, Assistant Attorney General. Respondent was represented by Thomas J. Frenier, President and CEO of respondent company. Also present for the hearing was Blair Byrd, Health Compliance Officer for the North Carolina Department of Labor.

After reviewing the record file and after hearing the evidence and arguments of the parties, the undersigned makes the following:

FINDINGS OF FACT

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et seq., the Occupational Safety and Health Act of North Carolina (the Act).

2. Respondent is a North Carolina Corporation in the business of manufacturing curved ply wood for the furniture industry. Respondent operates two plants, one in Thomasville and one in Lenoir, North Carolina. Respondent employs 28 employees at the Thomasville plant and 50 employees at the Lenoir plant.

3. On December 5, 2001, Health Compliance Officer (HCO), Blair Byrd, inspected respondent's Thomasville plant ("the plant" or "the job site") located at 4001 Ball Park Road, Thomasville, North Carolina. The inspection was a result of a random programmed planned inspection.

4. The HCO held an opening conference with Preston Abernathy and David Farthing, the Plant Manager. The HCO presented his credentials to respondent's representatives, explained his purpose for being there and obtained permission to proceed with the inspection.

5. The HCO observed and photographed the condition of the premises and interviewed respondent's employees. In order to enforce the Act, the HCO issued citations on January 17, 2002.

CITATION 1, ITEM 1a - REPEAT SERIOUS

29 C.F.R §1910.147(c)(4)(i)

(Lock Out/Tag Out Procedures)

6. 29 C.F.R. §1910.147(c)(4)(i) provides, in pertinent part, that employers must develop, document and utilize procedures for the control of potentially hazardous energy when its employees operate, conduct maintenance on and service machinery and employers must develop energy control procedures for all equipment with multiple energy sources and conduct periodic inspections of those procedures, at least annually.

7. The HCO reviewed respondent's health and safety program. In it, there was no section which provided energy control procedures for the numerous and varied machinery at the Thomasville plant which had multiple energy sources.

8. Respondent's failure to provide a machine-specific lock out/tag out program or any other effective energy control procedures for the 11 plant presses, all of which had multiple sources of energy (i.e. electrical and hydraulic), created the possibility of an accident, to wit: the accidental or inadvertent re-energizing of machinery while an employee's body part is exposed to moving parts.

9. The substantial probable result of such an accident would be broken or mangled body parts, necessitating hospitalization, lost time from work and, possibly, permanent disability.

10. Respondent was aware of this situation because - two months prior at its Lenoir plant, the Department of Labor had issued citations to respondent for the same serious violation. (Complainant's Exhibit 3, Lenoir Citation 1, Item 2a) On October 1, 2001, the Department of Labor gave respondent 30 days, or until November 2, 2001, to abate the violations at the Lenoir plant. Respondent abated the violations at the Lenoir plant within the abatement period and the Department of Labor closed the case on November 9, 2001. (Complainant's Exhibit 1)

11. Respondent stipulated that its Thomasville plant was in violation of 29 C.F.R. §1910.147(c)(4)(i) and stipulated that the Department of Labor had - on October 01, 2001 - issued a citation for the same violations at its Lenoir plant.

12. Respondent requested a hearing on whether the violation was a repeat violation and, if not, whether the penalty assessed was appropriate. Thomas J. Frenier, respondent's president and CEO, testified that, after he received the citations regarding the violations at the Lenoir plant and after abating those violations within the time limits given, he began to abate the same violations at the Thomasville plant. He had not completed the abatement at the Thomasville plant when it became the subject of a random planned program inspection.

13. The undersigned accepts Mr. Frenier's testimony as true and credible. However, the undersigned also finds: (a) that respondent was able to abate the violations at the Lenoir plant within the 30 day time limit given by the Department of Labor and, (b) that, after it had completed its abatement at the Lenoir plant, an additional 30 days had passed prior to the inception of the inspection at the Thomasville plant on December 5, 2001. Thus, the undersigned finds that respondent should have been able to abate the violations at the Thomasville plant prior to the Thomasville inspection. The violation was properly classified as a repeat violation.

14. The $1,250.00 penalty imposed for the violation cited in Citation 1, Item 1a was calculated as follows:

(a) the severity of the violation was properly determined to be medium because most injuries would be temporary in nature or result in limited disability;

(b) the probability assessment was properly deemed to be medium because respondent's employees were exposed daily and continuously to the hazard;

(c) the gravity based penalty was calculated to be $2,500;

(d) the adjustment factor of 40% for the size of the employer was properly applied;

(e) the adjustment factor of 10% for respondent's cooperation with the inspection was properly applied;

(f) the adjustment factor of 0% for respondent's safety and health program was properly applied in that no credit is due an employer when a violation is a repeat violation; and

(g) the adjustment factor of 0% for no history of prior violations was properly applied in that the violation was a repeat violation.

15. All of the calculations were properly applied except ¶ 14 (c). The HCO calculated the gravity based penalty to be $2,500 in accordance with the North Carolina Department of Labor Operations Manual, Section VI, B, 7. However, the HCO failed to increase the gravity based penalty in accordance with Section VI, B, 1, b, which provides, in pertinent part, that, "the amount of the increased penalty to be assessed for the repeat violation shall be as follows: "The gravity based penalty shall be doubled for the first repeat violation…." (Emphasis added) Thus, the gravity based penalty should have been $5,000.00. Applying the adjustment factors of 50% as affirmed in paragraph 14 (d)-(g) above, the proper penalty for Citation 1, Item 1a is $2,500.00.

16. Respondent has already abated these violations.

CITATION 1, ITEM 1b - REPEAT SERIOUS

29 C.F.R. §1910.147(c)(7)(i)

(Lock Out/Tag Training)

17. 29 C.F.R. §1910.147(c)(7)(i) provides, in pertinent part, that employers must provide adequate training to ensure that employees acquire the knowledge and skills required for the safe application, usage and removal of energy control devices.

18. The HCO reviewed respondent's health and safety program. Although the program did provide generic or basic "lock out/tag out" procedures, neither Mr. Abernathy nor Mr. Farthing were able to quickly identify the location of respondent's locks and tags. The HCO learned during employee interviews that the employees had not been properly trained on how to employ the locks and tags, nor were they required to use them during general maintenance of the machinery.

19. Respondent's failure to provide adequate training to its employees regarding lock out/tag out procedures created the possibility of an accident, to wit: the accidental or inadvertent re-energizing of machinery while an employee's body part is exposed to moving parts.

20. The substantial probable result of such an accident would be broken or mangled body parts, necessitating hospitalization, lost time from work and, possibly, permanent disability.

21. Respondent was aware of this situation because - two months prior at its Lenoir plant, the Department of Labor had issued citations to respondent for the same serious violation. (Complainant's Exhibit 3, Lenoir Citation 1, Item 2b) On October 1, 2001, the Department of Labor gave respondent 30 days, or until November 3, 2001, to abate the violations. Respondent abated the violations within the abatement period and the Department of Labor closed the case on November 9, 2001. (Complainant's Exhibit 1)

22. Respondent stipulated that its Thomasville plant was in violation of 29 C.F.R. §1910.147(c)(7)(i) and stipulated that the Department of Labor had - on October 01, 2001 - issued a citation for the same violations at its Lenoir plant.

23. Despite respondent's argument to the contrary, the undersigned finds that this violation was a repeat violation.

24. Citation 1, Item 1b was properly grouped with Citation 1, Item 1a, for purposes of calculating a penalty.

25. Respondent has already abated this violation.

CITATION 2, ITEM 1 - REPEAT NON-SERIOUS

29 C.F.R. §1920.38(a)(1)

(Written Emergency Action Plan)

26. 29 C.F.R. §1910.38(a)(1) provides, in pertinent part, that employers must provide a written emergency action plan outlining the actions which employers and employees must take to ensure employee safety from fire and other emergencies.

27. Respondent, by and through Mr. Frenier, stipulated that - at the time of the inspection - it did not have a written emergency action plan and that it had been cited for the same violation during the Lenoir inspection in October, 2001. (Complainant's Exhibit #4, Citation 2, Item 2)

28. The HCO properly deemed this violation to be non-serious.

29. The HCO properly deemed this violation to be a repeat violation. Respondent abated this violation at the Lenoir plant within 30 days of the issuance of the citations and should have had the violation abated at the Thomasville plant by the time of the Thomasville inspection.

30. The HCO properly applied a $100.00 minimum penalty for this citation in accordance with the Field Operations Manual, VI, B, 11, c for repeat non-serious violations.

31. Respondent has already abated this violation.

CITATION 2, ITEM 2 - REPEAT NON-SERIOUS

29 C.F.R. §1910.97(a)(3)(i)

(Radio Frequency Radiation Hazard Warnings)

32. 29 C.F.R. §1910.97(a)(3)(i) provides, in pertinent part, that the warning symbol for radio frequency radiation hazards was not properly posted on or near the machinery presses which use radio frequency to cure the veneer glue of the curved plywood.

33. Respondent, by and through Mr. Frenier, stipulated that - at the time of the inspection - it did not have radio frequency radiation hazard signs posted on or near the presses which use radio frequencies and that it had been cited for the same violation during the Lenoir inspection in October, 2001. (Complainant's Exhibit #4, Citation 2, Item 3)

34. The HCO properly deemed this violation to be non-serious.

35. The HCO properly deemed this violation to be a repeat violation. Respondent abated this violation at the Lenoir plant while the inspector was on site and should have had the violation abated at the Thomasville plant by the time of the Thomasville inspection.

36. The HCO properly applied a $100.00 minimum penalty for this citation in accordance with the Field Operations Manual, VI, B, 11, c for repeat non-serious violations.

37. Respondent has already abated this violation.

CITATION 2, ITEM 3 - REPEAT NON-SERIOUS

29 C.F.R. §1910.308(g)(1)(iii)

(Flexible Cords and Cables)

38. 29 C.F.R. §1910.305(g)(1)(iii) provides, in pertinent part, that flexible cords should not be used as a substitute for fixed wiring as prohibited by paragraphs (A) through (E) of the section.

39. Respondent, by and through Mr. Frenier, stipulated that - at the time of the inspection - it was substituting flexible cords and cables to provide power to the flourescent lighting in the small press area instead of the fixed wiring required by the regulations and that it had been cited for the same violation during the Lenoir inspection in October, 2001. (Complainant's Exhibit #5, Citation 2, Item 7a)

40. The HCO properly deemed this violation to be non-serious.

41. The HCO properly deemed this violation to be a repeat violation. Respondent abated this violation at the Lenoir plant immediately and should have had the violation abated at the Thomasville plant by the time of the Thomasville inspection.

42. The HCO properly applied a $100.00 minimum penalty for this citation in accordance with the Field Operations Manual, VI, B, 11, c for repeat non-serious violations.

43. Respondent has already abated this violation.

CITATION 2, ITEM 4a - REPEAT NON-SERIOUS

29 C.F.R. §1910.1200(e)(1)

(Written Hazardous Communication Program)

44. 29 C.F.R. §1910.1200(e)(1), provides, in pertinent part, that employers shall develop and maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 C.F.R. §1910.1200(f), (g) and (h) will be met.

45. Respondent, by and through Mr. Frenier, stipulated that - at the time of the inspection - it did not have a written hazard communication program for its employees who used chemicals such as Casco Products Systeko 1205/1203 resin and hardener that contains formaldehyde and that it had been cited for the same violation during the Lenoir inspection in October, 2001. (Complainant's Exhibit #6, Citation 2, Item 8a)

46. The HCO properly deemed this violation to be non-serious.

47. The HCO properly deemed this violation to be a repeat violation. Respondent abated this violation at the Lenoir plant by November 3, 2001 and should have had the violation abated at the Thomasville plant by the time of the Thomasville inspection.

48. The HCO properly applied a $100.00 minimum penalty for this citation in accordance with the Field Operations Manual, VI, B, 11, c for repeat non-serious violations.

49. Respondent has already abated this violation.

CITATION 2, ITEM 4b - REPEAT NON-SERIOUS

29 C.F.R. §1910.1200(h)

(Information and Training Regarding Hazardous Chemical)

50. 29 C.F.R. §1910. 1200(h), provides, in pertinent part, that employees using chemicals such as formaldehyde resin and hardener, the employer shall provide information and training as specified in 29 C.F.R. §1910.1200(h)(1) and (2).

51. Respondent, by and through Mr. Frenier, stipulated that - at the time of the inspection - it had not properly informed or trained its employees who used the formaldehyde resin and hardener and that it had been cited for the same violation during the Lenoir inspection in October, 2001. (Complainant's Exhibit #7, Citation 2, Item 8b)

52. The HCO properly deemed this violation to be non-serious.

53. The HCO properly deemed this violation to be a repeat violation. Respondent abated this violation at the Lenoir plant by November 3, 2001 and should have had the violation abated at the Thomasville plant by the time of the Thomasville inspection.

54. This item was properly grouped with Citation 2, Item 4a and, thus, no penalty was assessed.

55. Respondent has already abated this violation.

CITATION 3, ITEM 1 - SERIOUS

29 C.F.R. §1910.147(d)

(Procedures for Lock Out/Tag Out)

56. 29 C.F.R. §1910.147(d) provides, in pertinent part, that employees who operate, conduct maintenance and service machinery follow the established procedure for protecting employees from inadvertent or accidental re-energizing of the equipment.

57. Respondent stipulates to having violated this section, but argues that it is duplicative of Citation 1, Items 1a and b.

58. Citation 1, Item 1a relates to 29 C.F.R. §1910.147(c)(4)(i) and the failure of respondent to have developed, documented and utilized a program for controlling potentially hazardous energy regarding machinery with multiple power sources.

59. Citation 1, Item 1b relates to 29 C.F.R. §1910.147(c)(7)(i) and the failure of respondent to have provided adequate training to ensure that the employees employ the safeguards of a program for controlling hazardous energy.

60. Citation 3, Item 1 pursuant to 29 C.F.R. §1910.147(d), cites respondent for failing to ensure that its employees follow the written lock out/tag out procedures which respondent did establish and did have in force at the time of the inspection. (Complainant Exhibit #2). The difference between Citation 1 and Citation 3 is that in Citation 1, the employer was cited for failing to have an established procedure for machines with multiple sources of energy. In Citation 3, the employer was cited for failing to follow the lock out/tag out procedures it did have established for machinery, in general.

61. The undersigned does not agree that the Citations are duplicative.

62. The undersigned can not group these items under one citation with one penalty because the North Carolina Department of Labor Field Operations Manual, Section VI,C provides, in pertinent part, that, [n]ewly observed hazards will not be grouped with repeated items."

63. The $1,000.00 penalty imposed for the violation cited in Citation 3, Item 1 was properly calculated as follows:

(a) the severity of the violation was properly determined to be medium because most injuries would be temporary in nature or result in limited disability;

(b) the probability assessment was properly deemed to be medium because respondent's employees were exposed daily to the hazard;

(c) the gravity based penalty was properly calculated to be $2,500;

(d) the adjustment factor of 40% for the size of the employer was properly applied;

(e) the adjustment factor of 10% for respondent's cooperation with the inspection was properly applied;

(f) the adjustment factor of 10% for respondent's safety and health program was properly applied to this citation because this was not a repeat violation.

64. The HCO properly applied a 60% reduction to the gravity based penalty of $2,500 to arrive at a recommended penalty of $1,000.00

65. Respondent knew or should have known that they were not complying with their own written lock out/tag out program.

66. Respondent has already abated this violation.

CITATION 3, ITEM 2 - SERIOUS

29 C.F.R. §1910.212(a)(3)(ii)

(Points of Operation)

67. 29 C.F.R. §1910.212(a)(3)(ii) provides, in pertinent part, that points of operation of machinery should be guarded to prevent employees from having any part of their body in the danger zone during machinery operation.

68. The HCO presented pictures and digitized video images of respondent's employees operating the presses without guards such that their hands and fingers were exposed to the points of operation of the presses. (Complainant's Exhibits #8A-L and 9)

69. Respondent testified credibly that the number of times respondent's Lenoir and Thomasville plant presses have opened and closed without a lost time injury in the last four years is 1,620,000. Respondent argues that the absences of accidents proves that no hazard exists. It is well settled in North Carolina that this argument, "… simply amounts to a claim that there is no good reason to anticipate an accident until at least one has already occurred, which is nonsense." *Brooks v. Daniel Construction Company*, 71 N.C. App. 426, 432 (1985). The Court of Appeals in *Daniel Construction* concluded that, "Human error is not a rare phenomenon. A mark of ordinary prudence, we believe, is to anticipate human errors that are likely to injure people… and take precautions against them before, rather than after, injuries occur." *Id.* Based upon the evidence presented at the hearing and the law in North Carolina, the undersigned finds that a hazard does exist at respondent's Thomasville plant as a result of a lack of guards on the press machines, to wit: employees inadvertently or accidently having their hands or fingers caught in the presses.

70. The substantial probable result of such an accident would be fractures, contusions, lacerations and crush injuries.

71. At least five of respondent's press operators were exposed to the hazard on a continuous and daily basis.

72. The HCO properly determined the severity of the violation to be medium on the basis that any injuries would probably be temporary and reversible, although probably requiring lost time from work, hospitalization and possibly resulting in variable but limited disability.

73. The HCO determined the probability factor to be medium because of the daily exposure of respondent's employees to the hazard. However, based upon respondent's evidence that: (1) respondent's employees have been trained thoroughly, (2) the presses move very slowly (one inch per second), (3) the employees have a foot pedal which enables them to stop the movement of the press in the event of an emergency, and (4) the fact that respondent has sustained no lost time accidents in the last four years, the undersigned finds that the probability factor is low.

74. Based upon the severity and probability assessments, the gravity based penalty should have been $1,250.

75. The adjustment factors of 40% for the size of the employer; 10% for respondent's cooperation with the inspection; and 10% for respondent's safety and health program should have been applied for a total of a 60% reduction in the gravity based penalty.

76. The proper penalty should be $500.00.

77. Respondent knew or should have known that unguarded presses create the possibility of an accident.

78. In order to abate the violation, respondent should install barriers, guards, curtains, screens or other acceptable method designed to guard employee's extremities from the nip points of the operating presses.

79. Respondent has not yet abated this violation.

CITATION 3, ITEM 3 - SERIOUS

29 C.F.R. §1910.213(i)(1)

(Bandsaw Guards)

80. 29 C.F.R. §1910.213(i)(1) provides, in pertinent part, that the non working portions of a saw blade should be guarded or enclosed.

81. Respondent's Tannewitz 36 inch bandsaw at the Thomasville plant had 4 inches of unguarded non working blade and the Centauro 30 inch bandsaw had 18 inches of unguarded non working blade.

82. Respondent stipulated to the violation and the assessed penalty of $300.00.

83. Respondent has abated the violation.

CITATION 4, ITEM 1 - NON-SERIOUS

29 C.F.R. §1910.157(c)(2)

(Portable Fire Extinguishers)

84. 29 C.F.R. §1910.157(c)(2) provides, in pertinent part, that portable fire extinguishers should be visually inspected at least monthly.

85. Respondent stipulated to the violation.

86. No penalty was assessed.

87. Respondent has abated the violation.

CITATION 4, ITEM 2 - NON-SERIOUS

29 C.F.R. §1910.212(a)(2)

(Machine Guards)

88. Citation 4, Item 2 alleged a violation of 29 C.F.R. §1910.212(a)(2) because respondent failed to have guards on the rotating flywheel of the Buckeye Air Compressor.

89. Respondent stipulated to the violation.

90. No penalty was assessed.

91. Respondent has abated the violation.

CITATION 4, ITEM 3 - NON-SERIOUS

29 C.F.R. §1910.305(b)(1)

(Flexible Conduit Protection)

92. Respondent was cited for a violation of 29 C.F.R. §1910.305(b)(1) because a flexible conduit had been pulled away from the attachment location of the foot-operated control pedal which controlled the operation of the veneer presses, specifically presses 3 & 4.

93. Respondent stipulated to the violation.

94. No penalty was assessed.

95. Respondent has abated the violation.

CITATION 4, ITEM 4 - NON-SERIOUS

29 C.F.R. §1910.1200(f)(5)(i)

(Hazardous Chemical Identification)

96. Respondent was cited for a violation of 29 C.F.R. §1910.1200(f)(5)(i) because it did not ensure the containers containing hazardous chemicals used by employees, to wit: Casco Products Systeko 1205/1203 resin and hardener that contained formaldehyde, were properly labeled, tagged or marked with the identity of the hazardous chemicals.

97. Respondent stipulated to the violation.

98. No penalty was assessed.

99. Respondent has abated the violation.

CONCLUSIONS OF LAW

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

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. The Complainant proved by a preponderance of the evidence that respondent violated the sections of the Act as set forth in the Findings of Fact above, that the violations were properly classified and that respondent is subject to the penalties as set forth in the Findings of Fact above.

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED** as follows:

1. Citation 1, Item 1a is hereby **affirmed** as a repeat serious violation and a penalty is hereby imposed in the amount of $2,500;

2. Citation 1, Item 1b is hereby **affirmed** as a repeat serious violation and was properly grouped for the purposes of assessment of a penalty with Citation 1, Item 1a;

3. Citation 2, Item 1 is hereby **affirmed** as a repeat non-serious non-serious violation and a penalty is hereby imposed in the amount $100.00;

4. Citation 2, Item 2 is hereby **affirmed** as a repeat non-serious violation and a penalty is hereby imposed in the amount $100.00;

5. Citation 2, Item 4a is hereby **affirmed** as a repeat non-serious violation and a penalty is hereby imposed in the amount $100.00;

6. Citation 2, Item 3 is hereby **affirmed** as a repeat non-serious violation and a penalty is hereby imposed in the amount $100.00;

7. Citation 2, Item 4b is hereby **affirmed** as a repeat non-serious violation with no additional penalty imposed;

8. Citation 3, Item 1 is hereby **affirmed** as a serious violation and a penalty is hereby imposed in the amount $1000.00;

9. Citation 3, Item 2 is hereby **affirmed** as a serious violation and a penalty is hereby imposed in the amount $500.00;

10. Citation 3, Item 3 is hereby **affirmed** as a serious violation and a penalty is hereby imposed in the amount $300.00;

11. Citation 4, Item 1 is hereby **affirmed** as a non-serious violation with no penalty.

12. Citation 4, Item 2 is hereby **affirmed** as a non-serious violation and no penalty is imposed;

13. Citation 4, Item 3 is hereby **affirmed** as a non-serious violation and no penalty is imposed;

14. Citation 4, Item 4 is hereby **affirmed** as a non-serious violation and no penalty is imposed;

15. The $4,700.00 penalty shall be paid within ten (10) days of the filing date of this Order;

16. Respondent shall abate Citation 3, Item 2 (29 C.F.R. §1910.212(a)(3)(ii)(guarding points of operation) within 45 days of the date of this Order by installing barriers, guards, curtains, screens or other acceptable method designed to guard employee's extremities from the nip points of the operating presses.

.

This the 23rd day of May, 2003.

.

_____
Ellen R. Gelbin
Administrative Law Judge