

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2002-4170
OSHA INSPECTION NO. 305723934
CSHO ID NO. W5054

v.

ORDER

D S SWAIN GAS COMPANY INC.,

RESPONDENT.

APPEARANCES:

Complainant:

Ralf F. Haskell
Special Deputy Attorney General
North Carolina Department of Justice

Respondent:

Duard W. Swain, III
D S Swain Gas Company Inc.

BEFORE:

Hearing Examiner: Carroll D. Tuttle

THIS CAUSE came on for hearing and was heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on May 22, 2003, at the Old YWCA Building, Room 124-1st Floor, 217 West Jones Street, in Raleigh, North Carolina.

The Complainant was present and represented by Mr. Ralf F. Haskell, Special Deputy Attorney General, North Carolina Department of Justice. The Respondent Duard S. Swain, III was present and represented himself.

Based upon the evidence presented at the hearing and with due consideration of the arguments and contentions of all parties, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed a citation issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).
2. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of the Act (N.C.G.S. § 95-133).
3. Respondent, a North Carolina Corporation with its principle office located in Washington, North Carolina, is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9). Respondent has three other facilities in North Carolina, including a facility located at 9850 Highway 17 North, Vanceboro.
4. The undersigned has jurisdiction over the case (N.C.G.S. § 95-135).
5. On August 12, 2002, S B White, a Compliance Safety Officer (CSO) with the North Carolina Department of Labor, began an Occupational Safety and Health (OSH) inspection of Respondent's, D. S. Swain Gas Company Inc., facility located at 9850 Highway 17 North, Vanceboro, North Carolina. The inspection was a computer generated general scheduled inspection.
6. Respondent's Vanceboro facility consisted of a brick and metal building located on a five (5) to six (6) acre tract of land. Located within the building were an office area, a showroom, a maintenance area, and a storage room.
7. On August 22, 2002, as a result of the inspection, Complainant issued to Respondent two citations. Citation Number One, Item 1, alleges a serious violation of 29 CFR §1910.305(b)(2) with a proposed penalty of \$1,050.00. Citation Number Two alleges seven (7) non-serious violations, as follows: Item 1 alleges a non-serious violation of 29 CFR §1904.2(a); Item 2 a non-serious violation of 29 CFR § 1910.23(c)(1); Item 3 a non-serious violation of 29 CFR §1910.23(e)(1); Item 4 a non-serious violation of 29 CFR § 1910.37(q)(1); Item 5 a non-serious violation of 29 CFR §1910.215(a)(4); Item 6 a non-serious violation of 29 CFR §1910.215(b)(9); and, Item 7 a non-serious violation of 29 CFR §1910.1200(e)(1).
8. Respondent timely filed its Notice of Contest. This Board has jurisdiction over the subject matter and the parties to the action.
9. Respondent buys LP gas wholesale and trucks the gas from its Vanceboro facility to local housing and businesses for retail. Respondent also sells a limited supply of grills and appliances from its Vanceboro, North Carolina showroom.
10. On August 12, 2002, upon arriving at Respondent's Vanceboro facility, CSO White entered the building through the door which was used by the consuming public and went to the office area where he asked to speak with the person in charge. CSO White was informed that Roy Lee Hicks, Jr., was the manager and that, although he was out, he would be back shortly. Upon Mr. Hick's return, CSO White conducted an opening conference, including presenting his credentials to Mr. Hicks, explaining to him his purpose for his being there, and explaining the scope of the inspection to be conducted. Mr. Hicks consented to the inspection being conducted.
11. 29 CFR §1910.305(b)(2) provides that all pull boxes, junction boxes, and fittings shall be provided with covers approved for the purpose.
12. During the course of the inspection, CSO White observed a 220 VAC electrical distribution box on the South wall in the workshop storage area which had a 3" x 3" uncovered opening located directly below the breakers. Live 220VAC electrical parts were located 2 ½" inside and below the uncovered opening. The manager would spend 2 to 3 minutes daily switching the breakers within the panel, which controlled the lights to the building, "on" and "off." As a result, the manager's fingers would come within inches of the uncovered opening, which presented the hazard of his accidentally coming into contact with the 220 VAC while standing on the concrete floor which was in contact with earth. Such an accident would likely result in severe shock, including electrocution.
13. CSO White also observed a combination light switch and duplex 120 VAC outlet located at the back door of the workshop storage area which was missing the face plate, exposing the conductors inside to contact when employees either turned the light switch "on" or "off," or when they would plug a tool or an appliance into the outlet receptacle. Respondent's employees would use the receptacle or turn the light switch "on" and "off" two to three times a day. As a result, the employees' fingers would come within an inch or less of the exposed conductors while standing on the concrete floor over earth, which presented the hazard of their accidentally coming into contact with the live connectors. Such an accident would likely result in severe shock, including electrocution.
14. CSO White also observed a 120 VAC electrical duplex outlet located on the wall at the back of the work bench in the workshop area which had one of the receptacles broken exposing the conductors inside. Employees used this receptacle two to three times weekly to provide power to their hand held power tools. As a result, Respondent's employees could come into contact with the conductors while trying to plug in an electrical hand tool or other equipment. Such an accident would likely result in severe shock, including electrocution.
15. In calculating the penalty for Item 1 of Citation Number One, a severity assessment of "high" and probability assessment of "medium" were given, resulting in a gravity-based penalty of \$3,500. Adjustment factors of fifty percent (50%) for size, ten percent (10%) for good faith and ten percent (10%) for history were applied, resulting in a proposed adjusted penalty of \$1,050. The proposed adjusted penalty of \$1,050 was calculated in accordance with the Department of Labor's field operations manual and is appropriate.
16. 29 CFR §1904.2(a) requires that a log of all recordable occupational injuries and illnesses must be maintained at each establishment.
17. During the course of his inspection CSO White asked Mr. Hicks for copies of Respondent's 200 logs required to be maintained at its Vanceboro facility. Mr. Hicks was unaware of these logs, and none were maintained at the facility. Mr. White then called Respondent's main office in Washington, North Carolina, to inquire about the logs. He was advised to call back the next day; however, when he called back the following day he was unable to obtain copies of, or review, Respondent's 200 logs.
18. 29 CFR §1910.23(c)(1) provides that open floors or platforms 4 feet or more above the adjacent floor or ground level must be guarded by standard railings (or the equivalent as specified in 29 CFR § 1910.23(c)(3)(i) through (v)) on all open sides except for where there is an entrance to a ramp, stairway, or fixed ladder.
19. At the time of the inspection herein Respondent stored materials on the floor or platform of a storage area located over the office. The storage area, which was more than 4 feet above the adjacent floor or ground, was open sided in an area which did not have an entrance to a ramp, stairway or fixed ladder. The open sided floor was not properly guarded by standard railings in that it had no intermediate (mid) rail or toe boards. As a result having no toe boards, materials being stored on the floor or platform of the storage area could fall and strike employees working below. Additionally, as a result of not having an intermediate railing, employees working on the storage area floor or platform could fall more than four feet to the adjacent ground below. Under the circumstances which exist in the instant matter, such an accident would likely result in bruises.
20. 29 CFR §1910.23(d) provides that every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in paragraphs (d)(1)(i) through (v). 29 CFR §1910.23(e)(1) provides that a standard railing shall consist of a top rail, intermediate rail, and posts.
21. At the time of the inspection herein, stairs which had four or more risers were used by Respondent's employees to access the storage area over the office. Although the stairs had a handrail, they were not equipped with an intermediate rail. As a result of having no intermediate rail, employees using the stairs to gain access to the storage area could fall through the stair railings four or more feet to the adjacent ground below. Under the circumstances which exist in the instant matter, such an accident would likely result in bruises.
22. 29 CFR §1910.37(q)(1) provides that exits must be marked by a readily visible sign.
23. At the time of the inspection herein, a rear exit door was located in the storage area of Respondent's facility. The door, which led to the outside, did not have an exit sign. As a result, there was the possibility that employees would be unable to locate the exit in case of fire. This could result in a delay in Respondent's employees ability to exit the facility in case of fire and smoke. Additionally, this could also result in Respondent's employees going past the fire in order to access another exit. Under the circumstances which exist in the instant matter, such an accident would likely result in minor burns or smoke inhalation.
24. 29 CFR §1910.215(a)(4) provides that work rests shall be used to support the work on offhand grinding machines. 29 CFR §1910.215(b)(9) further provides that, where an operator stands in front of the opening of an offhand grinding machine, safety guards shall be constructed so that the peripheral protecting member (tongue guard) can be adjusted to the constantly decreasing diameter of the wheel.
25. At the time of the inspection herein, Respondent had a ½ horsepower Chicago Power Tools bench grinder in the workshop area of its facility. The bench grinder was used approximately two (2) hours weekly by Respondent's employees for off hand grinding. The grinder, which had two grinding wheels, did not have a work rest for the left wheel. As a result, a tool or other item being ground could be pulled into the wheel, which could result in the wheel breaking apart or exploding. Under the circumstances which exist in the instant matter, such an accident would likely result in minor abrasions.
26. The ½ horsepower Chicago Power Tools bench grinder was not equipped with a peripheral (tongue guard) guard on either side. A peripheral guard serves to reduce the opening to the wheel in order to protect an employee from coming into contact with the wheel while performing offhand grinding, as well as to contain the wheel should it explode or come apart. As a result of having no peripheral (tongue guards) guards, Respondent's employees were exposed to the possibility of their hands coming into contact with the wheel while they were performing offhand grinding work, or with the possibility of being struck by parts of the wheel should it explode or come apart. Under the circumstances which exist in the instant matter, such an accident would likely result in minor abrasions.
27. 29 CFR 1910.1200(a)(1) and (b)(1) require that chemical importers evaluate or assess the hazards of chemicals which they import, and to transmit information about their hazards to their employees. 29 CFR 1910.1200(c)(1) provides that employers shall develop, implement and maintain at each workplace a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g) and (h) of the section for labels and other forms of warning, material safety data sheets and employee information and training will be met.
28. Respondent imports liquid propane (LP) gas from wholesalers and trucks and sells (retails) the propane to local businesses and homeowners. LP gas is a hazardous chemical as defined in 29 CFR §1910.1200(c) in that it is an element, compound or mixture which presents a physical hazard such as fire or an explosion. Respondent, therefore, is required to have a written hazard communication program at each facility, including its Vanceboro facility. Respondent, however, did not have a written hazard communication program at its Vanceboro facility. Further, Respondent did not have material safety data sheets (MSDS) at the facility. As a result, Respondent's employees would be unfamiliar with the physical hazards of LP gas including the potential of fire or explosion, as well as with safe precautions which should be taken in its handling and use. (see § 1200(g)(2)(C)(3)(ii), (viii) and (ix)). Further, they would be unable to know what to do in case of an emergency, such in case of a fire or explosion. (see § 1200(g)(2)(C)(3)(x)). As a result, Respondent's employees were exposed to the hazard of a fire or explosion occurring while either using or handling LP gas, or in responding to an emergency. Under the circumstances which exist in the instant matter, such an accident would likely result in minor injuries.

Based upon the foregoing Findings of Fact, the undersigned Hearing Examiner concludes as a matter of law the following:

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order;
2. The Review Board has jurisdiction of this case and the parties are properly before the Board;
3. Respondent is subject to the provisions of the Act (N.C.G.S. 95-128) and is an employer within the meaning of N.C.G.S. 95-127(9);
4. Respondent is in violation of 29 CFR §1910.305(b)(2) in that all pull boxes, junction boxes and fittings were not provided with covers approved for the purpose;
5. The violation is serious in that Respondent's failure to cover a 3" x 3" opening in a 220 VAC electrical distribution box; failure to have a faceplate on a combination light switch and duplex 120 VAC outlet; and having a broken receptacle in a 120 VAC outlet, could have resulted in death or serious bodily injury;
6. The total proposed adjusted penalty of \$1,050 for these violations was properly calculated in accordance to Complainant's operations manual and is appropriate;
7. Respondent is in violation of 29 CFR §1904.2(a) in that Respondent did not maintain a log of all recordable injuries on an OSH 200 Log, or equivalent, at its Vanceboro, North Carolina, establishment.
8. Respondent is in violation of 29 CFR §1910.23(c)(1) in that the open floor of Respondent's storage area over the office was not guarded by standard railings as required in that it did not have an intermediate rail or toe boards;
9. The violation of 29 CFR §1910.23(c)(1) is properly classified as non-serious in that an accident would likely result in a non-serious injury;
10. Respondent is in violation of 29 CFR §1910.23(e)(1) in that the stairs to the storage area over the office was not guarded by standard railings as required in that it did not have an intermediate rail;
11. The violation of 29 CFR §1910.23(e)(1) is properly classified as non-serious in that an accident would likely result in a non-serious injury;
12. Respondent is in violation of 29 CFR §1910.37(q)(1) in that the rear exit located in the storage area of Respondent's facility was not marked by a readily visible sign;
13. The violation of 29 CFR §1910.37(q)(1) is properly classified as non-serious in that an accident would likely result in a non-serious injury;
14. Respondent is in violation of 29 CFR §1910.215(a)(4) in that Respondent's ½ horsepower bench grinder did not have a work rest;
15. The violation of 29 CFR §1910.215(a)(4) is properly classified as non-serious in that an accident would likely result in a non-serious injury;
16. Respondent is in violation of 29 CFR §1910.215(b)(9) in that Respondent's ½ horsepower bench grinder did not have a peripheral or tongue guard;
17. The violation of 29 CFR §1910.215(b)(9) is properly classified as non-serious in that an accident would likely result in a non-serious injury;
18. Respondent is in violation of 29 CFR 1910.1200(e)(1) in that Respondent did not develop, implement or maintain a written hazard communication program;
19. The violation of 29 CFR §1910.1200(e)(1) is properly classified as non-serious in that an accident would likely result in a non-serious injury;

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that

1. Citation One, Item 1, alleging a serious violation of 29 CFR 1910.305(b)(2) , is hereby affirmed; and,
2. The proposed penalty of \$1,050.00 is affirmed and shall be paid within ten (10) days of the filing date of this Order.
3. Citation Two, Item 1, alleging a non-serious violation of 29 CFR 1904.2(a), is hereby affirmed;
4. Citation Two, Item 2, alleging a non-serious violation of 29 CFR 1910.23(c)(1), is hereby affirmed;
5. Citation Two, Item 3, alleging a non-serious violation of 29 CFR 1910.23(e)(1), is hereby affirmed;
6. Citation Two, Item 4, alleging a non-serious violation of 29 CFR 1910.37(q)(1) , is hereby affirmed;
7. Citation Two, Item 5, alleging a non-serious violation of 29 CFR 1910.215(a)(4) , is hereby affirmed; and
8. Citation Two, Item 6, alleging a non-serious violation of 29 CFR 1910.215(b)(9) , is hereby affirmed.
9. Citation Two, Item 7, alleging a non-serious violation of 29 CFR 1910.1200(e)(1), is hereby affirmed.

This the 19th day of August, 2003.

Carroll D. Tuttle
Administrative Law Judge Presiding