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

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

TURNER-BAXTER, INC.,

RESPONDENT.

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

MATTHEWS CONSTRUCTION CO., INC.,

<u>ORDER</u>

RESPONDENT.

THESE MATTERS were heard by the undersigned on May 18, 2005 in Charlotte, North Carolina

The complainant was represented in both cases by Daniel Addison, Assistant Attorney General; the respondent, Turner-Baxter, Inc. ("TBI") was represented by Phillip VanHoy and the respondent, Matthews Construction Co., Inc. ("MCC") appeared through Ken Deloach, its director of human resources and safety.

At the outset of the hearing, the complainant moved for entry of default against MCC for failure to timely respond to the citation. After review of the file and argument of the representatives of the parties, the undersigned determined that the complainant was aware that MCC was defending the proceeding and that any late filing did not cause any prejudice to the complainant.

The complainant also moved to consolidate these two matters for hearing. By consent that motion was allowed.

Counsel for the respondent TBI withdrew the affirmative defense of isolated instance of employee misconduct alleged in its answer.

After hearing and receiving the evidence, the arguments of counsel and post hearing memoranda, the undersigned makes the following:

FINDINGS OF FACT

1. The complainant as Commissioner of Labor is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the Act).

2. The respondent TBI is a North Carolina corporation engaged in commercial painting It had 11 employees at the site at the time of the inspection described below and employs 60 persons overall

3. The respondent MCC is a North Carolina corporation licensed as a general contractor It had 4 employees at the inspection site and employs 123 persons overall.

4. On September 3, 2004, at approximately 10:30 a.m., Health Compliance Officer Peggy Rene conducted a general scheduled inspection of the Lowe's supermarket shopping center project in Stallings, North Carolina. She was accompanied by Health Compliance Officer Peggy Rene Conducted a general scheduled inspection of the Lowe's supermarket shopping center project in Stallings, North Carolina. She was accompanied by Health Compliance Officer Peggy Rene Conducted a general scheduled inspection of the Construction of the Lowe's supermarket shopping center project in Stallings, North Carolina. She was accompanied by Health Compliance Officer Peggy Rene Conducted a general scheduled inspection of the Construction of the Lowe's supermarket shopping center project in Stallings, North Carolina. She was accompanied by Health Compliance Officer Peggy Rene Conducted a general scheduled inspection of the Construction of the Con

OSHANC NO. OSHANC 2004-4464 OSHA INSPECTION NO. 308242833 CSHO ID NO. K2192

DOCKET NO. OSHANC 2005-4472 OSHA INSPECTION NO. 308183490 CSHO ID NO. K2192

5. MCC was the general contractor on this project; TBI was the painting subcontractor.

6. At the time of the inspection, employees of TBI were spray painting the metal ceiling and inside metal roof structure of the supermarket building. The employees were wearing white coveralls and were using respirators. The building was approximately 50,000 square feet. The roof was insulated with a rubber membrane.

7. The painting operation was being conducted on scissor lifts raised 10-15 feet above the ground, causing the lift platform to be 8-10 feet from the roof. The employees were using gas powered spray wands 4 feet in length. These wands were directly connected by hoses to 55 gallon drums containing the paint in order to provide a continuous flow of paint. The paint was sprayed upward to the ceiling in order to provide coverage.

8. The paint being used was a spraymaster dry fall paint. This paint is an oil base paint designed to dry to powder within a ten foot fall of the spray location. According to the material safety data sheet for this paint, it has a flashpoint of 79°F and a boiling range from 240° to 415°F.

9. This paint has received a Class 1-C flammable classification from the National Fire Protection Association's data.

10. Because vapors from this paint can ignite explosively in ambient air, it is recommended that the paint be stored at a temperature below 80° F and kept away from heat and flames.

11. Ms. Rene determined that the interior of the Lowe's building under construction was a Class 1, Division 1 classified location. This means that she determined that there were paint vapors present in the air at that location.

12. MCC had installed temporary lighting in the building for illumination of construction activities. This lighting consisted of RUUD brand 2WL EZ worklight fixtures containing a 400 watt bulb in a wire gasket and housing. These lights were not rated explosive-proof or non-sparking. The fixtures were not sealed and the bulbs were not of a kind that did not heat up when operating.

13. These lights were connected by temporary wiring and were attached to the ceiling in the general area where TBI employees were spraying.

14. Ms. Rene also determined that these light fixtures were not "intrinsically safe" and were not approved for locations in which ignitable vapors would be present.

15. Ms. Rene also determined that there exist in the market lighting fixtures for this type of construction project and painting operation.

16. Ms. Rene obtained the MSDS sheet for the paint from TBI and the specifications for the worklights from MCC. The electric panels in the building had been de-energized by David Wiles, MCC's project superintendent, because he knew the paint was flammable.

17. During the painting operations, TBI had fans operating at all of the entrances to the building. These fans were set to blow out in order to create air movement and pull vapors out of the building.

18. Ms. Rene determined from a TV weather report that the high temperature in the Charlotte area for September 3, 2004 was 82°F. Neither she nor Mr. Wilson took any temperature readings anywhere in the building during the inspection, nor did she or Mr. Wilson take any samples or measurements relating to the presence of paint vapors.

19. Respondent TBI requested from Glidden Company, its paint supplier, a calculation of the lower explosive limit for the paint vapors generated by this painting at the Lowe's building. The lower explosive limit is that point at which a vapor can combust or explode.

20. The calculation made for the lower explosive limit for the vapors in the building indicated a negligible amount of vapor.

21. Representatives of TBI testified that TBI has had similar projects inspected at least three times in the past by complainant's compliance officers and has not been cited for the violation alleged here.

22. These representatives further testified that the type of temporary lighting and type of paint are specified by the architect for the project and that explosion proof lighting has never been used on construction projects. TBI has 45 separate jobs in progress at any one time and performs 300-400 jobs each year.

23. Ms. Rene suggested that an explosion proof light could be used on the scissor lift or set on the floor to shine up at the ceiling, but up-lighting for this type of painting creates shadows and hazards relating to the light shining in workers' eyes and the light accidentally falling from the scissor lift.

24. Representatives of TBI inquired of its construction equipment rental company if explosion proof lights were available for rental and learned that they are not.

25. The proposed penalties for each respondent were calculated pursuant to the complainant's operations manual, but the complaint in the MCC case incorrectly alleged the penalty to be \$525.00 instead of \$1,225.00. The complainant's motion to amend the complaint to conform to the evidence, which showed a proper penalty calculation of \$1,225.00, was allowed.

Based on the foregoing Findings of Fact, the undersigned makes the following:

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. Both respondents are subject to the provisions of the Act.

3. The complainant has failed to prove by the greater weight of the evidence that the Lowe's supermarket facility on which the respondent TBI was conducting paint spraying operations was a Class 1, Division 1 location pursuant to 29 CFR 1926.449(a).

4. Since the location was not proved to be a Class1, Division 1 location, the complainant has failed to prove by the greater weight of the evidence that the respondent TBI has violated the provisions of 29 CFR 1926.407(b) by failing to prove that the RUUD ZWL EZ worklights were not approved for the Lowe's supermarket location.

5. Since the respondent MCC was cited with a violation of the same standard as TBI as a result of being the general contractor on the construction site, the complainant has likewise failed to prove a violation of the provisions of 29 CFR 1926.407(b) by this respondent.

6. The respondent TBI at the hearing stipulated a violation of the provisions of 29 CFR 1910.134(c)(2)(ii) by failing to verify that its employees were medically able to wear respirators.

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

1. Complainant's motion for entry of default against MCC is denied;

2. Complainant's motion for amendment of the complaint to conform to the evidence as to MCC is allowed;

3. Complainant's motion to consolidate these two matters for hearing is allowed;

4. Citation 1, Item 1, alleging a violation of 29 CFR 1926.407(b) against respondent TBI, is dismissed;

5. Citation 1, Item 1, alleging a violation of 29 CFR 1926.407(b) against respondent MCC, is dismissed.

6. Citation 2, Item 1 is affirmed as a nonserious violation of 29 CFR 1910.134(c)(2)(ii) against respondent TBI with a penalty of \$100.00;

7. This penalty shall be paid within thirty (30) days of the filng date of this Order; and

8 All violations not previously abated shall be immediately abated.

This 25th day of July, 2005.

