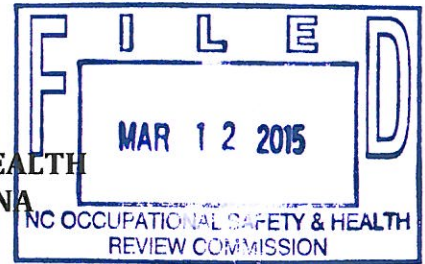


**BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA**



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

THE GOODYEAR TIRE AND RUBBER
COMPANY
and its successors

RESPONDENT.

DOCKET NO. OSHANC 2011-5221
OSHA INSPECTION NO. 315448837
CSHO ID NO. 10931

ORDER OF THE COMMISSIONERS

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 18th day of November 18 2014, Lee House, 422 North Blount Street, Raleigh, North Carolina, by Oscar A. Keller, Jr., Chairman, Dr. Richard G. Pearson, and Arlene K. Edwards, Members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Larissa S. Williamson, Special Deputy Attorney General; North Carolina Department of Justice, Raleigh, North Carolina.

Respondent: J. Matthew Little; Teague, Campbell, Dennis & Gorham, Raleigh, North Carolina.

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties. The Commission affirms the Order of Hearing Examiner Weaver.

ISSUE PRESENTED

WHETHER THE PLATEN IN QUESTION WAS CORRECTLY CLASSIFIED AS A PLATFORM, THUS BRINGING IT UNDER 29 CFR 1910.23(c)(1)?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1910.23(c)(1)

Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, a stairway, or fixed ladder.

29 CFR 1920.219(a)(4)

“Platform.” A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment.

Or in the alternative NCGS 95-129(1) (General Duty Clause)

Each employer shall furnish to each of his employees conditions of employment, and a place of employment, free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

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 and is subject to the Act N.C. Gen. Stat § 95-128.
4. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
5. On August 9, 2011, and thereafter, Compliance Safety and Health Officer Chris Moore inspected Respondent's worksite in Fayetteville, North Carolina.
6. As a result of the recommendations of the compliance officer, on August 30, 2011, the Complainant issued a citation to the Respondent under 29 CFR 1926.1910.23(c)(1), or in the alternative, N. C. Gen. Stat. sec. 95-129(1).
7. The Commission adopts the Hearing Examiner's Findings of Facts 5-22.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission 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 Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The Commissioner of Labor has proven by the greater weight of the evidence and by substantial evidence that The Goodyear Tire and Rubber Company committed a violation of 29 CFR 1910.23(c)(1).

DISCUSSION

The scope of review is the “whole record” test. The Commission “is entitled, if not obligated, to review the whole record.” Brooks v. Schloss Outdoor Advertising Co., 2 NCOSHD 552, 560-561 (1985). Upon a review of the whole record, the Commission determines if the Hearing Examiner’s factual findings were supported by competent and substantial evidence. Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Brooks v. Snow Metalcraft Corp., 2 NCOSHD 377, 380 (RB 1983).

“When there is conflicting testimony and the Hearing Examiner adopts findings of fact that are based on one party’s version of the facts, the Board follows the rule that [‘]The hearing examiner is in a far better position to determine the credibility of witnesses than we are when an appeal is based solely upon contradictions in testimony, as it is here, the decision of the hearing examiner must be affirmed.[’]” Southern Plumbing and Heating, Inc. Docket No. OSHANC 94-3057 (RB 1998).

The Hearing Examiner decided that the platen could be defined as a platform. The platen, and the base of the machine on which the platen was located, were not guarded by standard railing. The platen is a “working space for person” as required by the definition found in 29 CFR 1910.21(a)(4). Goodyear employees regularly stood on the platen to clean vent holes. Cleaning the vent holes was not scheduled but was a necessary and ordinary part of the work. There was testimony that this was done once a day on average. Goodyear has equipment, including specialized hand-held drills and ladders, dedicated to the task. This vent cleaning task is necessary to the efficient operation of the tire press machinery. There was substantial undisputed evidence that Goodyear knew and expected that its employees would be working with regularity on the platen more than 4 feet above the concrete floor.

Several cases in other jurisdictions have sought to define “platform.” This Court agrees with the Hearing Examiner who determined that the views found in *Donovan v. Anheuser-Busch*, 666 F.2d 315 (8th Cir. 1981) are most relevant to this case. In the *Anheuser-Busch* the tops of pasteurizers were found to be platforms. That court found it significant that employees were required to be present on top of the pasteurizers on a predictable basis, and that the functions performed there were necessary to the efficient operation of the equipment.

The Hearing Examiner’s findings of fact and conclusions of law were supported by the evidence. There was substantial evidence presented to establish the platen in question to be a platform, therefore, bringing it under 29 CFR 1910.23(c)(1). In the citation there was an alternative allegation under the General Duty Clause NCGS 95-129(1), but that is held moot since this court upholds the Hearing Examiner’s ruling that the specific standard was violated 29 CFR 1910.23(c)(1).

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's January 14, 2014, Order in this case be, and hereby is, **AFFIRMED**, to the extent that it is not inconsistent with this opinion. Respondent is further **ORDERED** to abate the violations and to pay the assessed penalty of \$1,950 within 30 days of the filing date of this Order.

This the 27th day of February 2015.


OSCAR A. KELLER, JR., CHAIRMAN


RICHARD G. PEARSON, Ph.D., MEMBER


ARLENE K. EDWARDS, MEMBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER OF THE COMMISSIONERS, upon:

KENNETH PARKER
PO BOX 26628
FAYETTEVILLE, NC 28314

by depositing same the United States Mail, First Class, at Raleigh, North Carolina, and upon:

J. MATTHEW LITTLE
TEAGUE, CAMPBELL, DENNIS & GORHAM
PO BOX 19207
RALEIGH, NC 27619

LARISSA WILLIAMSON
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 13th DAY OF March 2015.

OSCAR A. KELLER, JR.
CHAIRMAN



Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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