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

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA,	)	OSHANC 2011-5221
	)	OSHA INSPECTION NO. 315448837
COMPLAINANT,	)	CSHO ID NO. I0931
v.	)	
THE GOODYEAR TIRE AND RUBBER COMPANY, and its successors,	)	ORDER
RESPONDENT.	)	

THIS MATTER came on for hearing and was heard before the undersigned on January 23, 2013 in Raleigh, North Carolina. The Complainant was represented by Daniel D. Addison, Special Deputy Attorney General, and Respondent was represented by J. Matthew Little, of Teague, Campbell, Dennis and Gorham, LLP.

Complainant's witness was Chris Moore, Health Compliance Officer, North Carolina Department of Labor, Occupational Safety and Health Division; Respondent's witnesses were Johnny G. Strickland, Production Specialist for Goodyear Tire and Rubber Company, Rob McNeely, Business Center Manager for Goodyear Tire and Rubber Company, Michael Sutton, expert witness, and Lawrence A. Weaver, expert witness

ISSUES PRESENTED

Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1910.23(c)(1), or in the alternative, N.C. Gen. Stat. § 95-129(1), by permitting employees to work on platens in Respondent's tire curing press machines that were not guarded by a standard railing or the equivalent on all open sides?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1910.23(c)1) provides as follows:

> 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, stairway, or fixed ladder.

29 CFR 1910.21(a)(4) provides as follows:

> "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.

N.C. Gen. Stat. § 95-129(1) provides as follows:

> 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 injury or serious physical harm to his employees.

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Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties, including the briefs, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion, and enters an Order accordingly.

FINDINGS OF FACT

1. Complainant, Commissioner of Labor of the State of North Carolina (hereafter Complainant or Commissioner), 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) as well as the regulations adopted pursuant thereto.

2. Respondent, The Goodyear Tire and Rubber Company (hereafter Respondent or Goodyear), is a corporation which, at all times relevant to this case, was in the business of manufacturing tires at its plant in Fayetteville, North Carolina.

3. Respondent is an employer within the meaning of N.C. Gen. Stat. § 95-127(10).

4. On August 9, 2011 and thereafter, Chris Moore, health compliance officer with the North Carolina Department of Labor, conducted an inspection of Respondent's work site, its plant in Fayetteville, North Carolina.

5. At the time of Mr. Moore's inspection and before, mold changer employees of Respondent, as part of their regularly assigned work duties, used ladders to climb onto the platens at the bases of tire curing press machines. While standing on the platens, the employees reached overhead and used portable hand held drills to clean debris from vent holes in the overhead tire molds of the press machines. The process was prompted by a concern for defects in production tires.

6. The platens were round, metal flat surfaces about five and one-half to six feet across. The surfaces of the platens, on which the employees stood to perform the above-described task were

more than 48 inches above the adjacent concrete floor, and, in fact, measured between 51 and 52 inches above the floor. The center of the platens was occupied by the mechanism around which the tires were pressed. The outside edges of the platens were approximately 1-2 inches above, and only 1-2 inches horizontally, from the edges of the bases of the tire press machines, and only 1-2 inches from the open sides of the machines. T. pp. 27, 41, 56, 65, 75, 111; Complainant's Exhibits 1, 5 and 6; Respondent's Exhibit 4.

7. The open sides of the platens and the bases of the machines on which the platens rested were not guarded by standard railings or any other devices or equipment that would prevent employees from falling to the floor when the employees were standing and working on the platens.

8. When Respondents' employees stood on the platens and drilled out the vent holes in the overhead tire molds, they were looking up at a height of approximately seven feet. T. p. 73-74.

9. At least one employee reported that he felt light-headed and dizzy at times when he was drilling the vent holes from the platen, as the working conditions could be hot and he was working with his hands over his head. T. p. 30.

10. Respondent's employees performed the task of standing on the platens and drilling out the vent holes on an unscheduled basis, whenever it was determined that the vent holes were clogged and were causing defects in the tires being formed by the tire presses. Although unscheduled, this task was a regular part of the employees' work, which Respondent was aware of and expected. Respondent estimated that employees needed to perform this task approximately once a day. One of Respondent's employees told Health Compliance Officer Moore that he (the employee) had performed the vent hole drilling four times during his work shift on the day of HCO Moore's on-site visit to the plant. Respondent provided ladders for employees to access the platens and drills for the employees to use to perform the drilling. T. pp. 24, 26, 30, 43-44, 67-68.

11. When Respondent's employees stood on the platens and drilled the vent holes on the tire presses, they were positioned such that it was possible for them to fall accidentally off the open sides of the platens to the adjacent floor below. T. p. 70.

12. The vent hole drilling employees were more likely to fall because they were looking up--not at their feet--as they moved from one hole to another. T. p. 32.

13. Respondent had received a report that one of its employees had fallen off a platen on a tire press machine. None of Respondents' hearing witnesses had spoken with or could remember speaking with the employee about the fall. T. pp. 69, 82, 84, 118.

14. There was a substantial probability that if an employee fell off the platen to the concrete floor, he would suffer serious injuries, including severe contusions, strains, or sprains that would result in medical attention beyond first aid. An employee falling from a height of four feet would fall at a rate of 16 feet per second, and would impact the floor with a force of 1600

pounds. Employee falls of 4 feet or less in a variety of work settings have resulted in death or serious injury/broken bones. T. pp. 31-35, 121-122.

15. Employees of Respondent were exposed to the hazard of falling off the unguarded platens on the tire press machines.

16. Respondent acknowledged that its employees worked on the unguarded platens on an approximately daily basis. T. pp. 67-68.

17. Respondent's management personnel, including Johnny Strickland, Respondent's Production Specialist, and James Woodley, Respondent's Safety Coordinator, knew that Respondent's employees worked on the platens of the tire press machines. T. pp. 38, 54-55, 65-70.

18. Respondent's management personnel had knowledge of the height of the platens from the adjacent floor. T. pp. 56, 65.

19. Respondent's management personnel had knowledge that the platens had an open side that was not guarded by standard railings or their equivalent. T. pp. 38, 70-78.

20. Respondent's management personnel had knowledge that the holes that could need to be drilled went all the way around the mold. T. p. 76.

21. Based upon HCO Moore's inspection, Complainant issued a citation and penalty to Respondent on August 30, 2011. The citation alleged a violation of 29 CFR 1926.1910.23(c)(1), or in the alternative, N.C. Gen. Stat. § 95-129(1) (known as the "General Duty Clause).

22. Along with the issuance of the citation, Complainant issued a proposed adjusted penalty for the citation in the amount of $1,950.00. HCO Moore correctly calculated the proposed adjusted penalty in accordance with the criteria in the North Carolina OSHA Operations Manual. He calculated the penalty based on the standard criteria, accounting for the severity of probable injuries and the probability of a possible accident from the conditions. He also gave the respondent credits against the penalty to which it is entitled in accordance with the standard criteria. The penalty is appropriate and correct for this 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 platen in the tire press on which Respondent's employees stood and worked was a "platform" within the meaning of that term, as it is used in 29 CFR 1910.23(c)(1) and as it is defined in 29 CFR 1910.21(a)(4).

3. With regard to Citation 1, Item 1, Complainant proved by a preponderance of the evidence that Respondent committed a serious violation of 29 CFR 1910.23(c)(1), and the penalty and its adjustment for that violation was properly calculated in accordance with Complainant's Operations Manual.

4. In that this court finds that Respondent violated the cited N.C. OSH Act standard, 29 CFR 1910.23(c)(1), Complainant's alternative allegation that Respondent violated N.C. Gen. Stat. § 95-129(1) (the General Duty Clause) is moot.

DISCUSSION

Two questions are key to the consideration of the decision of this case. First, is the surface of the platen of the tire press machine a platform as specified in 29 CFR 1910.21(a)(4)? Second, if the surface of the platen is a platform, is the Respondent subject to the provisions of 29 CFR 1910.23(c)(1)?

The first question is approached by looking at the precedents cited by the parties. No North Carolina precedent appears to apply to this case. Respondent cites the *General Electric Co. v. Occupational Safety and Health Review Commission,* 583 F. 2d 61, (2d Cir. 1978) decision for its argument that 'platforms' in 29 CFR 1910.23(c)(1) are elevated working spaces that are "designed primarily for the operation of machinery and equipment and which require employee presence on a predictable and regular basis; and not to spaces where only occasional maintenance or repair is performed." *Id. at* 63. This definition could be construed to exclude the area from which the mold changers stood to drill the clogged holes of the tire presses, as there is no evidence to show that the platens were *designed* to provide for the drilling task. However, to interpret the definition of 'platform' in such a way would limit the practical application and the purpose of the rule that is the basis of the citation in this case. The 8th Circuit has criticized and declined to follow *General Electric* in its decision, *Donovan v. Anheuser-Busch,* 666 F.2d 315 (8th Cir. 1981).

In *Anheuser-Busch* the conduct at issue was multi-faceted with parts of it done weekly or biweekly and more often in summer months and one task at issue was performed once per shift. In contrast, the conduct at issue in *General Electric* involved maintenance performed just four to five times in a period of two and one-half years. *General Electric at* 62, Ftnt.1. The 8th Circuit's criticism was expressed in the following manner:

> "Platform" as used in 29 C.F.R. s 1910.23(c)(1) is defined as "(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." (Emphasis added.) 29 C.F.R. 1910.21(a)(4). Relying on the interpretation by the Second Circuit Court of Appeals of these standards in General Electric Co. v. Occupational Safety and Health Review Commission, supra, 583 F.2d 61 (C.A. 2 1978), the ALJ in his "Conclusions of Law" concluded that 29 C.F.R. 1910.23(c)(1) applies "only to

> elevated working spaces four feet or more above adjacent floor or ground level, which require employee presence for the operation of machinery and equipment for which it was designed."
> We conclude that this interpretation of the applicable standards is erroneous, and we decline to follow the interpretation of the definition of "platform" adopted by the ALJ . . . .
>
> Standards under the Act "should be given a reasonable, commonsense interpretation." National Industrial Constructors, Inc. v. Occupational Safety and Health Review Commission, 583 F.2d 1048, at 1055 (C.A. 8 1978). We conclude that the phrase "such as a balcony or platform for the operation of machinery and equipment", when given a reasonable and commonsense interpretation, does not constitute words of limitation restricting the definition of "platform", but is an example or illustration to the nature and quality of structures included in the general definition of "platform".

Donovan v. Anheuser-Busch, Inc., 666 F.2d 315, 326-27 (C.A.8, 1981)

The opinion of the 8th Circuit appears to be a more reasonable approach to interpreting the definition of "platform," as the language, "such as a balcony or platform for the operation of machinery and equipment," is simply illustrative and exemplary, not limiting.

What is evident in this case is that the platen was a surface on which employees stood with at least daily frequency to drill holes that became clogged in the operation of the tire presses. There is evidence to suggest that the drilling of the holes is even more frequent than the once daily that Respondent's witnesses acknowledged. One of the mold changers reported to HCO Moore that he had drilled holes in the molds to clean debris from them on four occasions on the day of the inspection. The evidence supports a finding that the platens were working spaces. The *General Electric* court may have been influenced by the infrequent, if not rare, use of the space in question, whereas, in *Anheuser-Busch*, the frequency of workers being on the surface-in-question was far greater. Likewise, in this case, the frequency with which workers were standing on the platens to drill clogged holes was far greater than in *General Electric* and probably greater than with *Anheuser-Busch.*

Finally, Respondent cites a federal OSHA Commission split decision that addressed both the above cases and relied on the General Electric one because, "We consider the facts now before us to be far closer to those in *G.E. v. OSHRC* than to those in *Donovan v. Anheuser-Busch.*" *Globe Industries, Inc.,* 10 OSHC 1596 (1982) (*Employees therein performed a once per week maintenance function on weekends when manufacturing was shut down*). *Globe* also asserted that an additional factor to consider which was noted in *General Electric* was whether the work done on the platform was "central to the processes of the employer." *Id. at* p.4. In this case, the evidence showed that tire defects prompted the drilling by mold changers. Producing tires without defects would appear to be work that is 'central to the processes of Goodyear;' hence, there is an additional basis for finding that the platen in this case is a platform. In summary,

more than sufficient evidence was entered to establish that the platen was a working surface and thus a platform.

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 substantially probable result of an accident could 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 *Commissioner of Labor v. Daniel Construction)* of the condition or conduct that created the hazard. *Commissioner of Labor v. Daniel Construction,* 2 OSHANC 299, 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No. 81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984).

Commissioner of Labor v. Liggett Group, Inc., OSHANC 94-3175 (1996)

A significant portion of the circumference of the platen was not open and presented no fall hazard. On the other hand there were open sides of the platen that were unprotected. Based on Complainant's Exhibit 1, the open front side would appear to be approximately 90 degrees, if not more. How large comparatively the back side opening is is not as clearly pictured, but it appears to be close to the same size as the front. If not the same size, it is certainly large enough for an employee to fall through. The platen was 51 to 52 inches above the cement floor, and this was testified to by the Respondent's employees. Mold changers were expected to work and did work on the platens whenever quality inspectors found defects in the tires that arose from clogged vent holes. The vent holes went all around the top part of the press. The drilling of the vent holes required the mold changers to work at an approximate height of seven feet so the work was above the heads of the employees. This, and the fact that the work required them to look up and not at their feet, made their work more hazardous.

While Respondent's witness testified that normally the workers could stand at the sides that were not open to do the drilling (T. pp. 76-77), the fact that the holes went all the way around the upper part of the press could have reasonably caused the employee to need to go to the other protected side to finish any work started. No training materials were offered to illustrate where employees were instructed to stand. The movement to the other position that was not open-sided would have required the employee to step near an exposed side. Any movement on the surface, including getting on or off the platen, would have added to risks because the surface was irregular and varied by 1-2 inches depending on where the employee was standing or stepping. This created a danger of tripping or losing one's balance.

The above discussion illustrates the first, second, and third of the five factors to justify a finding of a serious violation.

The fourth factor is established by testimony from both parties' witnesses that a fall could occur and that an accidental fall from a height of four feet can be serious and even deadly. In *Brooks v. McWhirter Grading,* 303 N.C. 573, 584-586, 281 S.E.2d 24, 31-32 (1981), North Carolina's Supreme Court held that proof of a possible accident is sufficient to prove a serious violation if the substantially probable result of the accident is serious physical injury or death. It is not necessary to prove that the *accident* is probable. Because of *McWhirter,* the large number of hours over thirty-plus years worked, with but one recorded fall, does not allow the Respondent to escape responsibility for the existence of a condition that presents a serious hazard.

Safety in the workplace is not analogous to dog owners who in some jurisdictions may be allowed "one free bite" when the dog hurts a visitor. Safety standards are not based on waiting for the first injury to occur before responsibility is established. The purpose of safety standards is to prevent accidents by eliminating foreseeable and preventable hazards. The rarity of accidents was, however, an appropriate factor to apply in accounting for the penalty imposed by the Commissioner. The lowest probability was applied by the Commissioner.

The fifth factor is well illustrated by the fact that Respondent's management knew: 1) of the presence of the platens; 2) that the platens were more than four feet high; 3) that employees worked on the platens; and 4) that there were no railings on the open sides of the platens. Whether or not Goodyear accepted that the work on the unguarded platens presented a fall hazard is irrelevant to the question of whether it violated 29 CFR 1910.23(c)(1). The reason why employer recognition of the hazard is not required in a case where a specific standard is at issue is because when a standard prescribes or prohibits certain specific conditions or equipment, a hazard is presumed to exist if the terms of the standard are met. Here, the standards are met. *See Southern Pan Services Company,* OSHRC No. 08-0866, 2010 OSAHRC LEXIS 22; *Vecco Concrete Construction of D.C., Inc.,* OSHRC No. 15579; 1977 OSAHRC LEXIS 190; 5 OSHC (BNA) 1960; 1977 OSHD (CCH) P22,247 (evidence that the employer's personnel perceived no hazard in the existence of the cited condition was irrelevant because by prohibiting certain conduct the standard presupposes that the conduct is hazardous).

Having established the elements necessary to justify the finding of a serious violation, the Commissioner's citation was appropriate and the penalty imposed is reasonable.
Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

1. Citation 1, Item 1 is affirmed as a serious violation of 29 CFR 1910.23(c)(1) and a penalty of $1,950.00 is hereby imposed.

2. The penalty shall be paid within twenty (20) days of the filing date of this Order.

This the 14 day of January, 2014.

Reagan H. Weaver
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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

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

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by depositing a copy of the same in the United States Mail, First Class;

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

THIS THE 15th DAY OF January 2014.

OSCAR A. KELLER, JR.
CHAIRMAN

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