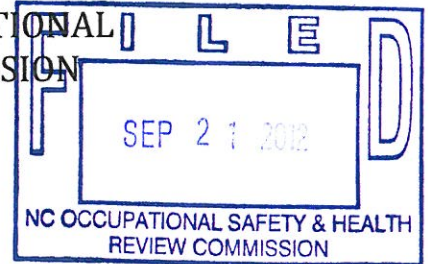


BEFORE THE NORTH CAROLINA OCCUPATIONAL  
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2012-5285  
OSHA INSPECTION NO. 315958124  
CSHO ID: I0931

vs.

MUNDY MAINTENANCE SERVICES  
AND OPERATIONS LLC

AMENDED ORDER

*and its successors*

Respondent.

**APPEARANCES:**

**Complainant:**

**Victoria L. Voight, Special Deputy Attorney General  
Casey Turner, Law Student (3<sup>rd</sup> year practice)  
North Carolina Department of Justice**

**Respondent:**

**Kyle R. Still, Ward and Smith, P.A.  
Counsel for Respondent**

**BEFORE:**

**Hearing Examiner: Monique M. Peebles**

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on July 19, 2012, at the North Carolina Medical Society Auditorium, 222 North Person Street in Raleigh, North Carolina.

The Complainant was represented at the hearing by Casey Turner under the 3<sup>rd</sup> year practice rule on behalf of Victoria Voight, Special Deputy Attorney General and the Respondent was represented by attorney Kyle Still, Ward and Smith, P.A.

After reviewing the record file, the evidence presented at the hearing, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

#### **FINDINGS OF FACT**

1. 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 N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").
2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about February 10, 2012, contesting a citation issued on January 10, 2012, to Respondent, Mundy Maintenance Services and Operations, LLC ("Respondent" or "Mundy").
3. Respondent, a corporation which performs maintenance work and general construction duties as a contractor in the State of North Carolina and is subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent employs 4,000 workers overall, and 13 people were employed at the worksite at the time of the accident.

4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
5. During the period between November 30, 2011, and December 13, 2011, Compliance Safety and Health Officer, Chris Moore, ("CSHO Moore") inspected Respondent's worksite at 3216 Cedar Creek Road in Fayetteville, North Carolina ("site"), pursuant to general scheduled assignment of DAK Americas LLC ("DAK").
6. CSHO Moore properly entered the site and received consent to the inspection by Mr. Anthony Hudson, site safety superintendent for DAK Americas LLC.
7. At the time of the inspection, the site was a multi-employer site. DAK was the property owner and owned the machines/equipment at the site, and DAK hired Mundy to perform maintenance work and general construction duties.
8. As a result of plain site hazards, CSHO Moore conducted a separate opening conference with Mr. Doug Williams, site manager for Respondent ("Mr. Williams").
9. CSHO Moore took photographs, interviewed 3 employees, and reviewed copies of Respondent's safety programs.
10. CSHO Moore conducted a joint closing conference with DAK and Respondent with Mr. Williams present, and he recommended that citations be issued.
11. As a result of the recommendations of the compliance officer, on January 10, 2012, the Complainant issued two citations to Respondent. Citation 2 carried no fines and was abated. Citation 1 was issued as follows:

**Citation 1 Item 1: Serious**

Citation 1, Item 1a, alleges a serious violation of 29 CFR 1910.212(a)(1): "One or more methods of machine guarding Employees was not provided to protect the operator and other employees in the machine area from hazards such as those created by points of operation, ingoing nip points, rotating parts, and flying chips and sparks:

- (a) Facility, Mundy welding shop – where a pedestal 115 VAC JET drill press (Model No. JDP-14JF) was missing a guard over the rotating chuck that was used to drill metal pipes.
  
- (b) Facility, insultation and fabrication shed - where a Consew table mounted sewing machine (200RB-5) was missing a guard around the needle that was used to sew insulation mineral wool soft pads.

The proposed penalty for this violation was \$2750.00.

### **UNGUARDED ROTATING CHUCK**

- 12. While conducting the inspection of the DAK site, CHSO Moore noticed an unguarded rotating chuck on a 115 VAC JET drill press in the pipe shop.
  
- 13. The 115 VAC JET drill press is a "sensitive" drill press.
  
- 14. Sensitive drill presses are manually operated and the employee has to pull down the handle to operate.
  
- 15. According to OSH Detail Sheets for Drill Presses (Respondent Exhibit 1), a guard at the point of operation for sensitive drill presses may not be necessary, as compared to an automatic drill press where guarding is mandatory.
  
- 16. According to OSH Detail Sheets for Drill Presses, guarding is needed if hair or clothing can get caught in the cutter.

17. Respondent's General Safety Rules for drill presses prepared by DAK (Respondent Exhibit 3) provide for short sleeves or sleeves rolled above the elbow to be worn as a safety precaution.
18. The 115 VAC JET drill press operates at a high velocity and can be set up to 2500 rotations per minute.
19. One of the Respondent employees, welder Robert Matthews, informed CHSO Moore during his interview that as a safety precaution he wore safety glasses and long sleeves.
20. An unguarded rotating chuck in a sensitive drill press which spins at a high velocity created a hazardous condition.
21. Six of Respondent's employees operate Respondent's drill press.
22. The hazardous condition of the drill press created the possibility of an accident if loose clothing got caught in the chuck while being operated and the possibility that an employee would be seriously injured.
23. The substantial probable result of such an accident is sprain, or minor fracture, or lacerations.
24. Respondent was aware that the chuck did not have a guard.
25. The hazard could have been abated by installing a guard covering the rotating chuck.

#### **Unguarded Needle**

26. Respondent employees operated a heavy duty Consew table mounted sewing machine to sew heavy mineral wool fabric used for the insulation of pipes.

27. Respondent considered the "foot" as a safety feature which "guarded" the individual employee from putting their finger under the needle while being operated.
28. In operating the machine Respondent insulator, Robert Matthews, who has used this machine for years, pushes the material and stops her hand when it reached the "foot."
29. Respondent's safety manager, Keith Fields, testified that he was unaware of the guard for the needle recommended by OSHA.
30. An unguarded needle on a heavy duty sewing machine created a hazardous condition.
31. Two of Respondent employees operate Respondent's sewing machine.
32. The hazardous condition of the sewing machine created the possibility of an accident if an individual's finger came into contact with the needle.
33. The puncture hazard created the possibility that an employee could be injured; the substantial probable result of such an accident is the risk of infection beyond the puncture.
34. Respondent should have known of the hazardous condition created by not having a guard for the needle.
35. The hazard could have been abated by installing a needle guard.
36. CHSO Moore found the severity to be medium for the unguarded rotating chuck and low for the unguarded needle and he combined the two violations. He found the probability to be high and assessed a combined gravity based penalty of \$5000.00.

37. CHSO Moore applied a 25% credit for safety and health programs, 10% credit for history, a 10% reduction for respondent's cooperation and proposed an adjusted penalty in the amount of \$2,750. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.
38. The hazards were abated by the purchase by DAK and installation of needle guard on December 9, 2011, and a chuck guard on December 12, 2011.

**Defense: Isolated Employee Misconduct**

Respondent has the burden of showing: (1) Respondent had work rules designed to prevent the violation; (2) the rules were adequately communicated to the employees; (3) steps were taken by the employer to discover violations; and (4) the employer enforced the rules when violations were discovered.

39. The Respondent's safety policy (Respondent's exhibit 3) was communicated to its employees through training and no violations were observed by Respondent supervisor on site, Williams.
40. No evidence was presented on what steps were taken by Respondent to discover violations and whether Respondent enforced rules when violations were discovered.

**Conclusions of Law**

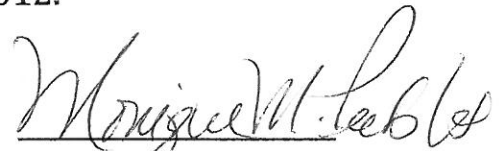
1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions and

Jurisdiction of the Act.

3. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 1, Item 1 was a serious violation of 29 CFR §1910.212(a)(1).
4. Respondent failed to meet its burden of proving the affirmative defense that the employee action was a result of isolated employee misconduct.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED, ADJUDGED, AND DECREED** that Citation 1, Item 1a, alleging a serious violation of 29 CFR 1910.212(a)(1) is hereby affirmed with a penalty of \$2750.00.

This the 17 day of September 2012.



Monique M. Peebles  
Administrative Law Judge



CERTIFICATE OF SERVICE

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

KYLE R. STILL  
WARD AND SMITH PA  
PO BOX 33009  
RALEIGH NC 27636

VICTORIA VOIGHT  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
P O BOX 629  
RALEIGH NC 27602-0629

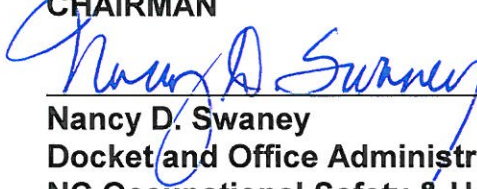
by depositing same in the United States Mail certified mail, postage prepaid, at Raleigh, North Carolina, and upon;

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 24<sup>th</sup> DAY OF September 2012.

OSCAR A. KELLER, JR.  
CHAIRMAN



Nancy D. Swaney  
Docket and Office Administrator  
NC Occupational Safety & Health Review Commission  
1101 Mail Service Center  
Raleigh, NC 27699-1101  
TEL.: (919) 733-3589  
FAX: (919) 733-3020