

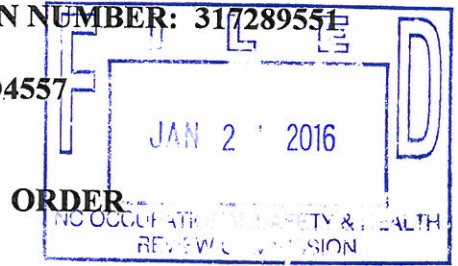
**BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA**

**Commissioner of Labor of the
State of North Carolina,**)
)
)
Complainant,)
)
v.)
)
H & P Wood Turnings, Inc.,)
and its successors,)
)
Respondent.)

DOCKET NO.: OSHANC 2014-5597

INSPECTION NUMBER: 317289551

CSHO ID: D4557



THIS MATTER came on for hearing and was heard before the undersigned on three dates in Raleigh at the offices of the North Carolina Safety and Health Review Commission: July 16, 2015, September 25, 2015 and on December 9, 2015. The Complainant was represented by Jill F. Cramer and the Respondent represented itself through its Vice-President, Richard Cavanaugh.

Complainant's witnesses were Scott Jones, Salt Lake City Testing Lab, United States Department of Labor Occupational Safety and Health Administration; Tim Juneau, Compliance Safety and Health Officer, North Carolina Department of Labor, Occupational Safety and Health Division; and Richard Strickland, Chief Fire Code Consultant, Office of State Fire Marshall, North Carolina Department of Insurance. Respondent's witnesses were Lafayette Atkinson, District X Supervisor, North Carolina Department of Labor, Occupational Safety and Health Division; Paul Bryant, President, Industrial Air Solutions, Inc.; Richard Cavanaugh, Vice-President, H & P Wood Turnings, Inc.; and Tammy Cavanaugh, Administrative Assistant, H & P Wood Turnings, Inc.

Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties, 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, H & P Wood Turnings, Inc. (hereafter Respondent or H&P) is a North Carolina corporation which, at all times relevant to this case was in the business of

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- manufacturing turned wood products for furniture at its location, 9375 U.S. Highway 117 South, Rocky Point, North Carolina 28457.
3. Respondent is an employer within the meaning of N.C. Gen. Stat. §95-127(10), and all of Respondent's employees referred to in the Complaint are "employees" within the meaning of N.C. Gen. Stat. §95-127(9). As of December, 2013 Respondent employed 11 employees.
 4. Compliance Safety and Health Officers Tim Juneau (Health Inspection) and John Stein (Safety Inspection) performed an inspection at Respondent's location beginning May 31, 2011.
 5. Citations were issued pursuant to the inspection begun on May 31, 2011.
 6. Respondent contested the citations and the files were assigned North Carolina Occupational Safety and Health Review Commission case numbers 2011-5224 and 2011-5225.
 7. The parties entered into a settlement agreement as a result of the 2011 inspection for cases 2011-5224 and 2011-5225.
 8. The settlement was filed with the Court on June 12, 2013.
 9. Pursuant to the above-referenced settlement agreement, all hazards not yet abated in June, 2013 were to be abated within six months. (Complainant's Exh. 8)
 10. During the six-month period, the parties agreed that Respondent would submit monthly reports regarding its abatement actions on the 5th of each month following the signing of the order.
 11. Complainant used emails and phone calls to Respondent to remind it of the reporting responsibilities.
 12. Respondent submitted reports on four occasions in July, September, October and November following the signing of the order.
 13. Pursuant to the settlement agreement, Respondent agreed to submit documentation that a qualified individual had evaluated the dust collection system within 45 days of the signing of the order.
 14. Respondent located a qualified individual to evaluate the dust collection system in September, 2013 and that individual, Paul Bryant, subsequently visited the facility and evaluated it in or about February, 2014. Bryant submitted a written report of his evaluation dated April 5, 2014 (See Respondent's Exhibit 16).
 15. Respondent agreed, among other things in the settlement agreement, to take specific abatement actions in response to three hazards identified in the first Citation, 2011-5224, and the alleged failure to abate the three hazards forms the first three of four issues tried in this proceeding. The first three issues are listed below:
 - a. **Citation 1, Item 2** - document the repair of the dust collection system by a qualified individual and submit photos of the repairs;
 - b. **Citation 1, Item 4** - document the evaluation of the job made sander/buffer and its connection to the dust collection system by a competent individual and submit photos of the new collector; and
 - c. **Citation 1, Item 7(a)** - document the evaluation of production area electrical equipment by a qualified electrician with certification that all electrical equipment is approved to be used in a Class II, Division 2 location.
 16. The settlement filed on June 12, 2013 also included a provision related to hearing conservation, but that is not at issue in this action.

17. On December 18, 2013, a little over six months after the filing of the order approving settlement, Compliance Safety and Health Officer Tim Juneau conducted an inspection to determine whether the above three hazards had been abated.
18. After the December, 2013 reinspection by Juneau, Complainant issued Respondent a Citation on March 5, 2014 alleging the following failure to abate (FTA) violations tracking the same citation numbers as were in the original Citation, 2011-5224, with corresponding penalties:
 - a. **Citation 1, Item 2** - N. C. Gen. Stat. §95-129(1) - failure to abate with a penalty of \$33,600.00;
 - b. **Citation 1, Item 4** - N. C. Gen. Stat. §95-129(1) - failure to abate with a penalty of \$33,600.00;
 - c. **Citation 1, Item 7(a)** - 1910.307(c)(2)(i) - failure to abate with a penalty of \$33,600.00;
19. In addition, also on March 5, 2014, Juneau issued a new Citation and Notification of Penalty that alleged a Repeat Serious violation with penalty, to wit,
 - a. **Citation 2, Item 1** - 1910.22(a)(1) - Repeat Serious violation for failing to keep the facility clean and orderly, or in a sanitary condition, or, in the alternative, applying the provisions of N. C. Gen. Stat. §95-129(1) -- the general duty clause -- with a penalty of \$5,600.00.
20. Respondent contested all four of the Citations (in Paragraphs 18 & 19) at the hearing and they constitute the issues addressed in this decision.

Citation I, Items 2, 4, 7(a) (Failures to Abate)

21. Upon his reinspection on December 18, 2013, Juneau found there were still repair issues with the dust collection system, and in addition, there had been no evaluation of the job made sander/buffer and its connection to the dust collection system.
22. Juneau took pictures to document what he observed on December 18, 2013 and those pictures were admitted into evidence (See Complainant's Exhibit 13).
23. The pictures of Complainant's Exhibit 13, especially 13-1, 13-2, 13-3, 13-4, 13-6, 13-7, 13-8, 13-12, 13-13, and 13-14 illustrate what Juneau observed on December 18, 2013.
24. As of the date of the reinspection, neither Items 2 nor 4 of Citation I had been abated.
25. A sample of the dust found at the H&P facility in June, 2011 was tested at the OSHA facility in Salt Lake City and was found to be combustible.
26. As of June, 2011, the dust at Respondent's facility was combustible.
27. As of June, 2011, the H&P facility was properly considered a Class II, Division 2 facility under the definitions found in 1910.399.
28. As of December 18, 2013, Respondent had not obtained an approval of any kind for the production area electrical equipment being used in the facility or for the ignitable or combustible properties of the combustible dust that was present.
29. As of December 18, 2013, the H&P facility remained a Class II, Division 2 location.
30. The failure to obtain an approval of any kind for the production area electrical equipment being used in the facility or for the ignitable or combustible properties of the equipment was a failure to abate Citation 1, Item 7(a).

Citation II, Item 1

31. The pictures taken by Juneau on December 18, 2013 documented dust having been allowed to collect in several areas of the H&P facility. The pictures admitted into evidence did not appear to replicate the same photographs taken at the initial visits of the first inspection that were taken in May and June, 2011 (See Complainant's Exhibits 9 and 10 and compare with Complainant's Exhibit 13).
32. No new sample of the dust pictured on December 18, 2013 was collected and no testing was offered into evidence of dust from the December, 2013 inspection.
33. The combustibility of the dust pictured in December, 2013--while possibly similar, even identical, to the sample tested from two and one-half years earlier--was not tested.
34. Complainant's policy, CPL 03-00-008, Combustible Dust Explosion Prevention Program, identified procedures for investigation of locations where hazards from combustible dust was suspected. The policy states: "If CSHOs find that there are potential combustible dust hazards, dust samples *must* be safely collected." (emphasis added) (Complainant's Exhibit 7, p.12).
35. CPL 03-00-008 refers to itself as being an "Instruction." *Id.* at p.17.
36. CPL 03-00-008 tells CSHOs that "In order to substantiate housekeeping violations, CSHOs *shall take* representative measurements. Thickness measurements *must* be made at several locations within the sampling area . . . As a part of determining whether the housekeeping violation is serious, the CSHO should determine whether the dust is combustible or can cause deflagration by submitting the sample to SLTC and obtaining its analyses." (emphasis added). *Id.*
37. The CSHO did not take measurements of dust accumulation depth on the December 18, 2013 inspection date.
38. Without having taken new dust samples, measured dust accumulations, and compared dust areas as percentages of the areas where it was found, the facts on which a new, serious violation two and one-half years after the initial measurements were taken, are insufficient to support a finding of a repeat, serious violation of 1910.22(a)(1).

ADDITIONAL FINDINGS OF FACT

39. Respondent introduced evidence of its financial statements and tax returns (See Respondent's Exhibit 22) which showed that over the past five years the business has either lost money or has made very modest profits. If all the profits and losses were accumulated for the 2010-2014 period, the losses exceed the profits substantially.
40. The tax returns and W-2's proffered for Richard Cavanaugh show that he has not received large or disproportionate salaries for his role leading the company, and there is no evidence to suggest that Tammy Cavanaugh has received anything more than modest compensation for her role which has been significant during the 2012-2014 time period.
41. Respondent is unable to pay penalties as proposed without going out of business and causing a number of long-time employees to become unemployed.
42. Respondent moved and Complainant did not object to Respondent's motion for the sealing of Respondent's Exhibit 22, as it contains recent confidential business information for H&P of a proprietary nature. The unsealing of this information would

expose Respondent to unnecessary intrusion upon its business interests without justification.

43. Respondent had abated the hazardous conditions for which it was cited in 2011 prior to the initiation of the hearing in this case.
44. In June, 2011 and on December 18, 2013, Respondent was a Class II, Division 2 facility. By the time of the hearing, H&P had become an unclassified location because of the corrective action it had taken, including but not limited to its greatly improved housekeeping. (See Respondent's Exhibit 7, p. 499-23 and Exhibit 8, p. 70-385).

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. The Respondent is subject to the jurisdiction and provisions of the Act.
3. Complainant proved by a preponderance of the evidence that Respondent failed to abate the violations of the Act for which it was cited in Citation I, Items 2, 4, and 7(a) as of the March 5, 2014 issuance of the Citations in this case.
4. The proposed penalties in this case were properly calculated, but the Respondent has presented strong and persuasive evidence of its financial incapacity which will allow adjustment of the penalties imposed by Complainant (See *Brooks v. Triple I Industries*, 2 NCOSHD 793 (1986)).
5. The failure to impose a penalty of some kind would make meaningless the provisions of the Occupational Safety and Health Act as well as its enforcement.
6. The contents of Respondent's Exhibit 22 should be protected from disclosure to the general public and should not be released without an order from the North Carolina Occupational Safety and Health Review Commission.
7. Complainant failed to prove by a preponderance of the evidence that Citation II, Item 1 was a repeat serious violation of 1910.22(a)(1) in that it did not establish the seriousness of the alleged violation because it did not measure the combustibility of samples of the dust pictured on December 18, 2013 nor did it measure the area covered by the dust compared to the area of the room.

DISCUSSION

The parties engaged in a protracted hearing that stretched over three days. Counsel for Complainant presented her case with care and Respondent, representing itself through its Vice President, *pro se*, was passionate in presenting its defenses and expressing concern for its employees. In the final analysis, Respondent's arguments could not overcome the facts that its abatement was not timely and the three failure to abate citations were established by the evidence presented by Complainant's counsel. Hence, the decision as to the FTA citation items became primarily a question of the appropriate penalty amount. Respondent's evidence of financial hardship and its having only 11 employees has allowed the penalty to be reduced substantially. While Respondent's Vice President had to cope with personal illness during the period of time following the initial Citations, personal illness is not a recognized basis to adjust or modify penalties under the NCOSH Act. Respondent's Vice President impressed

this hearing officer with his concern for protecting the employees. Concern for employees starts with providing a workplace that is free of hazards. If that concern remains paramount, there will never need to be any concern for the financial impact of compliance with OSHA penalties.

With respect to the first two of the FTA citation items, the Complainant established convincingly that Respondent had failed to comply with its abatement promises.

With respect to the third of the three FTA citation items, the CSHO cited the Respondent for a violation of §1910.307(c)(2)(i) because he considered combustible dust to be present and he believed that the electrical equipment in the H&P facility had not been approved for the location. §1910.307(c) provides that in a hazardous location, i.e. a classified location, the equipment, wiring methods, and installations of equipment must be either intrinsically safe, approved for the location, or safe for the location. Subparagraph 2(i) states that not only must the equipment be approved for the class of location, “but also for the ignitable or combustible properties of the ... dust, or fiber that will be present.” Complainant established that at the time of the original May/June, 2011 inspection, there was combustible dust. The abatement terms to which the Respondent agreed promised that Respondent would document the evaluation of production area electrical equipment by a qualified electrician with certification that all electrical equipment was to be approved in a Class II, Division 2 location. Respondent did not get an evaluation of any kind done timely. Respondent did eventually clean his facility thoroughly and persuaded this hearing officer that the facility should not remain a Class II, Division 2 facility. Failure to keep the facility clean could certainly subject it to reclassification as a Class II, Division 2 location.

With respect to the new violation, Citation II, Item 1, the Complainant’s enforcement policies expected the CSHO to sample, test and measure. Complainant chose to rely upon the dust sampling and testing from a period too far back in time to prove an additional, new, serious violation of OSH regulations. Because Respondent failed to act in a timely manner to clean its facility, Respondent was reasonable to cite it for housekeeping, but it did not prove a serious violation, nor did it prove a “repeat” violation as that had not been a citation in the previous three years. A non-serious violation of the housekeeping regulation was appropriate and the penalty of \$1,000 is appropriate.

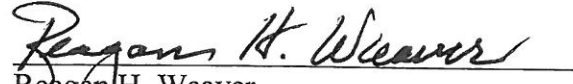
BASED UPON the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

1. Citation I, Items 2, 4 and 7(a) are affirmed as violations of the Act as indicated in the Citation.
2. The violation of Citation II, Item 1 is affirmed as a Non-Serious violation of 1910.22(a)(1).
3. The penalty for violation of the three failures to abate in Citation I, Items 2, 4, and 7(a) is reduced from \$100,800 by 90% to \$10,080, and this penalty shall be added to the remaining balance from the previous settlement of 2011-5224 and 2011-5225 and added to the penalty of \$1,000 for the non-serious violation of the

housekeeping Citation II, Item 1 then divided into 48 equal monthly payments to begin with the first payment in February, 2016.

4. The contents of Respondent's Exhibit 22 shall be sealed and protected from disclosure to the general public and shall not be released without an order from the North Carolina Occupational Safety and Health Review Commission.

This the 20 day of January, 2016.


Reagan H. Weaver
Hearing Examiner

CERTIFICATE OF SERVICE

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

RICHARD CAVANAUGH
H & P WOOD TURNINGS, INC.
P O BOX 505
ROCKY POINT, NC 28457

JILL CRAMER
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

by depositing a copy of the 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 27 DAY OF January 2016.

ARLENE K. EDWARDS
CHAIRMAN


Karissa B. Sluss

Docket and Office Administrator
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