

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

APR 19 2018

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT

DOCKET NO. OSHANC 2016-5788  
OSHA INSPECTION NO. 318028727  
CSHO ID NO. N4007

V.

GUY M. TURNER, INC. *and its  
Successors*

**ORDER OF THE COMMISSIONERS**

RESPONDENT/PETITIONER

**DECISION OF THE REVIEW COMMISSION**

This appeal was heard at or about 10:00 A.M. on the 16<sup>th</sup> day of November 2017 in the OAK Courtroom, Lee House, 422 North Blount Street, Raleigh, North Carolina, by Arlene K. Edwards, Chairman, Dr. Richard G. Pearson, and Frank P. Ward, Jr, Members of the North Carolina Occupational Safety and Health Review Commission.

**APPEARANCES**

Complainant: Melissa H. Taylor, Assistant Attorney General; North Carolina Department of Justice, Raleigh, North Carolina.

Respondent: Andrew S. Lasine; Keziah Gates, LLP, High Point, North Carolina.

The undersigned have reviewed the prior Order and record of proceedings before Hearing Examiner Ellen R. Gelbin and the briefs and arguments of the parties.

**ISSUES PRESENTED**

- I. **WHETHER THE USE OF PROTECTIVE EQUIPMENT WAS REQUIRED?**
- II. **WHETHER THE EMPLOYEES WERE EXPOSED TO CARBON BLACK IN EXCESS OF THE PERMISSIBLE EXPOSURE LIMITS (PEL)?**

## **SAFETY STANDARDS AND/OR STATUTES AT ISSUE**

*29 CFR 1910.134(e)(1): The employer did not provide a medical evaluation to determine the employee's ability to use a respirator before the employee was fit tested or required to use the respirator in the workplace.*

*29 CFR 1910.134(f)(1): The employer did not ensure that employee(s) required to use a tight-fitting facepiece respirator passed the appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT).*

*29 CFR 1926.55(a) Employee(s) were exposed to an airborne concentration of carbon black listed in Appendix A of 26 CFR 1926.55 in excess of the 8 hour Time Weighted Average concentration of 3.5 milligrams per cubic meter.*

## **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. State 95-133).
3. The Respondent/Petitioner 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. The Review Commission adopts the Hearing Examiner's Finding of Fact 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,

25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 54.

### **CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing Finding 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. Respondent Guy M. Turner, Inc. 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 not proven that Guy M. Turner, Inc. committed a violation of 29 CFR 1910.134(e)(1).
5. The Commissioner of Labor has not proven that Guy M. Turner, Inc. committed a violation of 29 CFR 1910.134(f)(1).
6. The Commissioner of Labor has proven that Guy M. Turner, Inc. committed a violation of 29 CFR 1926.55(a).

### **DISCUSSION**

#### **I. WHETHER THE USE OF PROTECTIVE EQUIPMENT WAS REQUIRED?**

The conclusions reached in Citation 1 Item 1A and Citation 1 Item 1B both hinge on whether use of protective equipment was required therefore triggering the provisions for medical evaluation and fit testing. The evidence clearly established that the employees were

wearing the respirators because they chose to. The employer, Guy M. Turner, Inc., did not require the use of protective equipment. To require a medical evaluation or fit testing every time an employee independently makes the decision to use a facemask would place an unnecessary burden on the employer and bring work-flow to a stop. Employees should always have the choice to wear protective equipment, but that choice does not create a new responsibility for the employer.

In this case, the employer was not cited for failing to do a work site assessment, and they contend that they did such an assessment. Their assessment found fall and fire hazards but not an inhalation hazard, so they did not require the use of respirators.

The orders of the Hearing Examiner in Citation 1 Item 1A and Citation 1 Item IB are overturned because the use of respirators was voluntary, and therefore, the provisions for medical evaluation and fit testing were not triggered.

**II. WHETHER THE EMPLOYEES WERE EXPOSED TO CARBON BLACK IN EXCESS OF THE PERMISSIBLE EXPOSURE LIMITS (PEL)?**

The permissible exposure limit (PEL) of carbon black is 3.5 mg/m<sup>3</sup>. On December 17, 2015, CSHO Pearson conducted air monitoring tests. Those tests showed that employee, Alex Fraser, was exposed at a level of 9.67 mg/m<sup>3</sup> of carbon black. Mr. Fraser was wearing a N95

CERTIFICATE OF SERVICE

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

ANDREW S. LASINE  
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P O BOX 2608  
HIGH POINT, NC 27261-2608

certified mail, return receipt requested, and upon:

MELISSA H. TAYLOR  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH, NC 27602-0629


by USPS first class mail, 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 DAY OF April 2018.

ARLENE K. EDWARDS  
CHAIRMAN

  
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