

**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 16th 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/m³. 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/m³ of carbon black. Mr. Fraser was wearing a N95

filtering face piece respirator. The employer argued that since the employee was wearing a filtering face piece, which provided protection above the PEL for carbon black, then the employee was not actually exposed to a citable amount of carbon black. Employee exposure is defined in 29 CFR 1910.134(b) as “exposure to a concentration of an airborne contaminant that would occur if the employee were not using protection.” Samples taken inside a respirator are not required to establish exposure in excess of the PEL. Secretary of Labor v. Gunito Corp., 2004 OSHARC LEXIS 84, 9, 20 O.S.H. Cas. (BNA) 1983, 2005 O.S.H. Dec (CCH) P32762 (O.S.H. R.C. Sept. 30, 2004). “Unless actual ingestion or inhalation is a specific element of a standard, ‘the [Commission] need only measure the level of contaminant in the employee’s breathing zone, and such measurements may even be taken before the air is processed by the employee’s respirator.’” Id., quoting, Bay State Refining Co., 15 BNA OSHC1471, 1472 n. 1, 1991-1993 CCH OSHD P29, 579, p. 40,021 n. 1 (No.88-1731, 1992) (citing Titanium Metals Corp. of America, 6 BNA OSHC 1760, 1763-64 & n. 11, 1978 CCH OSHD P22,836, p. 27615 & n. 11 (no. 15411, 1978)). The evidence established that the employee was exposed to 9.67 mg per cubic meter of carbon black, which is over the PEL of 3.5 mg per cubic meter.

The employer also argued that the exposure was the result of a one time event when a light fixture fell. Carbon black dust had accumulated on that light fixture. That type of event should be anticipated. The worksite consisted of 3 open levels. There were

plenty of surfaces on which dust could collect, and it is reasonable to expect disruption of those surfaces during a demolition.

The Order of the Hearing Examiner in Citation 1 Item 2 is affirmed because the evidence clearly established an exposure amount in excess of the PEL.

ORDER

For the reasons stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's March 15, 2017 Order in this case be, and hereby is **OVERTURNED** in part and **AFFIRMED** in part, to the extent that it is not inconsistent with this opinion. Respondent is further **ORDERED** to pay a penalty of \$2,400.00 within 30 days of the filing date of this Order.

This the 19th day of April 2018.



ARLENE K. EDWARDS, CHAIRMAN



RICHARD G. PEARSON, Ph.D., MEMBER



FRANK P. WARD, JR., MEMBER

CERTIFICATE OF SERVICE

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

ANDREW S. LASINE
KEZIAH GATES LLP
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



Karissa B. Sluss
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