



3. Respondent is, among other things, a crane and lifting company with its primary place of business in Greensboro, NC, and is an employer within the meaning of and subject to the provisions of the Act.
4. Respondent's job crew were employees within the meaning of the Act.
5. Potters Industries LLC of Apex, NC, hired respondent to demolish and remove old furnaces and infrastructure at 5414 South Holden Road, Apex, NC (job site), including torch-cutting on and carbon steel.
6. *Per* an anonymous complaint, the NC Department of Labor (NCDOL) assigned CO Pearson to perform a partial inspection for carbon black at the job site and requested that the Radiation Protection Section of the North Carolina Department of Health and Human Services (NCDHHS) send a compliance officer to test for radiation.
7. On December 10, 2015, CO Pearson arrived at the job site and explained the purpose and scope of her inspection. She presented credentials to, held an opening conference with, and received permission to inspect from Potters Plant Manager Bob Hooper and Branch Manager Travis Dowler and respondent's Director of Safety and Quality Assurance David Johnson.
8. The Potters' building complex was over 40,000 square feet, but the only area the CO inspected was the "large bead side area," where it had formerly used large furnaces to reduce glass into grit for road paint and sandblasting, among other things.
9. Potters hired respondent to demolish the large bead side area by removing the furnaces, the steel beams and other steel supporting structures to make room for future updates.
10. CO Jeffries tested for and found no radiation exposure at the job site.
11. CO Pearson observed a dimly lighted job site with respirable "carbon black," a fine black furnace powder, dust or soot in the air, on the floor and on other surfaces. (Complainant's Exhibits 2-4)
12. During the period of December 10, 2015 through December 17, 2015 and in accordance with the NCOSH recommended air sampling guide for carbon black (Complainant's Exhibit 1), CO Pearson tested the air quality in the large bead side area where respondent's employees were working.
13. Respondent employs 300 workers overall and 5 of its employees were working at the job site during the inspection.
14. CO Pearson also interviewed respondent's employees and took photos of the job site.

15. At the time of the inspection, respondent had both voluntary and mandatory respirator programs and some safety training, but did not require employees on site to wear them.
16. Employees at the job site area were voluntarily wearing their own personal or respondent-provided personal protective equipment (PPE) including respirators (3M® one-half face mask and N-95 face masks), safety glasses, steel-toed boots, gloves, hard hats and protective white Tyvek® coveralls that the CO saw were covered in a black substance.
17. Respondent did not monitor the air quality where employees were working, medically evaluate employees or fit-test their voluntary respirators
18. For the morning and afternoon shifts on December 17, 2015, the CO documented her pre-calibration of three Gilair 3 sampling pumps.
19. On December 17, 2015, at the request of the CO, three of respondent's employees, to wit: Alex Fraser, Jeff Burnette and Robbie Short, wore Gilair 3 sampling pumps for their morning shift and fresh ones during their afternoon shift, to measure carbon black air contaminates in the large bead area.
20. The CO preserved the chain of custody, labeling and sample integrity through the lab analysis by Analytics in Virginia, which verified that there was no cross-contamination nor leakage. (Complainant's Exhibit 5) The CO sent a copy of Analytics' report to respondent.
21. Based upon her calculations, the CO determine that neither torch cutter Mr. Short nor fire watchman/crane operator Mr. Burnette were exposed to carbon black above the accepted Permissible Exposure Limit (PEL) of 3.5 milligrams of contaminate per cubic meter of air (mg/m<sup>3</sup>) pursuant to General Industry Standard 29 CFR 1910.1000(a)(2) and Construction Industry Standard 29 CFR 1926.55.
22. Based upon her calculation, the CO determined that torch cutter Mr. Fraser had been exposed during his morning shift to 9.67 mg/m<sup>3</sup>, exceeding the PEL of 3.5 mg/m<sup>3</sup> allowed by General and Construction Industry Standards.
23. Respondent's Director of Safety and Quality Assurance, Mr. Johnson, testified that he saw no airborne carbon black at the jobsite and that his employees wet the floor to keep dust down. He explained that Mr. Fraser's over exposure was a one-time, sudden and accidental over exposure caused when carbon black dust build-up on top of a fluorescent light fixture, loosened by the vibration of Mr. Fraser's saw, fell and dumped on his head during his morning shift. Mr. Johnson buttressed his argument with evidence that none of the other employees were over exposed and Mr. Fraser's exposure level during the afternoon shift was within normal limits.
24. On February 2, 2016, the CO issued the following relevant citations:

Citation 1, Item 1a - SERIOUS:

29 CFR 1910.134(e)(1): The employer did not provide a medical evaluation to determine the employees' ability to use a respirator before the employee was fit tested or required to use the respirator in the workplace (Construction Reference 1926.103):

- a) Potters Industries, LLC, large bead side area – where an employee that performed demolition work was exposed to an airborne concentration of 9.67 milligrams per cubic meter of carbon black and was in excess of the 8 hour Time Weighted

Average concentration of 3.5 milligrams per cubic meter of carbon black and the employer did not provide a medical evaluation to determine the employee's ability to use a respirator.

Date By Which Violation Must Be Abated:	Immediately Upon Receipt
Proposed Penalty:	\$2,400.00

Citation 1, Item 1b – SERIOUS

29 CFR 1910.134.(f)(1): The employer did not ensure that employee(s) required to use a tight-fitting face piece respirator passed the appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT)(Construction Reference 1926.103):

- a) Potters Industries LLC large bead side area – where an employee that performed demolition work was exposed to an airborne concentration of 9.67 milligrams per cubic meter of carbon black and was in excess of the 8 hour Time Weighted Average concentration of 3.5 milligrams per cubic meter of carbon black and the employer did not ensure that employees passed the qualitative fit test or quantitative fit test.

Date By Which Violation Must Be Abated:	Immediately Upon Receipt
Proposed Penalty:	\$0.00

Citation 1, Item 2 – SERIOUS

29 CFR 1910.1000(a)(2): Employee(s) were exposed to an airborne concentration of carbon black listed in Table Z-1 in excess of the 8 hour Time Weighted Average concentration of 3.5 cubic milligrams per cubic meter:

- a) Potters Industries LLC large bead side area on 12/17/15 – where an employee that performed demolition work was exposed to an airborne concentration of 9.67 milligrams per cubic meter of carbon black and was in excess of the 8 hour Time

Weighted Average concentration of 3.5 milligrams per cubic meter of carbon black. This exposure was derived from two samples collected over 338 minutes, with zero concentration assumed for the remainder of the shift.

Date By Which Violation Must Be Abated:	Immediately Upon Receipt
Proposed Penalty:	\$2,400.00

**Citation 1, Item 1a**

25. For Citation 1, Item 1a, the CO found that there was a likelihood of employee over exposure to carbon black in the torch cutting area and during the removal of steel beams, which were covered in the dust.
26. The CO determined that respondent's employee Alex Fraser was over-exposed to carbon black during his morning shift on December 17, 2015.
27. The CO that respondent recognized the hazard and abatement methods because: 1) the job entailed cutting and removing sooty furnaces and carbon steel; 2) carbon dust was observable on the job site to the naked eye and on the Tyvek® coveralls, and, 3) employees were wearing many other types of PPE, including voluntary respirators.
28. The CO determined that there was a possibility of an accident, the substantial probable result of which was damage to Mr. Fraser's lungs due to over exposure to carbon black.
29. She calculated the Gravity Based Penalty as \$3,000.00 (Three Thousand Dollars).
30. She found the severity of an accident to be low.
31. She assessed the probability of over exposure to be greater.
32. She gave no credit for respondent's size.
33. She gave 10% credit for respondent's developmental safety and health program.
34. She gave 10% credit for respondent's lack of serious or willful violations during the three years prior to her inspection of the job site.
35. Based upon the adjustment factors, the CO calculated the proposed penalty as \$2,400 (Two Thousand Four Hundred Dollars) and requested immediate abatement of the hazard.
36. The CO believed that respondent could have avoided the hazard by taking the additional safety measures set forth in paragraph 27 above.

**Citation 1, Item 1b**

37. For Citation 1, Item 1b, CO Pearson found that respondent's failure to test the air quality, mandate respirators, medically evaluate employees and fit test their respirators was a hazard which created the possibility of an accident, to wit: over exposure to carbon black.
38. Respondent's employee Mr. Fraser was exposed to the hazard.
39. The CO determined that respondent recognized the hazard and abatement methods because for the same reasons as paragraph 27 above.
40. The CO determined the substantial probable injury to Mr. Fraser was lung damage.
41. She grouped this violation with Citation 1, Item 1a without assessing further penalty.

**Citation 1, Item 2**

42. For Citation 1, Item 2, the CO found that there was a likelihood of employee over exposure to carbon black in the torch cutting area and during the removal of steel beams which were covered in the dust.
43. The CO determined that respondent's employee Alex Fraser was over-exposed to carbon black during his morning shift.
44. The CO determined that respondent recognized the hazard and abatement methods for the same reasons cited in paragraph 27 above.
45. The CO determined that there was a possibility of an accident, the substantial probable result being damage to Mr. Fraser's lungs as a result of over exposure to carbon black.
46. She calculated the Gravity Based Penalty as \$3,000.00 (Three Thousand Dollars).
47. She found the severity of an accident to be low.
48. She assessed the probability of over exposure to be greater.
49. She gave no credit for respondent's size.
50. She gave 10% credit for respondent's developmental safety and health program.
51. She gave 10% credit for respondent's lack of serious or willful violations during the three years prior to her inspection of the job site.
52. Based upon the adjustment factors, the CO calculated the proposed penalty as \$2,400 (Two Thousand Four Hundred Dollars) and immediate abatement of the hazard.

53. The CO determined that respondent recognized the hazard and abatement methods because of the same reasons cited in paragraph 27 above.
54. The CO proposed a penalty of \$2,400 (Two Thousand, Four Hundred Dollars) and immediate abatement of the hazard.

**Complainant's Motion to Amend Citation 1, Item 2 and  
Respondent's Response in Opposition to the Motion**

57. Pursuant to Rule .0308 of the NC OSH Review Commission, respondent had until February 15, 2017 to file a response.
58. During the hearing of the matter on February 14, 2017, respondent argued against the Complainant's Motion to Amend Citation 1, Item 2 on the grounds that it was untimely filed and did not give respondent an opportunity to file a response prior to the hearing.
59. On February 15, 2017, respondent filed a Response in Opposition to Complainant's Motion, arguing that the motion was untimely filed and should be denied.
60. The undersigned heard oral arguments on the Motion from both sides at the conclusion of the hearing and — prior to drafting this Order — considered respondent's timely filed Response in Opposition to the Motion to Amend Citation 1, Item 2.
61. The construction industry respiratory protection section of 29 CFR 1926.103 provides the following note: "The requirements applicable to construction work under this section are identical to those set forth at 29 CFR 1910.134 of this chapter."
62. The Threshold Limit Values of Airborne Contaminants for carbon black in Appendix A of the Construction Industry Standards (29 CFR 1926.55) is identical to Table Z-1 of General Industry Limits for Airborne Contaminants (29 CFR 1910.1000(a)(2)).
63. The General Industry Standard of 29 CFR 1910.1000(e), Subpart Z and the Construction Industry Standard of 29 CFR 1926.55(b), Appendix A are identical, as follows:  
  
To achieve compliance with paragraphs (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be must be approved for each particular use by a competent Industrial hygienist or other technically qualified person. (Emphasis added)
64. The General and Construction Industry Standards are also identical in providing that: "[W]henever respirators are used, their use shall comply with" Industry Standards 1910.134 (General) and 1926.103 (Construction), respectively.

65. Respondent is not prejudiced by an amendment to Citation 1, Item 2 because the carbon black airborne standards of General and Construction Industries are identical; respondent had actual notice concerning the violation; and respondent had the ability to present defenses, prepare for the hearing, argue at the hearing and file a timely Response in Opposition — all prior to the undersigned considering the matter for final decision.
66. Citation 2, Item 1 involve similar or related hazards as those in Items 1a and 1b.

Based upon the foregoing FINDINGS OF FACT, the undersigned makes the following:

### **CONCLUSIONS OF LAW**

1. Paragraphs 1-66 above are hereby incorporated by reference as if fully set forth herein and to the extent necessary to effectuate this Order.
2. The NCOSH Review Board has jurisdiction over the parties and the subject matter.
4. The CO properly calculated the penalty for Citation 1, Item 1a as \$2,400.00 (Two Thousand, Four Hundred Dollars).
5. The CO properly calculated the penalty for Citation 1, Item 1b as zero and properly grouped it with Citation 1, Item 1a.
6. Citation 1, Item 2 should have been grouped with Citation 1a and b, with no additional penalty assessed.

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Complainant has proved by a preponderance of evidence that respondent violated the above regulations and that the penalties were properly calculated.
2. Respondent failed to prove that the employee's exposure was sudden, unexpected and unforeseeable when the vibrations from an employee's saw caused carbon dust to loosen, dislodge and fall from lighting or other fixtures onto or in the vicinity of employees.
3. Citation 1, Items 1a and b are hereby AFFIRMED and the CO properly calculated the penalty of \$2,400.00 (Two Thousand, Four Hundred Dollars).
4. Complainant's Motion to Amend Citation 1, Item 2 is hereby ALLOWED and is hereby grouped with Citation 1, Items 1a and b, with no further penalty assessed.
5. Citation 2, Item 1 is hereby DISMISSED with prejudice.

6. The penalty shall be paid within ten (10) days of the filing date of this Order.

On this, the 15<sup>th</sup> day of March, 2017.

A handwritten signature in black ink, appearing to read "E. Gelbin", is written over a horizontal line. The signature is stylized and cursive.

Ellen R. Gelbin  
Administrative Law Judge

CERTIFICATE OF SERVICE

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

ANDREW S. LASINE  
KEZIAH GATES LLP  
P. O. BOX 2608  
HIGH POINT, NC 27261

VICTORIA VOIGHT  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
P O BOX 629  
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by depositing a copy of the same in the United States Mail, First Class;

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 17 DAY OF March 2017.

ARLENE K. EDWARDS  
CHAIRMAN



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