

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

**FILED**

SEP -6 2022

NC Occupational & Safety  
Health Commission

COMMISSIONER OF LABOR OF )  
THE STATE OF NORTH CAROLINA, )  
)  
COMPLAINANT, )  
)  
v. )  
)  
)  
)  
D. H. GRIFFIN WRECKING )  
COMPANY, INC., )  
*and its successors,* )  
RESPONDENT. )

**FINAL ORDER**

OSHANC NO.: 2019-6216  
INSPECTION NO.'s: 318179561  
CSHO ID: B1151

THIS MATTER came on for hearing and was heard remotely before the undersigned on June 2, 2022. The Complainant, Commissioner of Labor of the State of North Carolina, hereafter referred to as Complainant or Commissioner, was represented by Stacey A. Phipps, Assistant Attorney General, North Carolina Department of Labor. Respondent, D. H. Griffin Wrecking Company, Inc., hereafter referred to as Respondent or D. H. Griffin, was represented by Jay M. Wilkerson with Conner Gwyn Schenck PLLC. Complainant's witnesses were Compliance Safety and Health Officer (CSHO), Matthew Gruber, and David Wright, former employee of Respondent. Respondent's witnesses were Hayden Ward, former employee of Respondent, and Scott Day, an expert witness.

Based upon the evidence presented at the hearing, and with due consideration of the post-hearing briefs of both parties, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion and enters an Order accordingly.

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

29 CFR 1926.1153(c)(1) provides as follows:

For each employee engaged in a task identified on Table 1, the employer shall fully and properly implement the engineering controls, work practices, and respiratory protection specified for the task on Table 1, unless the employer assesses and limits the exposure of the employee to respirable crystalline silica in accordance with paragraph (d) of this section.

29 CFR 1926.1153(f)(2) provides as follows:

The employer shall not allow compressed air to be used to clean clothing or surfaces where such activity could contribute to employee exposure to respirable crystalline silica unless:

29 CFR 1926.1153(f)(2)(i)

The compressed air is used in conjunction with a ventilation system that effectively captures the dust cloud created by the compressed air; or

1926.1153(f)(2)(ii)

No alternative method is feasible.

### **FINDINGS OF FACT**

1. Complainant 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, D. H. Griffin, a domestic corporation organized and existing under the laws of the State of North Carolina, was at all times relevant to this case, in the business of providing wrecking and demolition services and has an office in Asheville, North Carolina.
3. Respondent was an employer within the meaning of N.C. Gen. Stat. §95-127(11) and all the employees of Respondent mentioned herein were employees of Respondent within the meaning of §95-127(10).
4. Respondent was engaged in the later stages of demolishing a bank building in Asheville, NC, including a concrete reinforced steel vault on the day of the inspection, September 27, 2019.
5. On September 27, 2019, Matthew Gruber, a Compliance Safety and Health Officer (CSHO) for the North Carolina Department of Labor, observed what he later concluded were respirable crystalline silica dust hazards in the form of dust clouds that he observed from a public right of way.
6. The dust clouds were generated from a jack-hammer device mounted on a piece of heavy equipment that was demolishing the bank vault and also from another piece of heavy equipment that was picking up and moving the debris, including placing it in a dump truck.
7. After observing the site for approximately half an hour, Gruber initiated a comprehensive programmed planned inspection, pursuant to construction emphasis in a Special Emphasis Program (SEP) for Silica in Buncombe county.

8. As a result of the inspection, Complainant issued the following Citation on November 8, 2019:

**CITATION NUMBER ONE (Serious)**

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1926.1153(c)(1)	Corrected during inspection	\$6,300.00
002	29 CFR 1926.1153(f)(2)	12/9/19	\$1,200.00
<b>TOTAL</b>			<b>\$7,500.00</b>

9. On Tuesday, September 24, 2019, Respondent’s Project Manager, David Wright, had completed a Pre-Task Plan (PTP) that acknowledged potential respirable crystalline silica hazards from the work to be done that week at the demolition site.
10. Respondent’s PTP included an Exposure Control Plan (ECP). The ECP provided that the workers would need to “keep their windows and doors close” (sic) and that they should “keep the material wet” as they would be engaged in “demo building structure and loading truck.” The “demo building structure and loading truck” was identified as the “Task with Potential Silica Exposure.”
11. The ECP acknowledged that it was completed pursuant to Item xvii of Table 1 that is offered to employers as a “safe-harbor” rather than employers having to measure permissible exposure levels (PEL) for potentially harmful respirable crystalline silica for each task they undertake. This provision is offered as a component of the regulation appearing at 29 CFR 1926.1153(c)(1). For the activities listed in Table 1, compliance with the terms of the table for the activity in question provides a “safe-harbor.”
12. Table 1’s section xvii specifically identified the Equipment/Task of “Heavy equipment and utility vehicles used to abrade or fracture silica-containing materials (e.g. hoe-ramming, rock ripping) or used during demolition activities involving silica-containing materials.” This was the proper provision of Table 1 to be consulted for the Respondent’s activities.
13. Table 1 highlights what the employer must do to come within its “safe harbor.” Its expectation is spelled out in a column of the table entitled, “Engineering and work practice control methods.” The instructions to the employer are 1) “Operate equipment from within an enclosed cab” and 2) When employees outside of the cab are engaged in the task, apply water and/or suppressants **as necessary to minimize** dust emissions.” (Emphasis added)
14. Table 1’s last column and direction to employers who are engaging in the activity described in item xvii, is entitled “Required respiratory protection and minimum assigned protection factor (APF).” The column divides this last instruction into two types of situations, where the exposure is  $\leq 4$  hours/shift or  $> 4$  hours/shift. In *both* cases, the required activity of the employer is “None.” (Emphasis added)

15. Other activity items that are listed in Table 1 such as “Handheld grinders for mortar removal” spell out instructions such as “APF [of] 10 for  $\leq$  4 hours or APF [of] 25 for  $>$  4 hours” in contrast to what is said about the activities in xvii.
16. Respondent’s competent person on site attempted to meet the intent of the standard of Table 1 and incorrectly applied the standard.
17. Respondent’s employee, Hayden Ward, left his Hitachi cab door open for some period of time because of the heat and/or because the machine’s air conditioner pre-filter was clogged, while the CSHO was observing the site. During this time jack-hammering of the vault was occurring.
18. The clogged filter for the Hitachi meant that the air conditioner did not work properly and it was hot that day. It was not possible to work for long in a closed cab without a properly functioning air conditioner.
19. Respondent had no replacement filter available for the Hitachi machine.
20. Ward stepped out of the Hitachi and removed the pre-filter, as he intended to clean it. He walked around the site with the dirty pre-filter to the pickup truck where he could use compressed air. The jack-hammering of the vault by Wright continued while Ward was away from the protection of his cab.
21. Respondent’s employee, Mr. Mendez, was using a hose to spray water on the debris pile and on a side of the vault away from the jack-hammering. The watering was being done pursuant to the ECP to minimize the dust. The watering was not being done in a manner that minimized the dust as necessary, as it was not sufficiently targeted to the sources of the dust to minimize it effectively.
22. Mendez was generally upwind from the dust that was being generated, but he had no protection from exposure in the event the wind blew the dust in his direction.
23. Wright had refilled the water tank used by Mendez to water the site multiple times on the day of the inspection to ensure that the site was watered adequately; nevertheless, the failure to water the site as necessary to minimize the dust created a dangerous hazard.
24. Mr. Ward and Mr. Mendez were exposed to the dust which more probably than not contained respirable crystalline silica.
25. Respirable crystalline silica dust can cause lung cancer and silicosis as well as other illnesses that can lead to permanent disability and death.
26. The reason respirable crystalline silica dust standards were established was that worker exposure to it is known to increase the risk of developing serious silica-related disease.

In other words, the substantially probable result of exposure to such dust could be death or permanent disability.

27. Wright, as Project Manager on the site, prepared the Pre-Task Plan that acknowledged the potential presence of respirable crystalline silica dust, and he also prepared the Exposure Control Plan that noted that the machine operators needed to stay in their cabs and that the dust needed to be watered so his knowledge of the hazard is imputed to the employer.
28. The standard applied to evaluating an employer's knowledge is the "reasonably prudent man." See *Daniel Construction Co. v. Brooks*, 73 N. C. App. 426, 430, 2 OSHANC Decisions 311, 316-317(1985) Based on Wright's fore-knowledge and planning for protection against respirable crystalline silica dust, a reasonably prudent employer with that knowledge would have recognized that not enough was being done to meet the standard of taking *necessary* action to *minimize* the dust emissions.
29. Ward's use of compressed air on the filter meant that he exposed himself to the hazard of respirable crystalline silica dust when he blew the dust off the pre-filter because he was not using a ventilation system that would capture the dust cloud created by the compressed air. Further, he had at least one other option for fixing the problem created by the clogged pre-filter: He could have used a replacement filter. The fact that there was no replacement filter on site does not establish that no alternative method is feasible.
30. While Complainant cited Respondent for Ward having blown his hat off with the same compressed air source that he used to blow the filter off, Complainant did not prove more probably than not that Ward also blew off dust on his hat.
31. The blowing off of the pre-filter using compressed air created a visible dust cloud. In addition, it required Ward to leave the security of his cab in violation of the Exposure Control Plan. More probably than not both of these actions exposed Ward to respirable crystalline silica dust.
32. The penalties imposed by Complainant for the two violations were properly calculated and adjusted.

### **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. At all times material to this proceeding, the Respondent was subject to the requirements of N.C. Gen. Stat. §95-126 *et seq.* and the standards promulgated thereunder.
3. The Review Commission has jurisdiction of the parties and the subject matter.



4. Complainant proved by a preponderance of the evidence that Respondent committed serious violations of 29 CFR 1926.1153(c)(1) and 29 CFR 1926.1153(f)(2)

## DISCUSSION

This case involves the question of exposure to respirable crystalline silica dust and what constitutes compliance with Table 1 which gives a safe harbor to Respondents when they are dealing with potential respirable crystalline silica dust. Respirable crystalline silica dust causes cancer as well as silicosis and other illnesses that result in death or permanent disability. Table 1 is appended to 29 CFR 1926.1153(c)(1) and sets out for employers what they must do in order to avoid being required to measure the personal exposure levels of silica dust at their worksite.

In this case, Table 1 lists an activity that both parties agreed covers the activities involved in demolishing the bank building. Respondent prepared an Exposure Control Plan for potential respirable crystalline silica dust in order to prevent employee exposure to it. Despite a clear attempt on its part to prevent harmful exposure to respirable silica dust, Respondent failed to implement a successful plan. Table 1's provisions for Respondent's work activity was to "apply water and/or other suppressants *as necessary to minimize* dust emissions." Respondent repeatedly asserted at the hearing that the language quoted does not say to take steps as necessary to *eliminate* dust emissions. That is true.

Instead, the Table commands employers to do what is necessary to minimize emissions. Undoubtedly, D. H. Griffin Wrecking Company took steps to minimize dust emissions, but it did not do what was necessary. It is noted that the water tank had been refilled multiple times that day, and this shows that Respondent was not inattentive to the need to maintain the watering. On the other hand, Respondent failed to spray where it should have sprayed and did not stop work when one of its machine operators opened and left open his cab door or exited the cab and removed his machine's pre-filter for the cabin's air conditioning system. While this employee walked around the demolition site, he was exposed to dust emissions from the hammering of the bank vault. In addition, the employee who was watering the site was potentially exposed to the dust emissions as well.

The question for this hearing officer was how does an employer determine what *minimize* and *as necessary* mean? The answer is to apply the reasonably prudent person test. *See Daniel Construction Co. v. Brooks*, 73 N. C. App. 426, 430 (1985). It seems to the undersigned that spraying *both* point sources of dust emissions — the debris pile and the point where the jackhammer was working — would have been necessary watering places. This was not done, and had it been done there would have been fewer dust emissions. A reasonably prudent person would have considered this necessary.

The blowing off of the pre-filter was not the only way to make the air conditioning system work in the Hitachi machine. Certainly it was easier to blow the filter off than going to a store to buy a new one, but an employer in the wrecking and demolition business should have encountered this

problem often enough that it would be prepared with replacement filters for all its machines. It is not necessary to apply a reasonably prudent person standard to this violation as the violation is well established.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Citation 1, Item 001 is affirmed as a serious violation of 29 CFR 1926.1153(c)(1) with a penalty of \$6,300.0;
2. Citation 1, Item 002 is affirmed as a serious violation of 29 CFR 1926.1153(f)(2), and the conditions in paragraphs (f)(2)(i) and (f)(2)(ii) were not met, with a penalty of \$1,200.00;
3. Respondent shall pay the total of \$7,500.00 within twenty (20) days of the date of the filing of this Order.

This the 6 day of September, 2022.



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Reagan H. Weaver  
Hearing Officer

CERTIFICATE OF SERVICE

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

JAY WILKERSON  
CONNER GWYN SCHENCK PLLC  
3141 JOHN HUMPHRIES WYND AVE  
STE 100  
RALEIGH NC 27612

By depositing a copy of same in the United States Mail, Certified Mail, return receipt requested, at Raleigh, North Carolina, and upon:

STACEY PHIPPS  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
P O BOX 629  
RALEIGH, NC 27602-0629

By depositing a copy of same in the United States Mail, First Class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR  
LEGAL AFFAIRS DIVISION  
1101 MAIL SERVICE CENTER  
RALEIGH, NC 27699-1101

By email to [carla.rose@labor.nc.gov](mailto:carla.rose@labor.nc.gov) .

THIS THE 7 DAY OF September 2022.



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