

March 29, 2019

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

John Gresh
Perfect Fit Window Fashions, Inc.
9085 Comprint Court
Gaithersburg, Maryland 20877

Re: Perfect Fit Window Fashions, Inc.
MOSH Case No. T3990-002-17
OAH No. DLR-MOSH-41-17-25412

Dear Sir:

Enclosed is the Final Decision and Order of the Commissioner of Labor and Industry issued today in the above-captioned matter.

Sincerely yours,


Ashley Hicks
Administrative Specialist
Division of Labor and Industry

Enclosure

cc: ✓ Jenny Baker/Sarah Harlan, Assistant Attorneys General
✓ Catherine Bellinger, Assistant Attorney General
MOSH Office of Review

ATTORNEY GENERAL
OFFICE OF THE

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Commissioner of Labor and Industry on April 4, 2018. Based upon a thorough review of the factual record, and the arguments made by both parties, the Commissioner affirms the citation.

FINDINGS OF FACT

Perfect Fit manufactures custom wood shutters at its facility in Gaithersburg, Maryland. The manufacturing process includes wood processing to build the shutters. Tr. at 46. Wood dust is a by-product of the manufacturing process. Tr. at 128.² The facility has three work areas referred to as bays and each bay has dust collectors. Bay 3 has two dust collectors including a Pyradia Belfab DW Open Dust Collector (“Belfab”) that operates with a motor that moves air at 6,000 cubic feet per minute (“cfm”). The owner’s manual for the Belfab unit expressly provides “make sure your installation complies with the local authorities and with the appropriate NFPA Standards” and cautions that dust collector units should not exceed the air handling capacity of 5000 cfm. MOSH Ex. 15. The Belfab dust collector was full on the day of the inspection as well as the day of the closing conference. FF 6. The Belfab was not located 20 feet away from any means of egress or area occupied by employees. Tr. at 100. During the inspection, a sample of wood dust was taken from the Belfab and was analyzed by the Occupational Safety and Health Administration’s Salt Lake City Technical Center which concluded that the wood dust was combustible, and if there was an ignition source, it would be possible

² On review, the employer challenges the HE’s statement that the photographs show dust accumulation throughout the three working areas. This conclusion was not included in the Proposed Findings of Fact but rather in the HE’s Discussion. A review of the photographs from the inspection reveal that it is unclear whether there is wood dust on the floor of the bays. The Commissioner finds that there is not substantial evidence to support the HE’s statement.

for the dust to ignite. Tr. at 132. The other dust collector in Bay 3, a Woodteck Enclosureless dust collector, was located 93 inches from an employee work station. FF 22.

Bay 2 has several Grizzly 2 Horsepower dust collectors. One of the dust collectors in this bay is within 12 feet of the entrance to Bay 1 and within seven feet of an employee workstation. FF 20. In Bay 1, there are three dust collectors including a Delta Model 3 Horsepower dust collector (Delta), a Jet DC 1 Horsepower collector (Jet), and a Grizzly 2 HP Dust Collector. FF 19. The Delta and the Jet dust collectors are less than 20 feet from a means of egress. FF 21.

The National Fire Protection Association has established a consensus standard in the *NFPA 664, Standard for the Prevention of Fires and Explosions in Wood Processing and Wood Working Facilities* (NFPA 664) that addresses hazards in wood processing. MOSH Ex. 12. The NFPA 664 establishes certain requirements for fire and explosion prevention for industrial facilities that process wood and manufacture wood products. *Id.* These requirements include limitations on where dust collectors can be located and the maximum air handling capacity *Id.* The NFPA standard is clear that any unit used indoors between 1,500 cfm and 5,000 cfm must be at least twenty feet from the means of egress. *Id.* The NFPA 664 also specifies that the units need to have an operating motor no greater than 5,000 cfm as well as a regular housekeeping program.

MOSH Compliance Officer Mark Broadwater observed employees working in close proximity to the dust collectors with less than 20 feet from any means of egress. Tr. at 107. He also found that there was no housekeeping plan in place to empty the dust

collectors collecting wood dust on a daily basis. Tr. at 100. In addition, he determined that the Belfab, Jet and one of the Grizzly Dust Collectors were not grounded or bonded. FF 25.

DISCUSSION

To fulfill its burden of proof in a General Duty Clause case, MOSH is required to prove by a preponderance of the evidence that the employer failed to provide a workplace free of a hazard which is recognized by the employer or its industry and which was causing or likely to cause death or serious physical harm. See § 5-104, Labor and Employment Art., Md. Code Ann.; *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973). In addition, MOSH must prove the feasibility and likely utility of the abatement measures. *Secretary of Labor v. Cerro Metal Products Division*, 12 O.S.H. Cas. (BNA) 1821 (1986).

Perfect Fit raises a number of arguments on review.³ First, it challenges whether MOSH has met its burden of proving that a hazard existed. More specifically, Perfect Fit challenges the existence of an ignition source. Perfect Fit disputes the HE's reliance on a United Kingdom study ("UK Study") and MOSH's failure to give specific incidents of fire from a small dust collector. The Employer also challenges reliance on the "potential" of something happening. MOSH responds that it has met its burden of proving that there is a recognized hazard as well as demonstrating that a recognized hazard exists which

³ The Employer questions if there was correspondence between the HE and MOSH or MOSH's Assistant Attorney General prior to the issuance of the decision. At the review hearing, the Commissioner asked MOSH's Assistant Attorney General if she had assisted the HE with writing the decision. Commissioner Review Hearing Transcript at 38-39. She replied no and explained that she had no contact with the HE from the time of the hearing until she received the proposed decision. *Id.*

might result in serious harm. MOSH points out that the UK study was provided as a courtesy to Perfect Fit to provide more information on required distances for dust collectors.

Turning first to the issue of whether a recognized hazard existed, it is well established that a hazard is recognized if it is common knowledge in an employer's industry. To determine whether a hazard is recognized in an industry, case law has held that a national consensus standard such as the NFPA 664 can be used to demonstrate a recognized hazard. *See Secretary of Labor v. Cargill, Inc.*, 10 O.S.H. Cas. (BNA) 1398 (1982). As the Occupational Safety and Health Review Commission found in *Cargill*, voluntary industry standards are probative evidence of an industry's recognition of hazards. *Id.* The NFPA 664 was created in recognition of the hazards in the wood working industry and establishes the requirements for fire and explosion prevention in facilities that process wood or manufacture wood products. *See* MOSH Ex. 12 at 664-65. In this case, MOSH relied on the NFPA 664 to establish that dust explosions are a recognized hazard at the Perfect Fit facility and this was affirmed by the HE. The Commissioner upholds the HE's finding on this issue.⁴

A by-product of woodworking production is combustible dust. Tr. at 66. MOSH had some of Perfect Fit's dust tested and it was found to be combustible. Tr. at 133. As described by MOSH Compliance Officer Broadwater, combustible dust "is very fine particles that when they are confined present a deflagration hazard." Tr. at 70. He

⁴ In addition to the MOSH inspection, the Montgomery County Fire Marshal conducted an inspection of the worksite. The Fire Marshal who has the authority to enforce the NFPA 664 found similar hazards present at the Employer's facility. MOSH Ex. 13.

explained that the confinement of the combustible dust was “trapped in the collectors.” Tr. at 71. He also testified that Perfect Fit’s dust collectors were so full that they were difficult to open. Tr. at 58. The deflagration hazard exists when there is an ignition source. Tr. at 70-71. The Employer repeatedly asserted at the hearing before the Hearing Examiner, and on review before the Commissioner, that MOSH failed to provide evidence to support an ignition source.

Under the General Duty Clause, an employer’s obligation is to provide a workplace that is free from recognized hazards that are “likely to cause” death or serious physical harm. § 5-014(a)(2), Labor and Employment Art., Md. Code Ann. Thus, MOSH does not have to prove that an accident will occur only that an accident is possible. Here, the MOSH Compliance Officer identified several possible ignition sources including a metal staple or nail in the wood which could be fed into the machine. Tr. at 105. The compliance officer noted that there could be static charge buildup. Tr. at 204. He also identified a possible ignition source as a deeper cut that could cause friction and then a spark or a tool dropping into the equipment. Tr. at 200 & 205. The Employer disputes the ignition sources identified by MOSH and cites to the UK Study that was provided by MOSH. The Employer contends that the UK Study’s findings that a constant electrical arc is the most reliable ignition source is definitive. The MOSH Inspector testified that a constant electrical arc was just one example of a potential ignition source. As MOSH explained during the administrative hearing, the UK Study was provided to the Employer for informational purposes to help explain the 20 foot distance rule. Moreover, the UK Study was conducted prior to the adoption of the 2002 edition of the NFPA. Tr. at 122.

If a constant electrical arc were the only ignition source for an explosion, it would seem likely that the NFPA would address this, especially given that there have been two subsequent editions of the NFPA since the UK Study was issued. See MOSH Ex. 12 at 664-1. The NFPA reflects the consensus of the industry that hazards exist in dust collection units and does not provide that the hazards are limited to a constant arc as an ignition source. The Commissioner finds that there is substantial evidence to support the HE's conclusion that MOSH satisfied its burden of proving potential ignition sources.⁵

The Employer also challenges the applicability of the NFPA to its business on the grounds that the NFPA is vague as to its applicability to the Employer's smaller dust collectors. MOSH responds that the NFPA 664 is clear that it applies to all of Perfect Fit's dust collectors. The Employer's units meet the definition of "enclosureless dust collectors." See MOSH Exhibit 12 at 664-7. The definition does not contain any qualifications as to applicability based on size.⁶ There is nothing vague about the definition. It applies to all enclosureless dust collectors, including the Employer's. The Commissioner finds that there is no merit to Perfect Fit's contention and concludes that the NFPA applies to all of the Employer's dust collectors.

⁵ On review, the Employer challenges the HE's statement that the Employer did not provide evidence on the likelihood of a deflagration event at its facility. HE Decision at 11. The Employer is correct that MOSH bears the burden of proof. A review of the HE's decision demonstrates that the burden of proof remained on MOSH and the HE's comment did not shift the burden to the Employer but rather was a non-determinative comment by the HE.

⁶ MOSH's position on the applicability of the NFPA 664 to Perfect Fit's units is shared with the Montgomery County Fire Marshal. As noted earlier, the Fire Marshal, who is responsible for enforcing NFPA 664, similarly found that Perfect Fit was in violation of the standard during the course of its inspection. See MOSH Ex. 13.

Finally, in terms of feasible abatement, Perfect Fit contends that MOSH's suggested abatement is impossible due to the configuration of its facility. For the larger Belfab unit, the feasible abatement was to install a motor that moves air at under 5,000 cfm or move the unit outside. Tr. at 240-242. For all units, the feasible abatement was to move the units outside, install ducts to the outside or follow the NFPA 664 performance based standard which provides for an independent review of a site and suggestions for compliance. Tr. at 253. Consistent with the NFPA 664, MOSH also suggested a housekeeping program, grounding and bonding the units, reconfiguring the workstations to comply with the 20 foot rule and compliance with the other requirements of NFPA 664, Section 8.2.2.5.1.4. Tr. at 136. MOSH's feasible abatement mirrors the NFPA 664 and reflects what professionals in the industry consider necessary and valuable steps to address the recognized hazards in the woodworking and wood processing industry. MOSH's feasible abatement in essence is requiring Perfect Fit to comply with what is already recognized by safety experts as feasible in the industry. The Employer's argument on review that the feasibility of abatement is impossible is essentially an economic feasibility argument. However, the Employer never challenged the economic feasibility of MOSH's suggested abatement before the HE.⁷ The Commissioner finds that MOSH has met its burden of proving feasible abatement with either compliance with the applicable requirements of Section 8.2.2.5.1.4 in the NFPA 664 or in the alternative to look at the performance based standards of the NFPA 664.

⁷ The Employer raised this issue during his closing argument but there was no testimony or evidence in the record to support addressing this in closing.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on this 29th day of March, 2019, hereby ORDERS:

Citation 1, Item 1 alleging a serious violation of § 5-104(a) and proposed penalty of \$1,050.00 is AFFIRMED.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, 5-212, Annotated Code of Maryland, and the Maryland Rules, Title 7, Chapter 200.



Matthew Helminiak
Commissioner of Labor and Industry