IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-520

Filed: 17 January 2017

Cumberland County, No. 15 CVS 2782

THE GOODYEAR TIRE AND RUBBER COMPANY and its successors, Petitioner,

v.

CHERIE K. BERRY, COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, Respondent.

Appeal by Petitioner from order entered 8 February 2016 by Judge James Gregory Bell in Cumberland County Superior Court. Heard in the Court of Appeals 2 November 2016.

Teague Campbell Dennis & Gorham, LLP, by J. Matthew Little and Katelin L. Kennedy for Petitioner-Appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Larissa S. Williamson, for the State.

HUNTER, JR., Robert N., Judge.

The Goodyear Tire and Rubber Company ("Goodyear") appeals from a judgment entered 8 February 2016 affirming an order of the North Carolina Occupational Safety and Health Review Commission ("the Commission") which held Goodyear had violated 29 CFR § 1910.23(c)(1) by failing to install railings around the

elevated "platens" surrounding each of its tire presses. We affirm the trial court's order.

I. Facts and Background

Goodyear owns and operates a tire manufacturing facility in Cumberland County, North Carolina. The facility contains seventy-five tire curing presses, which give the tire its final shape and tread pattern. Each press contains an upper and lower mold. The lower mold is surrounded by a "round, flat metal surface" known as a "platen." The platen is circular and approximately five and a half to six feet across. When a tire is loaded into the press, the upper mold is lowered onto the lower mold, a bladder inflates in the middle of the tire, pressing it against the two molds, and the tire is "cured" at over 300 degrees for up to twenty five minutes, depending on the size of the tire. The upper mold contains many small vent holes, which allow air to escape the mold as the bladder inflates. These holes can become clogged with debris from the tire. When this occurs, a press operator is required to clear the vent hole with a handheld drill.

In August 2011, the North Carolina Department of Labor received a complaint from Mr. Kenneth Parker ("Mr. Parker"), the division chairman of the union representing Goodyear's workers, stating Goodyear required employees to stand on the platen when drilling vent holes in the upper mold. Mr. Parker alleged he fell from the platen while cleaning out vent holes. On 9 August 2011, Chris Moore ("Mr.

Moore"), a Compliance Safety and Health Officer with the North Carolina Department of Labor conducted an inspection of the plant. On 31 August 2011, Mr. Moore and his supervisor, Nicole Brown, issued a citation for failing to provide guard rails around the platens in violation of N.C. Gen. Stat. § 95-129(1) or 29 CFR § 1910.23(c)(1) in the alternative. On 29 September 2011, Mr. Parker requested he be allowed to participate as a party to the action, as he was an employee affected by the complaint.

On 21 October 2011, the Commissioner of Labor of the State of North Carolina ("the Complainant") filed a complaint with the North Carolina Occupational Safety and Health Review Commission ("the Commission") restating the violations alleged in the citation. Goodyear timely contested the complaint. Administrative Law Judge Reagan Weaver held a hearing on 23 January 2013. There, the evidence tended to show the following.

Mr. Moore testified first, noting during his inspection, he was told by Goodyear employees the vent holes in the upper mold became clogged with debris from the tire curing process, and "needed to be cleared out every so often" on an "as-needed basis." Upon finding a clog, employees would use a small step latter to climb up onto the platen. While standing on the platen, the employee would reach up over their head and drill out the clogged hole with a small hand drill. Mr. Moore measured the distance from the top of the platen to the concrete floor below as approximately fifty-

two inches. Mr. Moore observed no guard rails or any other device that would prevent an employee from falling off the platen.

Johnny Strickland ("Mr. Strickland") testified next. Mr. Strickland, a production specialist with Goodyear, manages the tire press production line. Mr. Strickland testified quality control personnel would flag a particular press for vent hole cleaning if it noted defects in the tire. Cleanings occur on an "as-needed basis," rather than as a regularly scheduled task. In May 2012, employees performed twenty-nine vent hole cleanings. Over time, Mr. Strickland estimated employees performed a cleaning once per day.

Mr. Strickland testified the platens are five and a half to six feet wide. He agreed platens are "a very stable working surface[.]" Employees can only stand on the edge of the platen, because the center of the lower half of press is occupied by the bladder. Because he personally performed the vent hole cleaning procedure in the past, Mr. Strickland estimated the top part of the mold stood seven feet above the platen, requiring a person of average height to reach only "slightly" above his or her head. In response to questioning, Mr. Strickland noted there was no fall hazard to the left or right sides of the tire press, which were blocked by the structure of the machine and other equipment, but only to the front and back. He testified workers are to stand on the sides of the platen, as opposed to its front or back, when drilling

the vent holes. Mr. Strickland also noted a one to two inch drop between the inner edge of the platen and the outside edge of the bladder.

Rob McNeely ("Mr. McNeely"), a manager for Goodyear in charge of safety, quality, and productivity for the tire press line, testified next. Mr. McNeely testified he researched the company's records dating back to 1976 and could find only one report of a fall from the platen of a tire press, the fall that generated the complaint at hand. After the fall, Mr. Parker did not miss any work. He was seen by a nurse at the plant and treated with two Tylenol.

Next, Goodyear tendered forensic engineer Michael Sutton ("Mr. Sutton"), as an expert on accident reconstruction and workplace safety. He evaluated the tire press for safety issues in November 2011. According to Mr. Sutton's measurements, the platen itself rises forty-nine inches off the floor, with parts of the mold rising fifty-one inches off the floor. He noted the platen had "some features to it," but was generally a "relatively flat surface" on a "heavy, stable machine." Mr. Sutton also observed the manufacturer had built a set of steps into the back side of the press, indicating to him the manufacturer intended for workers to climb up onto the platen. Because it would interfere with the opening and closing of the mold, it was impossible to build fixed railings into the tire press. Since the complaint was filed, Goodyear now uses a heavy metal cage suspended on a forklift to raise workers to the top of the mold for vent hole cleanings.

Mr. Sutton also testified about the relative hazard of the vent cleaning procedure versus other common activities, comparing it to climbing in and out of the cab of a tractor-trailer. In so doing, Mr. Sutton concluded the vent cleaning procedure did not constitute a hazard.

The Commission issued its order on 14 January 2014. Its order found the following:

> 5. At the time of Mr. Moore's inspection and before, mold changer employees of Respondent, as part of their regularly assigned work duties, used ladders to climb onto the platens on the bases of tire curing press machines. While standing on the platens, the employees reached overhead and used portable hand held drills to clean debris from vent holes in the overhead tire molds of the press machines. The process was prompted by a concern for defects in production tires.
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> 6. The platens were round, metal flat surfaces about five and one-half to six feet across. The surfaces of the platens, on which the employees stood to perform the above-described task were more than 48 inches above the adjacent concrete floor, and in fact, measured between 51 and 52 inches above the floor. The center of the platens was occupied by the mechanism around which the tires were pressed. The outside edges of the platens were approximately 1-2 inches above, and only 1-2 inches horizontally, from the edges of the bases of the tire press machines, and only 1-2 inches from the open sides of the machines.
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> 7. The open sides of the platens and the bases of the machines on which the platens rested were not guarded by standard railings or any other devices or equipment that would prevent employees from falling to the floor when the employees were standing and working on the platens.

8. When Respondents' employees stood on the platens and drilled out the vent holes in the overhead tire molds, they were looking up at a height of approximately seven feet.

. . . .

10. Respondent's employees performed the task of standing on the platens and drilling out the vent holes on an unscheduled basis, whenever it was determined that the vent holes were clogged and were causing defects in the tires being formed by the tire presses. Although unscheduled, this task was a regular part of the employees' work, which Respondent was aware of and expected. Respondent estimated that employees needed to perform this task approximately once a day. One of Respondent's employees told Health Compliance Officer Moore that he (the employee) had performed the vent hole drilling four times during his work shift on the day of HCO Moore's on-site visit to the plant. Respondent provided ladders for employees to access the platens and drills for the employees to use to perform the drilling.

11. When Respondent's employees stood on the platens and drilled the vent holes on the tire presses, they were positioned such that it was impossible for them to fall accidentally off the open sides of the platens to the adjacent floor below.

12. The vent hole drilling employees were more likely to fall because they were looking up—not at their feet—as they moved from one hole to another.

13. Respondent had received a report that one of its employees had fallen off a platen on a tire press machine. None of Respondents' hearing witnesses had spoken with or could remember speaking with the employee about the fall.

> 14. There was a substantial probability that if an employee fell off the platen to the concrete floor, he would suffer serious injuries, including severe contusions, strains, or sprains that would result in medical attention beyond first aid. . . .
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> 15. Employees of Respondent were exposed to the hazard of falling off the unguarded platens on the tire press machines.
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> 16. Respondent acknowledged that its employees worked on the unguarded platens on an approximately daily basis.

Based on these findings, the Commission came to the following conclusions of law:

> 3. The platen in the tire press on which Respondent's employees stood and worked was a "platform" within the meaning of that term, as it is used in 29 CFR 1910.23(c)(1) and as it is defined in 29 CFR 1910.21(a)(4).
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> 3. [sic] With regard to Citation 1, Item 1, Complainant proved by a preponderance of the evidence that Respondent committed a serious violation of 29 CFR 1910.23(c)(1) . . . .

In its discussion of the issues, the Commission noted it based its interpretation of the term "platform" on the broad construction given that term by the Eighth Circuit in *Donovan v. Anheuser-Busch*, 666 F.2d 315 (8th Cir. 1981). The Commission rejected the more limited interpretation of "platform" described by the Second Circuit in *General Electric v. OSHRC* and advanced by Goodyear. 583 F.2d 61 (2nd Cir. 1978). Further, the Commission stated the instant case was much closer on the facts to *Anheuser* than *General Electric.*

On 13 February 2014, Goodyear requested review by the Occupational Safety and Health Review Commission Review Board ("the Review Board"). After receiving briefs and hearing oral arguments, the Review Board affirmed the Commission's ruling in an order filed 12 March 2015. Goodyear timely filed a motion for judicial review of the Commission's order in Cumberland County Superior Court on 13 April 2015

After receiving briefs from both parties and conducting a hearing, the trial court issued its order on 8 February 2016. The court made the following findings and conclusions:

> (1) The proper standard of review for the question of statutory interpretation is *de novo*. The reviewing court may substitute its judgment for that of the Review Commission if the Commission's decision was affected by an error of law.
> (2) The platen, and the base of the machine on which the platen was located, were not guarded by [a] standard railing.
> (3) The platen is a "working space for person[s]" as required by the definition of 29 CFR 1910.21(a)(4). Goodyear employees regularly stood on the platen to clean vent holes. While standing on the platen, the employees were over four feet above the concrete floor below.
> (4) The task of cleaning the vent holes was not scheduled, but was a predictable task that occurred approximately once per day.
> (5) The vent cleaning task was necessary for the efficient operation of the tire press machinery.
> (6) In keeping with the views of the court in *Donovan v. Anheuser-Busch*, 666 F.2d 315 (8th Cir. 1981), the platen is a platform as defined in 29 CFR 1910.21(a)(4).

> The holding in *Anheuser-Busch* is most relevant to this case. In the *Anheuser-Busch* case, the tops of pasteurizers were found to be platforms. That court found it significant that employees were required to be present on top of the pasteurizers on a predictable basis, and that the functions performed there were necessary to the efficient operation of the equipment. Just as in *Anheuser-Busch*, the Petitioner's employees stood on top of the platens on a predictable basis and the task was necessary for the efficient operation of the tire press.
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> (7) The North Carolina OSHA Review Commission properly found that the Hearing Examiner's findings of fact and conclusions of law were supported by the evidence. There was substantial evidence presented to establish that the platen in question was a platform, and therefore, governed by 29 CFR 1910.23(c)(1).
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> (8) Because there is no error of law or fact as to the Review Commission's Findings of Fact, Conclusions of Law, and order with respect to its ruling that the Petitioner committed a serious violation of 29 CFR § 1910.23(c)(1), as alleged in Citation One, Item 1a with an assessed penalty of $1,950.00, the Order of the Review Commission is upheld.

Goodyear timely appealed the trial court's order, filing its notice of appeal to this Court on 3 March 2016.

II. Jurisdiction

Goodyear appeals a final judgment of the superior court, entered upon review of a decision of an administrative agency. Jurisdiction is proper in this Court under N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Standards of Review

When this Court is asked to review a superior court order regarding an agency decision, "the appellate court examines the trial court's order for error of law." *ACT-UP Triangle v. Comm'n for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). Our review is two-fold. First, we must determine whether the trial court exercised the appropriate scope of review. If so, we must then decide whether the trial court did so properly. *Id.*

The trial court's standard of review depends on the issued raised on appeal. *Id.* "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Associated Mech. Contrs. v. Payne*, 342 N.C. 825, 831, 467 S.E.2d 398, 401 (1996) (internal quotation marks omitted) (quoting *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981)).

When the appellant challenges the sufficiency of the evidence supporting a state agency's decision, the court must evaluate the evidence under the "whole record test." *Associated Mech. Contrs.*, 342 N.C. at 832, 467 S.E.2d at 401.

> The "whole record" test does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [agency's] decision, to take into account whatever in the record fairly detracts from the weight of the [agency's] evidence. Under the whole evidence rule, the court may not consider the

> evidence which in and of itself justifies the [agency's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson v. Wake County Board of Education, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (internal citations omitted). The "whole record test" is "not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

IV. Analysis

The trial court's order correctly recited the proper standard of review for statutory interpretation, stating that it applied *de novo* review to the Commission's interpretation of the definition of "platform." *Associated Mech. Contrs.*, 342 N.C. at 831, 467 S.E.2d at 401. Further, the trial court also employed the correct standard of review as to the Commission's findings of fact. Although it did not explicitly use the term "whole record review," the trial court properly stated it reviewed the findings for "substantial evidence." *Thompson*, 292 N.C. at 410, 233 S.E.2d at 541. Thus, we proceed directly to review whether the trial court properly reviewed the issues at hand.

A. Definition of "Platform"

Goodyear claims the trial court incorrectly relied on *Donovan v. Anheuser-Busch*, 666 F.2d 315 (8th Cir. 1981), in interpreting the definition of "platform" under 29 CFR 1910.21(a)(4). After review, we disagree.

Congress passed the Occupational Safety and Health Act of 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources[.]" Pub. L. No. 91-596, § 2(b), 84 Stat. 1590, 1590 (1970) (codified at 29 USC § 651(b) (2015)). The act gave the Secretary of Labor broad powers to "set mandatory occupational safety and health standards[.]" § 2(b)(3), 84 Stat. at 1590.

As part of the constellation of work safety regulations that followed, 29 CFR § 1910.23 requires "[e]very open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder." 29 CFR § 1910.23(c)(1) (2016). "Platform" is defined as "[a] working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment." 29 CFR § 1910.21(a)(4) (2016).

During the pendency of this appeal, the Department of Labor amended and reorganized the relevant sections of the Code of Federal Regulations, removing the

"platform" language from the updated regulation.[1] *See* Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 Fed. Reg. 82494, 82991 (Nov. 18, 2016) However, we interpret the language as it existed when the citation was issued. *See Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574 n.1 (2002) ("N.C.G.S. § 20-279.21 and N.C.G.S. § 1-52 have been amended since the accident giving rise to this action. However, for purposes of this opinion, all references will be to the 1993 versions of the statutes, which were in effect at the time of the 9 December 1993 accident."); *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353 n.2 (1992) ("Various sections of the Wage and Hour Act have been amended since the filing of this lawsuit. All references to the Wage and Hour Act in this opinion are to the version in force at the time plaintiffs were allegedly fired for refusing to work for less than the minimum wage."); *Capital Outdoor, Inc. v. Tolson*, 159 N.C. App. 55, 57 n.1 (2003) ("The regulation has been amended since the petitions were filed in this

[1] This decision will have limited applicability because Goodyear has obtained regulatory relief. The Department of Labor amended 29 CFR Part 1910 on 18 November 2016, changing the regulations to, *inter alia*, "update[] requirements to reflect advances in technology" and "wherever possible to give employers greater compliance flexibility." Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 Fed. Reg. 82494, 82494 (18 Nov. 2016). As part of this reform, 29 CFR § 1910.23(c)(1) has been amended to remove the "platform" language. The amended regulation now requires an employer "must ensure that each employee on a *walking-working surface* with an unprotected side or edge that is 4 feet (1.2 m) or above a lower level is protected from falling . . . ." 81 Fed. Reg. at 82991 (emphasis added) (to be codified at 29 CFR § 1910.28(b)(1)). A "walking-working surface" is defined as "any horizontal or vertical surface on or through which an employee walks, works, or gains access to a work area or workplace location." 81 Fed. Reg. at 82981 (to be codified at 29 CFR § 1910.21(b)). These reforms do not become effective until 17 January 2017. 81 Fed. Reg. at 82494.

case to clarify that the phrase 'sign structure' excludes 'cut outs or embellishments.' N.C. Admin. Code tit. 19 A.R. 2E.0203(1)(f) (June 2002).").

Goodyear does not dispute the top of the platen rises more than forty-eight inches off the floor, but argues the definition of platform "does not apply to every possible elevated working space, and particularly does not apply to the platens." We disagree.

Although our state's courts have not yet interpreted the definition of "platform" under 29 CFR § 1910.21(a)(4), in interpreting federal law, this Court uses the decisions of the federal circuit courts of appeal as persuasive authority.

There are two leading cases from the United States Courts of Appeals which frame the issue. First, in *General Electric Co. v. OSHRC*, the Second Circuit considered whether the top of an oven used to bake insulation onto small air conditioning motors was a "platform" for the purposes of the regulation. 583 F.2d 61 (2d Cir. 1978). In that case, General Electric required workers to climb on top of the nearly eleven foot tall, twelve foot wide oven to perform maintenance on two circulation and exhaust motors. *Id.* at 62. Such maintenance took place only four or five times in the two and a half year period prior to the case. *Id.* at 62 n.1.

In overturning an administrative law judge's ruling that gave the "broadest possible meaning to the term 'platform,'" the Second Circuit held the definition did not "apply to every flat surface over four feet high . . . . An elevated surface does not

automatically become a 'working space' and a 'platform' merely because employees occasionally set foot on it while working." *Id.* at 63-65. The court relied on two norms of statutory construction to read the second clause of the definition—"such as a balcony or platform for the operation of machinery and equipment"—as a limiting phrase. *Id.* at 65. It then distinguished "infrequent, periodic maintenance" from "operation" of machinery, before concluding:

> a reasonable interpretation of § 1910.23(c)(1) is that it applies only to elevated working spaces, 4 feet or [more] above ground level, which are designed primarily for the operation of machinery and equipment and which require employee presence on a predictable and regular basis; and not to spaces where only occasional maintenance or repair work is performed.

Id. at 65 (internal quotation marks and citation omitted).

The definition of "platform" was next addressed by the Eighth Circuit in *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315 (8th Cir. 1981). Anheuser-Busch had been cited for failing to place railings on the top of its beer pasteurizers. At least once per shift, employees were required to climb on top of the six foot tall, twenty-five foot wide pasteurizers to inspect, remove, and replace spacers that ran between separate lots of beer cans as they passed through the machine. *Id.* at 317-18. Further, employees were required to inspect and clean parts of the pasteurizer on a weekly basis, as well as perform "periodic repair." *Id.* at 318.

The Eighth Circuit overruled the administrative law judge, who had relied on the Second Circuit's reasoning in *General Electric* to find the tops of the pasteurizers were not platforms. *Id.* at 318-322. Critiquing the Second Circuit's ruling, the court held standards under the Occupational Safety and Health Act "should be given a reasonable, commonsense interpretation." *Id.* at 326 (quoting *National Industrial Constructors, Inc. v. Occupational Safety and Health Review Commission*, 583 F.2d 1048, 1055 (8th Cir. 1978). The Eighth Circuit rejected the Second Circuit's holding that the "such as" language in the definition constituted a limiting phrase, stating that rules of statutory construction should not be applied when there is no ambiguity, to defeat the legislative intent and purpose of a statute, to make general words meaningless, or to reach a conclusion inconsistent with other rules of construction. *Id.* at 326-27. Instead, the Eighth Circuit consulted several dictionaries to give "such as" a plain meaning as a "phrase of general similitude indicating that there are includable other matters of the same kind which are not specifically enumerated by the standard." *Id.* at 327.

The court then looked to Congress's intent to assure "safe and healthful working conditions," as well as United States Supreme Court precedent holding the Occupational Safety and Health Act was designed to be "prophylactic in nature," addressing the causes of potential injuries before they occurred. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12, 100 S. Ct. 883, 890, 63 L. Ed. 2d 154, 164 (1980). It held

this legislative intent could not be accomplished through a restrictive reading of the term "platform." *Anheuser-Busch*, 666 F.2d at 327. Consequently, the Eighth Circuit concluded "the interpretation of the plain meaning of the definition . . . is reasonable and preferable." *Id.*

Finally, the Eighth Circuit distinguished *General Electric* on the facts, holding the tops of the pasteurizers at issue in *Anheuser-Busch* would be considered "platforms" even under the Second Circuit's narrow definition. In *General Electric*, the surface at issue was the top of an oven that employees accessed for occasional maintenance. *Id.* at 328. In *Anheuser-Busch*, the periodic inspection, maintenance, and cleaning of the pasteurizers, as well as the daily need to place, move and remove the spacers required "employee presence on the top surfaces of the 'can-line' pasteurizers on a predictable and regular basis. The functions were all necessary to the efficient operation of the 'can-line' pasteurizer machinery and equipment." *Id.*

We hold the trial court did not err when it classified the platen as a "platform" under 29 CFR § 1910.21(a)(4). The trial court correctly adopted and applied the broader definition of "platform" advanced by the Eighth Circuit in *Anheuser-Busch*. "When a statute is ambiguous, 'the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish,' in order to assure that the intent of the legislature is accomplished." *Comm'r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 23, 609 S.E.2d 407, 412 (2005) (quoting *Tellado v. Ti-Caro* Corp.

119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995)). The United States Supreme Court has recognized the "fundamental objective" of the Occupational Safety and Health Act is a "prophylactic" measure designed to "prevent occupational deaths and serious injuries." *Whirlpool Corp.*, 445 U.S. at 11-12, 100 S. Ct. at 890, 63 L. Ed. 2d at 163-64. As such, it is appropriate to give "broad construction" to the regulations stemming from the Act. *See Reich v. Muth*, 34 F.3d 240, 245 (4th Cir. 1994). Our state courts, recognizing that the federal and state acts are "substantially the same," have similarly held that the Act serves a "broad purpose" that is not served by a narrow reading of the law. *Weekley Homes, L.P.*, 169 N.C. App. at 21-23, 609 S.E.2d at 412-13.

Employing a broad definition of the term, we agree the platen should be defined as a "platform." Goodyear does not dispute its employees climb onto the platen daily to drill out vent holes. Neither does it dispute the platen is elevated at least four feet above the surrounding concrete floor. As a result, under a plain meaning of the definition, the platen is a "working space for persons, elevated above the surrounding floor or ground" as defined by 29 CFR § 1910.21(a)(4).

Moreover, we disagree with Goodyear's argument the platen would not constitute a "platform" under the narrower definition laid out in *General Electric*. While the Second Circuit excluded "spaces where only occasional maintenance or repair work is performed" from its definition of "platform," it explicitly included any

surface "which require[s] employee presence on a predictable and regular basis." *General Electric*, 583 F.2d at 65.

Goodyear attempts to distinguish the instant case from *Anheuser-Busch* on the basis that Anheuser required its employees to perform regularly scheduled maintenance and inspection. However, only by imposing an extremely rigid interpretation of the terms "regular and predictable" can we limit their application only to work is apportioned by a company schedule. In the instant case, Mr. Strickland testified before the Commission the vent hole cleaning procedure was performed approximately once per day and could be required multiple times per shift. Thus, the fact these cleanings were unscheduled and occurred only as advised by Goodyear's quality control personnel does not change the fact they occurred daily on a "predictable and regular basis." Consequently, even under the narrower definition embraced by the Second Circuit, the platen would be considered a "platform" for the purposes of 29 CFR § 1910.23(c)(1).

As a result, we hold the trial court did not improperly conduct its *de novo* review of the Commission's order, and affirm its holding that the platen is a platform under a broad definition of the term.

B. Whole Record Review

Goodyear also challenges the sufficiency of the evidence supporting the Commission's decision the platen constituted a "platform" for purposes of 29 CFR §

1910.23(c)(1). Specifically, Goodyear challenges the court's findings that "Goodyear employees regularly stood on the platen to clean out vent holes" and "[t]he task of cleaning the vent holes was not scheduled, but was a predictable task that occurred approximately once per day." Because we hold there was a "rational basis in the evidence" to support these findings, we affirm the trial court's order. *Rogers*, 297 N.C. at 65, 253 S.E.2d at 922.

When an appellate court applies the whole record test, it "must examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by substantial evidence." *Mann Media v. Randolph*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (internal quotation marks omitted). It is well settled that it falls to the "administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence[,] if any." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 672, 599 S.E.2d 888, 902 (2004) (quoting *State ex rel. Utils. Comm'n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982)). As a result, a reviewing court may not replace the administrative body's judgment as between two "reasonably conflicting views," even if the court might have justifiably reached a different conclusion under *de novo* review. *Mann Media*, 356 N.C. at 14, 565 S.E.2d at 17-18.

First, we hold there was sufficient evidence to support the court's findings that Goodyear employees regularly stood on the platen. Mr. Moore, the state compliance officer, testified Goodyear employees would clean out the vent holes "every so often" on an "as needed basis." Mr. Moore also testified the cleanings were "not performed very often." Mr. Strickland, the manager of the tire press production line, testified in May 2012, Goodyear employees performed twenty-nine vent hole cleanings. He further testified the plant averaged one vent hole cleaning per day.

Goodyear argues the court should have interpreted this testimony to mean the vent hole cleanings did not occur on a regular basis. However, it is not up to the trial court or this court to reweigh the evidence on review. Mr. Strickland's testimony the vent cleanings occurred once per day is sufficient evidence for the Commission to conclude the cleanings occurred on a regular basis. Thus, we hold the trial court did not err in making its finding of fact.

Second, there was sufficient evidence to support the court's finding the vent hole cleaning was a predictable task that occurred once daily. Goodyear argues the vent hole cleaning was a maintenance task and was not a necessary operational task. In its brief, Goodyear calculates that if both the top and bottom of each of the molds required cleaning once per day, employees would perform one hundred and fifty cleanings per day and over four thousand cleanings per month, rather than the twenty-nine testified to by Mr. Strickland. Nonetheless, the character of the

procedure is irrelevant to the inquiry. It matters not *why* the procedure was performed, but *that* it was performed. The Commission heard uncontested testimony the vent hole cleanings occurred on average once per day across the factory. This is sufficient evidence to conclude the cleanings were a predictable task and they occurred on a daily basis. Thus, we hold the trial court did not err in making this finding of fact.

C. Unfair Surprise

Finally, Goodyear argues the citation and subsequent orders enforcing it constitute a new interpretation of 29 CFR § 1910.23(c)(1) and thus should be vacated as an unfair surprise.

North Carolina Rule of Appellate Procedure 10(a)(1) requires "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2016). There is no indication in the record Goodyear raised this issue before the trial court. As a result, the argument is not properly before this Court.

Based on the foregoing, the order of the trial court is

AFFIRMED.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).