

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2000-3896
OSHA INSPECTION NO. 303326367
CSHO ID NO. G0240

v.

BRADLEY & BARNES CONSTRUCTION
CO.

ORDER

RESPONDENT.

APPEARANCES

Complainant:

Daniel S. Johnson
North Carolina Attorney General's Office

Respondent:

Tim Barnes
Vice President/Safety Officer of Respondent corporation

BEFORE

Administrative Law Judge: Charles R. Brewer

This matter came on for consideration before the undersigned Administrative Law Judge at a hearing conducted September 8, 2000, in the City of Raleigh pursuant to a notice of hearing dated August 14, 2000. The Complainant was represented at that hearing by Daniel S. Johnson of the North Carolina Attorney General's Office, and the Respondent was represented by Mr. Tim Barnes, Vice President/Safety Officer of the respondent corporation. At the outset of the hearing the Complainant withdrew Citation 1, Item 1g. The remaining items (Items 1a-1f) were grouped because they involved similar related hazards that may increase the potential of injury resulting from an accident for a proposed penalty of \$175.

The Respondent was charged in Citation 1 Item 1a with a serious violation of 29 CFR 1926.20(b)(1) with failure to initiate and maintain such programs as may be necessary to comply with this part, that is to say development of a safety and health program with policy, hazard assessment, and work rules to be implemented at the site to include hazards associated with tubular welded frame scaffold systems. The Respondent was cited in Citation 1, Item 1b with a serious violation of 29 CFR 1926.20(b)(2) alleging that the employer's safety and health program did not provide for frequent and regular inspections of the job sites, materials, and equipment to be made by a competent person, that is to say that safety and health inspections were not conducted by an individual who was aware of the safety and health standards and/or an individual who has sufficient authority to control or eliminate the hazards associated with tubular welded framed scaffold systems. The Respondent was cited in Citation 1, Item 1c with a serious violation of 29 CFR 1926.451(g)(1)(iv) alleging that each employee on a self-contained adjustable scaffold was not protected by a guardrail system (with a minimum 200 pound top rail capacity) when the platform was supported by the frame structure, that is to say that the subcontractor employees installing concrete block veneer from a tubular welded frame scaffold system, 5 feet wide x 112 feet long x 16 feet 5 inches high were not provided with adequate guardrail protection on all open sides and ends. The Respondent was cited in Citation 1, Item 1d with a serious violation of 29 CFR 1926.451(b)(5)(i) alleging that each end of a platform 10 feet or less in length extended more than 12 inches over its support, that is to say that the east end of the tubular welded frame scaffold system, 5 feet wide x 112 feet long x 16 feet 5 inches high, had planking extending 18 inches beyond the support. Respondent was cited in Citation 1, Item 1e with a serious violation of 29 CFR 1926.451(e)(1) alleging that portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands) ramps, walkways, integral prefabricated scaffold access or direct access from another scaffold, structure, personnel hoist, or similar surface were not used when scaffold platforms were more than two feet above or below a point of access, that is to say that the subcontractors' employees installing concrete block veneer from a tubular welded frame scaffold system, five feet wide x 112 feet long x 16 feet 5 inches high, were climbing the horizontals cross braces to gain access/egress to/from the working platform. Finally, Citation 1, Item 1f cites the Respondent with a serious violation of 29 CFR 1926.452(c)(2) alleging that frames and panels were not braced by cross, horizontal, or diagonal braces, or combination thereof, which secure vertical members together laterally, that is to say that a tubular welded frame scaffold system, 5 feet wide x 112 feet long x 16 feet 5 inches high, was missing three cross braces on the east end of the scaffold system.

Several significant stipulations were entered into between the parties on the record at the hearing. First, the Respondent stipulated that the proposed penalty is deemed

appropriate if the Respondent is, in fact, in violation of the standards cited. Secondly it was stipulated that there was a potential for a fall and that a substantial probability of a serious injury or death existed if a fall had occurred. It was further stipulated that the only employees exposed to the hazards were those of a subcontractor, not the employees of the Respondent. Finally, and most importantly, the Respondent stipulated that the violations alleged occurred by the subcontractor. The only question presented is whether the Respondent is legally responsible for these violations.

DISCUSSION

A referral inspection was conducted at a construction site of an Ethan Allen store at 818 South College Road in Wilmington, North Carolina, on January 11, 2000. The inspector observed scaffolding problems from his car and his supervisor allowed him to proceed with an inspection. The inspector conducted an opening conference with Bill Johnston, who was the Respondent's superintendent and with a representative of the masonry subcontractor. In light of the significant stipulations set forth above the undersigned will limit the findings of fact and conclusions of law made hereafter to the issue of whether the Respondent should be held responsible for the conduct of the subcontractor.

FINDINGS OF FACT

1. On or about January 5, 2000, Bill Johnston had a conversation with Mr. Rodney Bumgardner of Bum Masonry, the masonry subcontractor on this project. Mr. Johnston informed Mr. Bumgardner that all the scaffolding needed guardrails. Mr. Bumgardner told Mr. Johnston that they would use the braces on the scaffolding for guardrail by keeping the scaffolding one level higher than the working platform. Further, Mr. Bumgardner told Mr. Johnston that they would use the Respondent's ladders to access the scaffolding.
2. Mr. Bumgardner is the sole owner of Bum Masonry.
3. Bum Masonry provided and set up the scaffolding on the project.
4. Mr. Tim Barns, a superintendent with the Respondent corporation, came to the project about 7 o'clock a.m. on the day of the inspection and made the Respondent's ladders available to the subcontractor.
5. Mr. William Cecil (Bill) Johnston was the project superintendent for the respondent company.

6. Mr. Johnston first observed problems with the scaffolding soon after the masonry project began. He observed that there were no ladders and no guardrails. He observed the work on a daily basis.

7. As a result of Mr. Johnston's observations he conferred with Rodney Bumgardner on January 5, 2000, as noted above. The problems in connection with the use of ladders and the lacking of guardrails were corrected as a result of this conversation.

8. On the day before the inspection there were guardrails and ladders were in use. The subcontractor complied with the standards concerning the guardrails and the ladders up to the day of inspection.

9. On the day of the inspection work was performed laying masonry with guardrails properly in place.

10. Between 7:15 a.m. and 9:30 a.m. on the date of the inspection the walkboards had been moved up one full level.

11. At the time of the inspection the workers of the masonry subcontractor were working on a platform which was not protected by guardrails and were improperly accessing the platform by climbing on the scaffolding rather than the approved use of ladders.

12. Paragraph 23 of the Complainant's case report which was admitted into evidence as part of Respondent's Exhibit No. 2 contends that "Mr. Bill Johnston, Project Superintendent, was at the job site on a daily basis for eight hours per day and was in charge of all the operations at the site. He was in plain view of the subcontractor's employees working from the tubular welded frame scaffold system. He should have, with reasonable diligence, been aware of the hazardous condition."

CONCLUSIONS OF LAW

1. The potential liability of a general contractor for exposure of a subcontractor's employees to safety hazards was established in North Carolina case of *Commissioner of Labor v. Romeo Guest Associates, Inc.* OSHANC 96-35013. The Safety and Health Review Board held in that decision that "a general contractor's duty under N.C.G.S. §95-129(2) to comply with 'occupational safety and health standards or regulations' runs to employees of subcontractors on the job site."

2. The *Romeo Guest* decision, however, does not establish a strict liability standard. Instead the decision holds "that duty is a reasonable duty and although the general contractor is responsible for assuring that the contractors fulfill their obligations for

employee safety that affect the whole construction site, the general contractor is only liable for those 'violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.'...In addition, the general contractor cannot 'anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire job site to detect violations created by others.'...It is only responsible for those hazards that it could reasonably have detected because of its supervisory capacity. The general contractor is required to make reasonable efforts to anticipate hazards to subcontractor's employees and reasonable efforts to inspect the job site to detect the violations that its subcontractors may create." Emphasis in the original decision.

3. In all proceedings commenced by the filing of a Notice of Contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence. Rule .0514(a) of the Rules and Procedure of the Safety and Health Review Board of North Carolina.

4. However, the stipulations noted above carry the burden of proof for the Complainant as to the existence of the violations by the masonry company. Nonetheless, the Complainant carries the burden of proof as to whether, under all the circumstances, the Respondent should be held responsible for the violations of the subcontractor.

5. One of the elements the Commissioner is required to show under these circumstances is whether the general contractor could reasonably have been able to detect and prevent or abate the violative conditions by reason of his supervisory capacity over the job site.

6. The evidence of the Commissioner fails to establish that the Respondent was aware of the violations found in Citation 1, Items 1a, 1b and 1d. While there was evidence of the awareness of the violations of Items 1c and 1e, the evidence showed that the Respondent had addressed these violations earlier in conversations with the subcontractor. Further, the evidence showed that the ladders needed to comply with Item 1e were made available to the subcontractor the morning of the inspection and that early on the morning of the inspection the subcontractor was in compliance with the requirement of protection by guardrail. The noncompliance occurred, apparently, shortly before the inspector arrived.

7. The Complainant has failed to carry its burden proving that the general contractor is liable only for those violations it could reasonably have been expected to present or abate by reason of its supervisory capacity.

8. While it is arguable that the Respondent through use of its supervisory authority might have avoided some or all of the hazards cited, this simply was not established by a preponderance of the evidence in the Complainant's case before the undersigned.

It is therefore ORDERED that Citation 1, Items 1a-1f are hereby dismissed and, as noted above, Item 1g has heretofore been withdrawn.

This the 27th day of September, 2001.

Charles R. Brewer
Administrative Law Judge