

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

COMMISSIONER OF LABOR
OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2000-3911
OSHA INSPECTION NO. 303329767
CSHO ID NO. P9344

v.

JAMES HOWARD dba JAMES HOWARD
CONSTRUCTION and its successors,

ORDER

RESPONDENT.

APPEARANCES:

Complainant:

Daniel S. Johnson
Assistant Attorney General
North Carolina Department of Justice

Respondent:

James Howard, owner

BEFORE:

Hearing Examiner: Carroll D. Tuttle

THIS CAUSE came on for hearing and was heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina on January 26, 2001, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The complainant was present and represented by Daniel S. Johnson, Assistant Attorney General, North Carolina Department of Justice. The respondent was present and represented himself, *pro se*.

The Court first considered as a Motion to Dismiss, the Notice of Default dated July 11, 2000, in which Respondent was Ordered to file a Statement of Position with 5 days of receipt of the Notice. After consideration, the Motion to Dismiss was denied.

Based upon the evidence presented at the hearing and with due consideration of arguments and contentions of counsel and the respondent, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. The complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for compliance with, and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (N. C. Gen. Stat. § 95-126, *et seq.*).
2. This case was initiated by a Notice of Contest which followed citations issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).
3. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
4. The undersigned has jurisdiction over the case (N.C.G.S. § 95-135).
5. Respondent is in the construction business in North Carolina and, at the time of the inspection, was engaged in constructing a building for BB&T at 2675 Western Boulevard, Jacksonville, North Carolina.
6. On March 17, 2000, Safety Compliance Officer Gene Powell, with the North Carolina Department of Labor was engaged in an inspection of a worksite on Western Boulevard in Jacksonville, North Carolina. At various times during the day during and following the inspection on Western Boulevard, Officer Powell observed workers on the roof of a nearby building under construction.
7. Officer Powell observed workers on the roof not tied off. At one time, Officer Powell pulled to the side of the road, a four lane divided highway, and using binoculars, observed the activity at the site including the activity on the roof. With binoculars, Officer Powell saw workers on the roof without lanyards connected.
8. Officer Powell conducted an opening conference at approximately 2:00 p.m. with Respondent's representative, the general contractor and with two sub-contractors. The construction site was the construction of a BB&T bank

building which was located one hundred to one hundred fifty feet off the highway.

9. During the course of the inspection, Officer Powell made notes, took photographs and interviewed employees.

10. Respondent's job site foreman was Mr. Derrick Barry who went with Officer Powell during the walk around inspection. Mr. Barry also indicated that he was a co-owner of Respondent. Mr. James Howard was present during the opening conference but left the job site afterward.

11. Respondent has a total of seven employees and had four employees at this job site.

12. A closing conference was conducted with Mr. Barry after the inspection.

Citation No. 1, Item # 1a

13. Citation No. 1, Item # 1a, requires the employer to conduct safety programs required by the standards in connection with hazards associated with the job being performed.

14. Officer Powell testified that based upon his investigation, no safety programs other than rudimentary verbal instructions were given and Respondent relied on the general contractor to provide safety programs. This was based upon employee interviews. Mr. James Howard testified that Respondent did conduct regular safety programs in fall hazards and the use of ladders. The Court cannot find from the hearsay evidence of Officer Powell that Respondent did not conduct safety programs when Respondent has offered direct evidence that such programs were conducted.

Citation No. 1, Item # 1b

15. Citation No. 1, Item # 1b, alleges that Respondent did not provide for frequent and regular inspections of the job sites, materials, and equipment to be made by a competent person.

16. Officer Powell testified that based on the conditions he observed at the site i.e. employees working on the roof without being tied off, Respondent must not be conducting regular inspections of the job site.

17. Mr. Howard testified that the equipment was in place including harnesses, lanyards, and tie off's including metal tie off points he personally installed, for the employees to be tied off, but that employees hate the entanglement of the ropes.

18. From the evidence including the photographs taken by Officer Powell, the Court finds that two of Respondents employees were working on the roof without being tied off. The distance from the edge of the roof to the ground was thirteen feet and thirty-one feet to the roof peak.

19. Employees working on the roof without being tied off presented the possibility of an accident from a fall hazard, the substantially probably result of which would be broken bones.

20. Two of Respondents employees were exposed to this hazard. The photographs indicated and the Court finds that one employee was connected by a lanyard to the tie off rope.

21. The Court also finds from the evidence that the job site foreman was on site and either knew or should have known that the employees were not tied off. Mr. Barry was working on the platform bringing up materials to the workers on the roof. Frequent and regular inspections were not conducted which would have revealed these conditions.

22. Complainant properly calculated the proposed penalty from the Field Operations Manual which resulted in a gravity based penalty of \$2,500.00. After giving credit for size (60%), cooperation (10%) and history (10%), the adjusted penalty was \$500.00.

Citation No. 1, Item No. 1c

23. Citation No. 1, Item No. 1c, alleges a serious violation of 29 CFR 1926.501(b)(1), in that employees were working on the top of a 6/12 pitch roof with a peak of 31 feet and 13 feet eaves without being protected by rails or other fall protection.

24. Respondent had provided fall protection in the form of harnesses, lanyards and tie off ropes with tie off points personally installed by Mr. James Howard. Respondent had a foreman and, according to his interview with Officer Powell, he was part owner of the company, actually on site and working with the employees.

25. The Court has already found from the evidence that at least two employees were working on the roof without being tied off to the fall protection system and that Respondent knew or should have known that they were not tied off. Mr. Howard testified that employees do not like to be tied off to the ropes because it interferes with their movements.

26. The Court finds that at least two of Respondents employees were working on the roof without fall protection and that it was 31 feet to the roof peak and 13 feet from the roof eaves to the ground.

27. These conditions presented the possibility of an accident from a fall hazard, the substantially probably result of which would be broken bones. Respondent knew or should have known of these conditions.

28. This violation was grouped with Citation No. 1, Item No. 1b. The penalty was properly calculated pursuant to the Field Operations Manual.

Citation No. 1, Item No. 1d

29. Citation No. 1, Item No. 1d, alleges a serious violation of 29 CFR 1926.503(a)(2) in that employees were working on a roof with a 6/12 pitch with a peak of 31 feet and 13 feet eaves were not adequately trained in fall protection.

30. Officer Powell testified that based upon his interview with Mr. Barry, Respondent had not conducted adequate training in fall protection. He reasoned that if adequate training had been conducted that employees would not work on the roof at these heights without proper fall protection.

31. It was clear from the evidence however that adequate fall protection was provided by Respondent but that it was not used properly by some of the employees even while a foreman was present. It appears to the Court that the foreman needs additional training rather than the employees especially in light of the testimony regarding how employees dislike wearing the harness and lanyards while working.

32. Mr. James Howard testified that frequent and regular training was provided by Respondent to the employees in fall protection and ladder safety.

33. The Court finds from this direct evidence of Mr. Howard as opposed to the hearsay evidence of what Mr. Barry would have said that training was provided by Respondent.

Citation No. 1, Item No. 1e

34. Citation No. 1, Item No. 1e, alleges a serious violation of 29 CFR 1926.1053(b)(1) alleging that a ladder was used by employees to access a 6/12 pitch roof with a peak of 31 feet and 13 feet eaves where the ladder did not extend at least 3 feet above the upper landing area.

35. The rungs of the ladder at this site are approximately twelve inches apart so that three rung spaces would be approximately three feet.

36. Exhibit 6 is a photograph taken by Officer Powell which he used to illustrate his testimony that the ladder was not three feet above the landing area. The photograph shows the ladder appearing to be located in a cut-out area on the roof and does appear to be less than three feet above the roof surface looking through the second rung opening.

37. The testimony of James Howard was that the photograph is an optical illusion because the ladder is in fact not resting against the roof surface as it appears in the photograph, but is resting against a metal beam which runs along the edge of the roof.

38. After carefully reviewing Exhibit No. 6, the distance, using the rungs of the ladder, is difficult to determine above the edge of the roof surface to the top of the ladder.

39. The court finds that the ladder is resting on a metal beam running along the edge of the roof and not inside the cut out. The court is unable to determine that the ladder extends less than three feet above the roof surface.

Citation No. 1, Item No. 1f

40. Citation No. 1, Item No. 1f, alleges a serious violation of 29 CFR 1926.1060(a) alleging that employees using a ladder to access a 6/12 pitch roof were not trained in how to minimize hazards.

41. Officer Powell testified that based upon his interview with Mr. Barry, Respondents employees were not trained in proper set up and safe use of ladders.

42. Mr. Howard testified that employees were given frequent and regular training in safety issues including fall protection and ladders.

43. The Court cannot find a violation from hearsay testimony about what Mr. Barry would have testified regarding ladder training versus the direct evidence given by Mr. Howard that Respondent did provide such training.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court concludes as a matter of law, as follows:

1. This Court has jurisdiction of this cause and the parties are properly before the Court.
2. Respondent is subject to the provisions of the Act and is an employer within the meaning of N.C.G.S. § 95-127(9).
3. The Court cannot find from the greater weight of the evidence that Respondent failed to have sufficient safety programs in place to comply with 29 CFR 1926.20(b)(1).
4. The Court finds from the greater weight of the evidence that Respondent failed to have frequent and regular inspections of the job site as required by 29 CFR 1926.20(b)(2).
5. The Court finds from the greater weight of the evidence that Respondent employees were working on the roof without proper fall protection as required by 29 CFR 1926.501(b)(1).
6. The Court cannot find from the greater weight of the evidence that Respondent failed to provide adequate training in fall protection.
7. The Court cannot find from the greater weight of the evidence that Respondent allowed its employees to use a ladder which did not extend three feet above the landing surface.
8. The Court cannot find from the greater weight of the evidence that Respondent's employees were not trained in how to minimize hazards.
9. All penalty calculations were properly done pursuant to the Field Operations Manual and were properly grouped.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED as follows:

1. Citation No. 1, Item No. 1a, Item No. 1d, Item No. 1e and Item No. 1f, be and they are dismissed.

2. Citation No. 1, Item No. 1b and Item No. 1c, are hereby affirmed as grouped together with a penalty of Five Hundred (\$500.00) Dollars to be paid within ten (10) days of service of this Order.

Entered this 30th day of November, 2001.

Carroll D. Tuttle
Administrative Law Judge Presiding