

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

T & M GENERAL CONTRACTORS,

RESPONDENT.

DOCKET NO. OSHANC 2000-3956
OSHA INSPECTION NO. 303827224
CSHO ID NO. S2522

ORDER

APPEARANCES:

Complainant:

Linda Kimbell
Assistant Attorney General
North Carolina Department of Justice

Respondent:

Michael C. Lord
MAUPIN TAYLOR & ELLIS, P.A.
Attorneys for Respondent

BEFORE:

Hearing Examiner: Carroll D. Tuttle

APPEARANCES:

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 October 18, 2001, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Ms. Linda Kimbell, Assistant Attorney General. The Respondent was represented by Mr. Michael C. Lord of Maupin Taylor & Ellis, P.A.

Complainant moved the Court to dismiss Citation Number 1, Item 1c (29 CFR 1926.502(b)(10)). Without objection, the motion was allowed.

Respondent moved the Court for a continuing objection to the compliance officer's testimony to the extent it was hearsay. Without objection, the motion was allowed.

Respondent moved the Court to make available to Respondent the unredacted copies of witness statements appearing in the narrative section of the investigative file (also known as the OSHA-1B form) that was previously produced by the Complainant. Respondent had complied with North Carolina General Statute § 95-136(e1) by making a timely written request for the statements. Complainant objected to producing the information claiming that, because the compliance officer did not obtain a separate and signed statement from the witnesses interviewed during the inspection, no "witness statements" within the meaning of the disclosure statute existed to be produced. Over this objection, the motion was allowed.

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

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about October 17, 2000, contesting a citation issued September 25, 2000, to Respondent, T & M General Contractors, Ltd. ("Respondent" or "T&M").
2. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act"), N.C. Gen. Stat. §§ 95-126 *et seq.*
3. Respondent is a corporation duly organized and existing under the laws of North Carolina. Respondent is engaged in the construction business.
4. Respondent is subject to the provisions of the Act and is an employer within the meaning of N.C. Gen. Stat. § 95-127(9).
5. On or about September 8 through September 11, 2000, Safety Compliance Officer Sydney Sutton, employed by the North Carolina Department of Labor, inspected a work site located at 6051 Tryon Road, Cary, North Carolina. During the course of the inspection, Officer Sutton took photographs, made notes, interviewed employees and obtained documents.

6. On September 8, 2000, Officer Sutton observed T&M employees placing sheathing planks on the roof area of a church under construction under the direction of Harold "Buddy" Johnson. Officer Sutton viewed the work from a "couple of football fields away" on a public road for approximately 15 minutes until the workers began to leave the roof for the day. Officer Sutton believed that the employees were not wearing complete fall protection equipment when working outside of the guardrail system in place.

7. T&M worked under a site-specific fall protection plan prepared by PFB Company, Inc. and Daniel Smith PE, Consulting Engineers. Paul Bartholomew, a principal with PFB Company with 22 years of experience with truss erection, testified about the plan. The plan represents a significant investment of time and money to provide clients, here T&M, with fall protection for specific jobs in accordance with 29 CFR 1926.502(k). Mr. Bartholomew stated that, under the plan for the church project, no employees were exposed to a fall hazard during the inspection that required them to be tied off. The perimeter of the roof was guarded by a series of guardrails. Flat trusses extended four and one-half feet beyond either edge of the railing. The trusses were placed two feet apart. In case an employee somehow managed to slide down onto the trusses, in Mr. Bartholomew's view, the employee would not fall to the ground. Nonetheless, Respondent's employees working outside of the guardrails were tied off.

8. On September 8, 2001, Officer Sutton spoke with Thomas Migliaccio, the President of T&M who has over a decade of experience in construction. He had recently returned to the site. Mr. Migliaccio told Officer Sutton that he did not believe any employees were working without complete fall protection equipment. He stated that he had reminded his employees that morning that they were to wear fall protection whenever they worked outside the guardrails. He advised Officer Sutton that if she had pictures of the employees not wearing fall protection, those employees would be fired.

9. On September 11, 2000, Officer Sutton showed Mr. Migliaccio photographs taken from the roadway two days earlier. She pointed out what appear to be a yellow hose (possibly for use with an air gun). Mr. Migliaccio stated the object was an employee lanyard/lifeline. The employees were wearing body harnesses. Upon reaching the company equipment trailer, Mr. Migliaccio pointed to a blue hose and stated that it was used for air guns. He also pointed out two ropes, one a lanyard and one for general use. Officer Sutton believed the rope used as a lanyard was made of natural fiber; she performed no tests on the rope to determine its actual composition.

10. Officer Sutton next interviewed company employees. Each employee stated that they had received fall protection training. Two employees were able to understand and

answer questions concerning training. No employee admitted that he was not wearing fall protection at the time of the inspection. Based on her observations, Officer Sutton believed that the employees needed retraining as they, she believed, worked outside the guardrail system without wearing complete fall protection equipment. Officer Sutton did not interview Foreman Johnson.

11. Foreman Johnson testified that, during the inspection, no employee worked outside the guardrails without being tied off. Foreman Johnson had a clear, unobstructed view of the work during this period. Mr. Johnson, at the time of the hearing, was a former employee of T&M. He disclaimed any interest of the outcome of this action. The Complainant subpoenaed his presence at the hearing.

12. At the hearing, Mr. Migliaccio demonstrated the equipment used by employees. He showed the Court the type of blue hose used for pneumatic equipment. He also showed the types of ropes used by employees that were pointed out to Officer Sutton during the inspection. The lanyard rope was made of synthetic fibers.

13. Complainant issued Respondent one serious citation with one item grouping various alleged fall protection violations (Item 1a, 29 CFR 1926.501(b)(11); Item 1b, 29 CFR 1926.502(a)(2); Item 1c, 29 CFR 1926.502(b)(10); and Item 1d, 29 CFR 1926.502(d)(14)), with a single proposed penalty of \$100.00.

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. This Court has jurisdiction of this cause and the parties are properly before the Court.
3. Complainant failed to meet its burden of proving a violation of the cited standards.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Citation No. 1 and each sub-part, as amended, be and the same are hereby dismissed.

This 11th day of February, 2002.

Carroll D. Tuttle
Administrative Law Judge Presiding