

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2001-3999
OSHA INSPECTION NO. 304007685
CSHO ID NO. S6127

v.

CUMMINGS CONSTRUCTION
COMPANY

ORDER

RESPONDENT.

THIS MATTER was heard by the undersigned on March 20, 2002 in Charlotte, North Carolina. The complainant was represented by Ralf F. Haskell, special deputy attorney general; the respondent was represented by Edward Bograd of Shumaker, Loop & Kendrick, LLP.

At the start of the hearing, counsel advised the undersigned that on November 20, 2001, the parties had taken the deposition of Edward W. Simko, the complainant's safety compliance officer, to be submitted as testimonial evidence in lieu of live testimony because Mr. Simko was called to active military duty outside the State of North Carolina. The transcript of Mr. Simko's deposition testimony, including photographs he took while conducting the inspection, was admitted into evidence.

After reviewing the above evidence (which was the only evidence submitted by either party), hearing the arguments of counsel at the hearing and considering the post-hearing briefs of the parties, the undersigned makes the following

FINDINGS OF FACT

1. The complainant is responsible by statute for compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").
2. The respondent is a corporation operating as a licensed general contractor located in Matthews, North Carolina. The respondent employs 20 persons.
3. On September 25, 2000, respondent as general contractor was constructing a Petro Express convenience store at 4283 East Franklin Boulevard in Gastonia, North Carolina.

4. On that date, complainant received a telephone notification in its Charlotte office that a possible violation of the Act was occurring on that jobsite. Mr. Simko, a safety compliance officer for complainant, was assigned to investigate.

5. Upon arriving at the jobsite, Mr. Simko observed four individuals working on the roof of the convenience store building, which was under construction. He observed that none of these individuals were utilizing any fall protection equipment, nor were there any fall arrest systems on the roof, except for a toe board.

6. Mr. Simko photographed these conditions, which photographs were admitted into evidence.

7. Mr. Simko conducted an opening conference with Rusty Braswell, who was respondent's superintendent on the jobsite. At the time of Mr. Simko's arrival on the jobsite, Mr. Braswell was standing at a work platform facing the convenience store building. The four employees working on the roof were in his plain view. The lack of fall arrest equipment or systems was also clearly visible.

8. The roof of the building had a 4x12 pitch. There was a parapet incorporated into one part of the roof. The distance from the ground to the eave was approximately 12 feet. Surrounding the building was hard dry dirt. The employees were working above the eave line.

9. The employees working on the roof were installing 4x8 sheeting panels on the roof rafters. Mr. Braswell advised Mr. Simko that these employees worked for Luis Zarate, a subcontractor on the project.

10. Mr. Braswell further advised Mr. Simko that he was aware that these workers were working on the roof without fall protection. He also stated that he was aware that these individuals were required to have fall protection. He told Mr. Simko that he had "not gotten around" to making sure that these workers used their fall protection equipment.

11. Mr. Braswell then directed an unidentified individual to order the workers off the roof. The four workers complied, then went to their truck and obtained fall protection equipment such as shoulder harnesses, lanyards and ropes.

12. Mr. Simko cited respondent for a violation of 29 CFR 1926.501(b)(1), which requires employees on walking working surfaces such as roofs, with an unprotected edge higher than 6 feet above a lower level, to have personal fall arrest systems in place.

13. The respondent was cited for this violation under the multiemployer worksite doctrine, since respondent was the general contractor and had full supervisory authority on the jobsite, including coordination and supervision of the work of subcontractors.

14. Mr. Simko determined that without fall protection there was the possibility of an accident to an employee by falling off the roof. He further determined that the substantially probable injury from a fall of at least 12 feet would be broken bones or other serious bodily injury. This would be a serious violation of the standard.

15. Mr. Simko calculated the penalty pursuant to the Field Operations Manual. He determined the gravity-based penalty to be \$1,250.00, based on a medium severity and low probability of an accident. The respondent was given credits of 60% for size, 25% for good faith, 10% for cooperation and 10% for history. Because the credits exceed 100% of the penalty, the minimum statutory penalty of \$100.00 for a serious violation was assessed.

Based on the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The respondent is subject to the provisions of the Act.
3. The respondent has violated the provisions of 29 CFR 1926.501(b)(1) by allowing a subcontractor's employees to work without fall protection on the roof of a construction project on which the respondent was the general contractor.
4. This violation of the standard is a serious violation, because even though the possibility of an accident in this matter was low, the type of injuries that would result from a fall of more than 12 feet would likely be at a minimum broken bones. Such potential injuries incident to a violation of a standard have always been considered by the Safety and Health Review Board and the courts to be a serious violation of the standard.
5. The proposed penalty has been properly calculated pursuant to the Field Operations Manual.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

1. Citation 1, Item 1 is affirmed as a serious violation of 29 CFR 1926.501(b)(1), with a penalty of \$100.00.
2. This penalty shall be paid within fourteen (14) days of the date of this Order.
3. All violations not previously abated shall be immediately abated.

This 2nd day of April, 2002.

RICHARD M. KOCH
HEARING EXAMINER