

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

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

YOUNG CONTRACTING CO., INC.  
and its successors,

RESPONDENT.

DOCKET NO. OSHANC 2002-4130  
OSHA INSPECTION NO. 305091639  
CSHO ID NO. W4302

**ORDER**

**DECISION OF THE REVIEW BOARD**

This appeal was heard at or about 11:00 A.M. on the 2nd day of December, 2003 in Room 124, First Floor, Old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by Oscar A. Keller, Jr., Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the North Carolina Safety and Health Review Board.

**APPEARANCES**

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Jay M. Wilkerson of Conner, Gwyn Schenck PLLC, Raleigh, North Carolina for the Respondent.

**ISSUES PRESENTED**

1. Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed serious violations of the following standards?

- a. 29 CFR §1926.20(b)2 for failure of the general contractor to conduct frequent and regular inspections;
- b. 29 CFR §1926.100(a) for failure of subcontractor's employees to wear hardhats when there was a danger of being struck in the head by falling objects;
- c. 29 CFR §1926.102(a) for failure of subcontractor's employees to wear proper eye protection while using pneumatic nailer;
- d. 29 CFR §1926.451(e)(1) for subcontractor's employees' use of crossbraces on scaffolding as a means of access, and
- e. 29 CFR §1926.501(b)(1) for failure of subcontractor's employee to use fall protection while standing on parapet wall at roof.

**SAFETY STANDARDS AND/OR STATUTES AT ISSUE**

1. 29 C.F.R. §1926.20 provides, in pertinent part, as follows:

- (b)(1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

(b)(2) Such programs shall provide for frequent and regular inspections of the job sites, materials and equipment to be made by competent persons designated by the employers..

2. 29 CFR §1926.100(a) provides:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

3. 29 CFR §1926.102(a)(1) which provides:

Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

4. 29 CFR §1926.451(e)(1) which provides:

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, 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 shall be used. Crossbraces shall not be used as a means of access.

5. 29 CFR §1926.501(b)(1) which provides:

"Unprotected sides and edges." Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

6. § 5(a)(2) of the federal OSH Act provides:

Each employer shall comply with occupational safety and health standards promulgated under this Act.

7. N.C. Gen. Stat. §95-129(2) provides, in pertinent part, as follows:

Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article.

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Having reviewed and considered the record, the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby affirms the decision of the Hearing Examiner to the extent that it is not inconsistent with this Order and makes the following Findings of Fact, Conclusions of Law, and Order:

#### **FINDINGS OF FACT**

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).
4. The employer (Respondent) Young Contracting Co. Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. An inspection was made of Respondent's work site located at 945 Hanes Mall Boulevard in Winston-Salem, North Carolina on or about March 15, 2002 by Safety Compliance Officer, Jerry Whitfield as a result of observations of fall protection violations made from a public highway.

6. Respondent was the general contractor on the site.

7. As a result of this inspection, on March 22, 2002, the Occupational Safety and Health Division of the North Carolina Department of Labor issued the following citation to Respondent:

**CITATION NUMBER ONE (Serious)**

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	29 CFR 1926.20(b)(2)		\$250.00
2	29 CFR 1926.100(a)		\$250.00
3	29 CFR 1926.102(a)		\$350.00
4	29 CFR 1926.451(e)(1)		\$250.00
5	29 CFR 1926.501(b)(1)		\$350.00

8. On Friday, February 14, 2003, a hearing was held in Winston-Salem, North Carolina before the honorable Ellen R. Gelbin.

9. On March 11, 2003, Judge Gelbin issued an Order affirming Citation Number One, Items 1 through 5 and their proposed penalties for a total penalty of \$1,450.00.

10. On April 11, 2003, Respondent filed its Petition for Review.

11. On April 17, 2003, the Chairman of the Safety and Health Review Board entered an Order granting Respondent's Petition for Review..

12. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

13. The issues on appeal were heard by the full Board on December 2, 2003.

14. The Board adopts the Hearing Examiner's findings of facts numbered 1 through 14 and 17 through 39.

15. The failure to wear hard hats as alleged in Citation 1, Item 2 created the hazard of head injury from falling or flying objects.

16. The wearing of the hard hats would have reduced or eliminated the hazard of head injury from falling or flying objects.

17. The substantial probable result of an accident resulting from the failure to wear hard hats could be a cut on the head requiring stitches, skull fracture and/or death which are serious injuries.

18. The Board adopts the Hearing Examiner's findings of facts numbered 40 through 45.

19. The failure to wear proper eye protection as alleged in Citation 1, Item 3 created the hazard of a nail from the pneumatic nailer striking the employee in the eye.

20. The substantial probable result of an accident resulting from the failure to wear proper eye protection while using the nail gun could be penetrating injuries to the eye, resulting in recoverable eye injuries or partial or complete loss of vision which are serious injuries.

21. The wearing of proper eye protection would have reduced or eliminated the hazard of eye injury.

22. The Board adopts the Hearing Examiner's findings of facts numbered 46 through 51.
23. The use of the crossbraces as a means of access to the scaffold as alleged in Citation 1, Item 4, created the hazard of serious injury from falling off of the scaffold.
24. The Board adopts the Hearing Examiner's findings of facts numbered 52 through 57.
25. The failure to use fall protection while installing the channel and plywood to the parapet as alleged in Citation 1, Item 5 created the hazard of an employee falling from a height greater than 6 feet and sustaining serious injury.
26. The Board adopts the Hearing Examiner's findings of facts numbered 58 through 63.
27. The failure to have a competent person designated by the employer make frequent and regular inspections of the job site, materials, and equipment created the hazard of serious injuries, such as but not limited to, the hazards of head injury from falling or flying objects, eye injury from a nail from the pneumatic nailer striking the employee in the eye, broken bones or death from falling off of the scaffold and/or parapet as alleged in Citation 1, Item 2 through Item 5.
28. The failure to have a competent person conduct frequent and regular inspections of the job site created the possibility of an accident such as a fall from a scaffold, head injury from falling objects while not wearing a hard hat, fall from a height of 23 feet and a nail in the eye from a nail gun while not wearing proper eye protection. (T p 108).
29. The substantial probable result of an accident resulting from the failure to conduct frequent and regular inspections of the job site could be death or serious physical injury. (T pp 108-109).
30. The employees of the subcontractor were exposed to the hazards enumerated in finding of fact numbered 27 above. (T pp 109-110).
31. The employer knew or should have known whether or not a competent person was making frequent and regular inspections of the job site in that its superintendent, Mr. Phillips was on the job site daily and failed to fill out the daily safety inspection report that the employer provided to him to document his safety inspection. (T pp 269-270, 111-112).
32. The Board adopts the Hearing Examiner's findings of facts numbered 64 through 66.

## **CONCLUSIONS OF LAW**

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

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The Board has jurisdiction of this cause and the parties are properly before this Board.
3. The Complainant met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR § 1926.20(b)(2) as alleged in Citation One, Item 1 in that frequent and regular inspections of the jobsite, materials, and equipment were not made by a competent person designated by the employer as part of its accident prevention program.
4. The Complainant met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR §1926.100(a), as alleged in Citation One, Item 2, for failure of the subcontractor's employees to wear hardhats when there was a danger of being struck in the head by falling objects.

5. The Complainant met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR §1926.102(a), as alleged in Citation One, Item 3, for failure of the subcontractor's employees to wear proper eye protection while using a pneumatic nailer.

6. The Complainant met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR §1926.451(e)(1), as alleged in Citation One, Item 4, for the subcontractor's employees' use of crossbraces on the scaffolding as a means of access.

7. The Complainant met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR §1926.501(b)(1), as alleged in Citation One, Item 5, for failure of the subcontractor's employee to use fall protection while standing on parapet wall at the roof.

## **DISCUSSION**

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that "Upon review of the report and determination by the hearing examiner the Board may adopt, modify or vacate the report of the hearing examiner . . . and the report, decision, or determination of the Board upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record." "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

In order to prove a serious violation of an OSH standard the Complainant must prove the following:

1. A hazard existed;
2. employees were exposed;
3. the hazard created the possibility of an accident;
4. the substantial probability of an accident could be death or serious physical injury and
5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel Construction Co., 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984)) of the condition or conduct that created the hazard.

If a personal protective standard is involved, the Complainant must also prove that the use of the personal protective equipment (hard hats and/or safety glasses, etc.) would have reduced or eliminated the hazard.

This case involves the issue of general contractor liability under the multi-employer worksite doctrine first enumerated by this Board in Commissioner of Labor v. Romeo Guest Associates, Inc., OSHANC 96-3513, Slip Op., (RB 1998). In Romeo Guest, the Review Board stated:

Therefore, 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 jobsite. However, 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." (Citations omitted). In addition, the general contractor cannot "anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations created by others." (Citations omitted). It is only responsible for those hazards that it could reasonable [sic-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 jobsite to detect violations that its subcontractors may create.

Id., OSHANC 96-3513, Slip Op at 6-7, (RB 1998). This duty of the general contractor that is spelled out in Romeo Guest is a variant of the "reasonable man test" listed above as item 5 as one of the elements that the Complainant has to prove.

The Respondent does not challenge the validity of the multi-employer worksite doctrine set out in Romeo Guest and does not challenge items of proof 1 through 4 above or the 6<sup>th</sup> item for the personal protective standards for any of the citations, but instead asserts that the Respondent made reasonable efforts to anticipate hazards to the subcontractor's employees and made reasonable efforts to inspect the jobsite to detect violations that the subcontractors might have created. In findings of fact numbered 44-45, 50-51, 56-57, 62-63, and 64-65 the Hearing Examiner gave the reasons, based on the evidence presented, that the Respondent had failed to make reasonable efforts to inspect the jobsite and detect violations for each of the citation items .

In its Petition for Review the Respondent challenges these findings of fact as well as others. The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976). Pursuant to the mandate of N.C. Gen. Stat § 95-135(i), the Board has examined each of these challenged findings of fact and has found each to be supported by substantial evidence and a preponderance of evidence in the record. Also, pursuant to that mandate the Board has adopted each of those challenged findings of fact as well as others. Pursuant to the authority of N.C. Gen. Stat § 95-135(i) to "modify . . . the report of the hearing examiner", the Board has made some of its own findings of fact based on substantial evidence and a preponderance of the evidence in the record. The Board finds the Hearing Examiner's finding of fact numbered 64 to be succinct and repeats it below for emphasis:

64. For the reasons listed in each of the Citation Items above, Respondent, in its supervisory capacity, should reasonably have detected and prevented or abated the hazards cited in Citation 1, Items 2, 3, 4 and 5. Thus, the violation of 29 C.F.R. §1926.20(b)(2) as cited in Citation 1, Item 1 was serious in that Respondent allowed serious violations of the OSHA act to exist on the job site.

The Board has examined the reasons listed in the Hearing Examiner's opinion and finds that these reasons are supported by substantial evidence in the record and that the Respondent, in its supervisory capacity, should reasonably have detected and prevented or abated the hazards listed in Citation 1, Items 1, 2, 3, 4 and 5.

The Respondent also challenges certain enumerated conclusions of law made by the Hearing Examiner. The Board has examined each of those challenged conclusions of law and pursuant to the authority to modify the report of the hearing examiner, the Board has made its own conclusions of law which are based on the findings of fact which the Board adopted from the hearing examiner and which the Board found on its own. Each of those findings of fact which the Board adopted and which the Board found on its own was based on substantial evidence in the record. The Board has not adopted any of the hearing examiner's conclusions of law and none of the hearing examiner's conclusions of law are necessary to support the decision of the Board. In light of the Board's action in making its own conclusions of law, the Respondent's challenge to the Hearing Examiner's conclusions of law is moot.

The Respondent also asserts that the specific acts ordered by the Hearing Examiner in paragraph 7 of her order exceeded the scope of her authority. Pursuant to N.C. Gen. Stat § 95-135(i), the Board is issuing its own order modifying that portion of the order by ordering that the Respondent abate the violations but not specifying what methods the Respondent is required to use to abate the violations. In light of the Board's actions with respect to the issue of abatement, Respondent's last challenge is moot.

Pursuant to the mandate of N.C. Gen. Stat. 95-138(a), the Board has affirmed the penalties assessed for each of the citation items, after first giving due consideration to the size of the employer's business, the gravity of the

violations, the good faith of the employer and the employer's record of previous violations.

## **ORDER**

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's March 11, 2003 Order in this cause be, and hereby is, **AFFIRMED**, to the extent that it is not inconsistent with this opinion, and Respondent is found to have committed serious violations of 29 CFR § 1926.20(b)(2) with an assessed penalty of \$250.00; 29 CFR §1926.100(a) with an assessed penalty of \$250.00; 29 CFR § 1926.102(a) with an assessed penalty of \$350.00; 29 CFR § 1926.451(e)(1) with an assessed penalty of \$250.00 and 29 CFR § 1926.501(b)(1) with an assessed penalty of \$350.00 as alleged in Citation One, Items 1 through 5, respectively, and Respondent is **ORDERED** to abate the violations and to pay the total assessed penalty of \$1,450.00 within 30 days of the date of this order.

This the 29th day of April, 2004

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OSCAR A. KELLER, JR., CHAIRMAN

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RICHARD G. PEARSON, MEMBER

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JANICE SMITH GERALD, MEMBER