

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2002-4127
OSHA INSPECTION NO. 304956394
CSHO ID NO. J4861

v.

MID-SOUTH ERECTORS, INC.,

ORDER

RESPONDENT.

THIS MATTER was heard by the undersigned on January 21, 2003 in Charlotte, North Carolina. The complainant was represented by Claud R. Whitener, III, Assistant Attorney General; the respondent was not represented by counsel but appeared through its owner and chief executive officer, Donald McCarver.

After hearing and receiving the evidence and considering the arguments of the representatives of the parties, both during and after the hearing, the undersigned makes the following

FINDINGS OF FACT

1. The complainant is charged by law with responsibility 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 North Carolina corporation located in Charlotte, North Carolina which is engaged in the construction business specializing in steel erection. It employs 23 persons.
3. On October 17, 2001 Safety Compliance Officer Robert Jacobson conducted an accident-generated partial inspection of a construction site located at 7905/8350 Old Plank Road in Charlotte.
4. The respondent was erecting metal decking for the roof of a gymnasium/cafeteria /multi-purpose room being built in conjunction with the construction of a new elementary school.
5. The respondent was a subcontractor on this project to Shelco, Inc., the general contractor.
6. On the date of the inspection, respondent's employee Hector Gabriel Valencuela-Rivera fell to his death after accidentally stepping off the metal decking pieces already installed on the roof and landing on the concrete floor below. Mr. Valencuela-Rivera was not wearing any fall protection at the time of his fall.
7. According to eyewitnesses, Mr. Valencuela-Rivera was walking backwards dragging a piece of metal decking when he stepped off a leading edge of the decking in place.
8. Prior to the accident, four pieces of 25 feet, 9 inch by 36 inch wide, 22 gauge metal decking had been installed by respondent's employees Ezekiel and Valencuela-Rivera on the morning of the accident. At that point it was determined that the decking was incorrectly installed, gapping some 2-3 inches at the eave. Work on the deck had ceased while respondent's foreman Paul Davis went to the general contractor's trailer to discuss the situation.
9. In the course of his accident inspection, Mr. Jacobson took photographs and measurements and made a diagram.
10. The roof of the gymnasium/cafeteria/multi purpose room has essentially a gable design for a one-story open structure. The eave/roof intersection is 23 feet, 7 inches above the ground. The ridge of the roof is approximately 41 feet high, giving the roof a 3:12 slope.
11. Mr. Jacobson used mathematical calculations to conclude and testify that Mr. Valencuela-Rivera was 29 feet, 9 inches above the concrete floor when he fell. Mr. Jacobson used a 25-foot engineering rod to also show that Mr. Valencuela-Rivera was more than 25 feet above the ground when he fell.
12. Mr. Jacobson further testified that there was no other employee of respondent that he could prove was exposed to a fall hazard who was more than 25 feet above the ground.
13. The respondent provided scissor-lifts to its employees, which equipment was on site. There is no evidence the employees used these scissor-lifts.
14. The actions of Mr. Valencuela-Rivera created the possibility of an accident, the substantially probable result of which was death or broken bones and/or internal injuries.
15. The respondent was cited with a violation of 29 CFR 1926.105(a), based on complainant's operational procedural notice that provides that for non-tiered buildings where personal fall protection equipment is impractical, a safety net must be installed when employees are working at heights greater than 25 feet above the next level or floor. No safety net had been installed under Mr. Valencuela-Rivera's work area.
16. Mr. Jacobson determined that, for penalty purposes, the probability quotient was medium and the severity quotient was high. From a gravity based penalty of \$3,500.00, the respondent was given a 60% size credit, 10% good faith credit for cooperation and no credit for history, resulting in a cited penalty of \$1,050.00.
17. Subsequent to the hearing and pursuant to permission granted by the undersigned, the respondent telefaxed to the undersigned a document captioned "OSHA National News Release", indicating a new steel erection standard (Subpart R, 29 CFR 1926.750 *et seq.*) This document contained parts of a proposed new standard for steel erection safety that the respondent argued would permit erection of a "controlled decking zone" without fall protection, so long as the height above the ground was less than 30 feet.
18. It appears that standard does not fully support respondent's position, but it was not in effect on the date of the inspection in this matter. This new standard was not made effective in North Carolina until January 18, 2002. (*See*, 13 NCAC 07F.0201)

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 revised Subpart R, beginning with 29 CFR 1926.750 *et seq.* was not in effect in North Carolina on the date of the inspection in this case. The respondent is charged with knowledge of the governmental regulations, including standards of the Act, affecting its industry. *See, Brooks v Davey Dickens*, 3 NCOSHD 351 (RB 1989).
4. The complainant has proved by the greater weight of the evidence a serious violation of 29 CFR 1926.105(a).
5. The respondent has failed to prove by the greater weight of the evidence any affirmative defenses, including isolated instance of employee misconduct.
6. The proposed penalty was 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 1926.105(a) with a penalty of \$1,050.00.
2. Such penalty shall be paid within twenty (20) days of the filing date of this Order.
3. All violations not previously abated shall be immediately abated.

This 10th day of February, 2003.

RICHARD M. KOCH
HEARING EXAMINER