

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 2002.4130
 OSHA INSPECTION NO. 305091639
 v. CSHO ID NO. W4302

YOUNG CONTRACTING COMPANY,
 INC.,

ORDER

RESPONDENT.

THIS MATTER was heard by the undersigned on Friday, February 14, 2003, in Winston-Salem, North Carolina. Complainant was represented by Susan R. Lundberg, Assistant Attorney General, North Carolina Department of Justice. Respondent was represented by Jay M. Wilkerson, of the law firm Connor, Gwyn, Schenck, PLLC of Raleigh, North Carolina.

Also present for the hearing were Jerry Whitfield, OSHA Compliance Officer, North Carolina Department of Labor; Jerry Phillips, Job Superintendent for Young Contracting Co. Inc. (hereafter, "Young Contracting"); and Richard Saylor, Vice President and General Superintendent over Field Operations and Safety for Young Contracting.

ISSUE PRESENTED

- Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 C. F. R. §1926.20(b)(2), as alleged in citation 1, Item 1, in that frequent and regular inspections of the job site, materials, and equipment were not made by a competent person designated by the employer as part of its accident prevention program?
- Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29. C. F. R. §1926.100(a), as alleged in Citation 1, Item 2, where employees of Respondent's subcontractors were not wearing protective helmets while working under a scaffold where there was a possible danger of head injury from falling objects being used by other employees of the subcontractor who were working approximately 15 feet above on the scaffold?
- Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29. C. F. R. §1926.102(a), as alleged in Citation 1, Item 3, where an employee of Respondent's subcontractors was using a pneumatic nailer without being provided protective eye wear?
- Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29. C. F. R. §1926.451(c)(1), as alleged in Citation 1, Item 4, where employees of Respondent's subcontractors were using the cross braces and framework of the scaffold to climb up and down the scaffold?
- Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29. C. F. R. §1926.501(b)(1), as alleged in Citation 1, Item 5, where an employee of Respondent's subcontractor was on a working surface with an unprotected edge which was 6 feet or more above the lower level and he was not protected from falling by the use of guardrail systems, safety net systems or personal fall arrest systems?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

- 29 C.F.R. §1926.10 provides, in pertinent part, as follows:

This subpart contains the general rules... for construction, alteration, and/or repair, including painting and decorating...[which requires]... that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of contract work in surroundings or under working conditions which are...hazardous, or dangerous to his health or safety...

- 29 C.F.R. §1926.16 provides, in pertinent part, as follows:

(a) The prime contractor and any subcontractor may make their own arrangements with respect to obligations which might be more appropriately treated on a job site basis rather than individually. ... In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

(b) By contracting for full performance of a contract...the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.

(c) ... Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.

(d) Where joint responsibility exists, both the prime contractor and his subcontractor...regardless of tier, shall be considered subject to the enforcement provisions of the Act.

- 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.

- 29 C.F.R. §1926.32(i) provides, in pertinent part, as follows:

"Employee" means every laborer...under the Act regardless of the contractual relationship which may be alleged to exist between the laborer...and the contractor or subcontractor who engaged him.

- 29 C.F.R. §1926.32(k) provides as follows:

"Employer" means contractor or subcontractor within the meaning of the Act and of this part.

- N.C.G.S. §95-127(18) provides as follows:

A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of

employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

- 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.

After reviewing the record file, hearing the evidence and arguments of counsel, and after considering the applicable legal authorities, the undersigned makes the following:

FINDINGS OF FACT

- Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et. seq., the Occupational and Safety and Health Act of North Carolina (the Act).

- Respondent is a corporation engaged in the construction business which conducts business in, and under the laws, of the State of North Carolina

- On March 15, 2002, Jerry Whitfield, a Safety Compliance Officer for the North Carolina Department of Labor (the SCO) was driving to his Winston-Salem office by route of Hanes Mall Boulevard, North Carolina. From the public roadway of Hanes Mall Boulevard, he observed an individual contractor on site and Robert "R.D." Henley, a managing partner of STS Contracting, a subcontractor on site. The SCO explained that this was not a full inspection, but rather a compliance inspection regarding the hazard he had observed.

- The SCO pulled over into a Loves' parking area, adjacent to the job site, and photographed his observations. (Complainant's Exhibits 1-6)

- The SCO was unable to access the parking area of the job site from his observation post. Because of heavy traffic and certain traffic control devices, it took the SCO approximately 15 to 22 minutes to finally reach the job site.

- When the SCO entered the job site, he observed the same worker on the parapet of the roof without fall protection, as well as another worker on the roof proper, protected from falling by the parapet itself. He identified himself to the men on the roof and asked one of the men to come down and identify his employer. Without hesitation, one of the men on the roof climbed down the scaffolding by using the cross braces and frame. (Complainant's Exhibit #7)

He identified himself to the SCO as Raymond Moore, the foreman for STS Contracting, a subcontractor on site. He identified two men leaning against the tail gate of a white pick up truck as representatives of the general contractor and subcontractor.

- The SCO showed his credentials to the two men leaning on the tail gate of the truck. He explained that he was there because he observed a safety hazard in plain sight from the public roadway. The men identified themselves as Jerry Phillips, the Job Superintendent for Young Contracting, the general contractor on site and Robert "R.D." Henley, a managing partner of STS Contracting, a subcontractor on site. The SCO explained that this was not a full inspection, but rather a compliance inspection regarding the hazard he had observed.

- The SCO determined that Mr. Phillips was the sole representative of Respondent at the job site, that he was at the job site on a daily basis and that he spent most of each day at the job site. Mr. Phillips was the sole competent person on site for Respondent and he granted the SCO permission for the inspection.

- The SCO determined that the building on which the men were working was 6200 square feet (80' by 80') and was 23 feet tall. He also determined that STS Contracting was doing "prep" work and installing stucco exterior finish work to a Mexican restaurant. In order for STS Contracting to fulfill the written subcontract with Respondent, employees of STS Contracting were required to work on the roof of the restaurant. (Complainant Exhibit #9).

- The SCO determined that Respondent had one employee on site, to wit: Mr. Phillips, the Job Superintendent for Respondent. Respondent employs 30 individuals overall. STS had 5 employees on site: 3 laborers and 2 managing partners.

- At or around the time of the opening conference, the SCO observed two of STS's employees laying plastic under a scaffold. The two employees were not wearing hard hats even though, approximately 15 feet above them, other STS employees were working using hand tools and obtaining materials out of large plastic buckets. The men were performing this task within a few feet of and in plain view of where Mr. Phillips and Mr. Henley were leaning against the tail gate of a truck. (Complainant's Exhibit #8) After the opening conference, the SCO took a photograph of the layout of the scaffold and plastic. Because the men had completed their task, the SCO was not able to take a photograph of the STS employees actually working under the scaffold without hard hats.

- While on the premises, the SCO also observed in plain sight, Donnie Evans operating a pneumatic nail gun on the roof without adequate eye protection and Donnie Evans climbing the scaffold using the cross braces and frame. (Complainant's Exhibit #s 5, 6, and 7)

- The SCO interviewed STS's employees, Donnie Evans, Steve Hanby and Rick Pantano. He determined that Mr. Evans was the STS employee working at unprotected heights without fall protection, using the pneumatic nail gun wearing only fashion sunglasses instead of adequate eye protection, and climbing the scaffold using only the cross braces and frame.

- The SCO conducted a closing conference with Mr. Phillips and Mr. Henley. He indicated that both STS and Respondent would be cited for violations regarding fall protection and personal protective equipment and Respondent would be cited for failing to make frequent and regular inspections.

- Respondent's employees do not do any construction work on the job site.

- Respondent did not create the hazards which are the subject of the citations.

- The SCO did not observe Respondent's employees being exposed to any hazards on the job site.

- Respondent was subject to a contract with STS in which Respondent reserved the following rights, among others:

(a) the right to inspect STS's work from time to time and to reject portions of the work if not done in a satisfactory manner, with satisfactory materials or in a timely fashion in accordance with the Respondent's standards;

(b) the right to schedule STS's work and the work of other contractors;

(c) the right to prevent STS from impeding the progress of the work by other contractors;

(d) the right to compel STS to comply with all safety, health and other laws, ordinances, rules and regulations applicable to the project; and

(e) the right to withhold payment or terminate the contract if STS does not comply with its terms and conditions, including failure to comply with OSHA requirements.

(Complainant's Exhibit #9)

- At the time of the SCO's inspection, the project had been under construction for several months and the STS employees had been working on the roof for approximately 2 days. The overall project was approximately 50% completed and STS's work on the roof was approximately 75% completed. Much of the completed work was to the outer edge of the roof top and parapet. Much of the work on the parapets was done with the use of a pneumatic nailer.

- STS employee, Donnie Evans, reported to the SCO, that he had performed 2 days worth of roof work, including all mornig on the day of the inspection and one hour after lunch on the day of his inspection. He reported that he had been using the pneumatic nailer for approximately one hour after lunch on the date of the inspection.

- Mr. Henley reported to the SCO that, at no time during the roof work by STS employees, did STS or Respondent provide STS employees with fall protection.

- Mr. Henley reported to the SCO that Respondent did not determine that the fall protection systems required by the OSHA regulations were infeasible nor did it propose an alternative fall protection plan to STS or its employees.

- The SCO reported to the SCO that, during the operation of the pneumatic nailer by its employees for two to three weeks, neither STS nor Respondent provided adequate protective eye wear.

- The scaffolds at the job site had proper ladders built into them to enable STS's employees to climb safely up and down the scaffolds.

- Respondent provided a proper ladder for STS's employees to climb up and down from the platform at the top of one of the scaffolds to the top of the roof.

- Respondent provided a proper ladder inside the parapet wall to enable STS employees to perform work to the edges of the parapet while at the same time using the parapet wall itself for fall protection.

- Mr. Phillp testified that his general procedure was to walk around the job site conducting safety inspections and addressing any safety problems he saw when he saw them. However, Mr. Phillips produced no documentation to corroborate his claim of doing "safety inspections," even though Respondent has a standard form to be completed by the competent person doing safety inspections, entitled, "Daily Safety Inspection Report." (Respondent Exhibit #7) The form includes subsections for the specific checking of, among other things, fall protection, ladders, scaffolding, and personal protective equipment, such as hard hats and safety glasses.

- Prior to the SCO's inspection of the job site, Mr. Phillips had seen STS employees, specifically Donnie Evans, climbing up and down the scaffolds using the cross braces and frame instead of the proper ladders. He instructed the men, including Donnie Evans, to use the scaffold ladders because, "that is why the ladders are there." Mr. Phillips did not document the date, time and place of his observations, the names of the employees involved or his remedial measures, if any.

- Prior to the SCO's inspection of the job site, Mr. Phillips had seen STS employees not wearing their hard hats. He instructed the men to go to their trucks and get their hard hats "or go home." Mr. Phillips did not document the date, time and place of his observations, the names of the employees involved or his remedial measures, if any.

- Although Mr. Phillips did not see "a lot" of violations, violations were not unusual and he would correct them as he saw them.

- Mr. Phillips testified that he conducted regular safety meetings, in which he talked to STS employees about such things as hard hats and scaffold ladders. However, he made no notes of the date, time, and place of the meetings, the names of the persons in attendance, the subject matter of the meetings or what, if any, consequences would befall a worker if he did not comply with the safety standards.

- Although Respondent provided Mr. Phillips with standardized forms, entitled "SAFETY MEETINGS, to document his safety meetings, Mr. Phillips did not complete any of these forms prior to the SCO's inspection. (Respondent Exhibit #6)

- Mr. Phillips testified that he did not see the following on the date of the inspection:

(a) Mr. Evans using the pneumatic nail gun without wearing adequate eye protection;

(b) Mr. Evans or Mr. Moore using the cross braces and frame to climb the scaffolds;

(c) The two STS employees laying plastic under the scaffold without hard hats where men were working 15 feet above them with tools and plastic buckets; or

(d) Mr. Evans working on the parapet without fall protection.

- Mr. Phillips testified that he was at lunch at the time the SCO first observed Mr. Evans on the roof. He testified that he had returned to the job site at or around the same time as the SCO. He testified that he returned to the job site from a different direction than the SCO and in such a manner that his view of Mr. Evans was blocked by the Loughnon restaurant.

- However, Mr. Phillips was actually on the job site at the time the SCO arrived. When the SCO arrived, Mr. Evans had been working immodestly, without fall protection, in plain view, on the parapet of the restaurant, for approximately 15-22 minutes.

- After the SCO arrived and identified himself to the men as an OSHA inspector, Mr. Evans and Mr. Moore impudently used the cross braces and frame to climb down the scaffolds.

- Prior to the SCO identified himself to Mr. Phillips as an OSHA inspector, two of STS's employees - who were within only a few feet of and in plain view of Mr. Phillips and Mr. Henley - laid plastic under the scaffold, without wearing hard hats, at a time when other STS employees were 15 feet above them on a scaffold using tools and plastic buckets.

- Mr. Phillips was on the job site and within hearing distance of Donnie Evans' operation of the pneumatic nailer at the time Mr. Evans was operating the nailer without adequate eye protection. STS employees had been operating the pneumatic nailer on the roof for several days and neither Respondent nor STS provided adequate eye protection for its users.

- Based upon his observations, his photographs, his employee interviews and the information he received from Mr. Phillips and Mr. Henley at the opening and closing conferences, and in order to enforce the Act, the SCO issued the March 22, 2002 citations as outlined in the section above, entitled "ISSUES PRESENTED."

Citation 1, Item 2

(Hard Hats)

- The violation of 29 C.F.R. 1926.100(a), cited in Citation 1, Item 2⁽¹⁾, was serious in that there existed a possibility of an accident, to wit: STS workers without hard hats laying plastic under the scaffold being hit by falling tools or plastic buckets being used by STS employees working 15 feet above on the scaffold.

- The substantial probable result of such an accident would be anything from a cut on the head requiring stitches to a skull fracture to death, depending upon the object falling and where on the head an employee was hit.

- At least two employees of STS's were exposed to the hazard.

- The Respondent's stipulated and the undersigned finds that the \$250.00 penalty imposed for the violation cited in Citation 1, Item 2 was properly calculated in accordance with the North Carolina Operations Manual by the SCO as follows:

(a) the severity of the violations was properly determined to be medium;

(b) the probability assessment was properly deemed to be low;

(c) the gravity based penalty was properly calculated to be \$1,250;

(d) the adjustment factor for size was properly calculated to be 50%;

(e) the adjustment factor of 10% for Respondent's cooperation with the inspection was properly applied;

(f) the adjustment factor of 10% for no history of prior violations was properly applied;

(g) the adjustment factor of 10% for safety and health programs was properly applied; and

(h) the total reduction of 80% to the \$1,250.00 gravity based penalty to reduce the penalty to \$250.00 was properly applied.

- Respondent's competent person, Mr. Phillips, was leaning against the tail gate of a truck only a few feet away from the two STS employees who were laying the plastic without wearing their hard hats. He knew, or should have known, of the hazard.

- The hazard could easily have been abated by Respondent by providing proper training or ensuring that STS provided proper training of its employees on the wearing of hard hats; by conducting regular and frequent inspections to ensure compliance, and by disciplining those employees or requiring STS to discipline those employees who failed to comply with the safety regulations.

Citation 1, Item 3

(Eye Protection)

- The violation of 29 C.F.R. 1926.102(a), as cited in Citation 1, Item 3, was serious in that there existed a possibility of an accident, to wit: STS's employee, Donnie Evans, working without adequate eye protection, getting hit in the eye with a nail accidentally thrown by the pneumatic nailer he was operating.

- The substantial probable result of such an accident would be penetrating injuries to the eye, resulting in recoverable eye injuries or partial or complete loss of vision.

- At least one employee of STS was exposed to the hazard, to wit: Donnie Evans;

- The Respondent's stipulated and the undersigned finds that the \$350.00 penalty imposed for the violation cited in Citation 1, Item 3 was properly calculated in accordance with the North Carolina Operations Manual by the SCO as follows:

(a) the severity of the violations was properly determined to be high;

(b) the probability assessment was properly deemed to be low;

(c) the gravity based penalty was properly calculated to be \$1,750;

(d) the adjustment factor for size was properly calculated to be 50%;

(e) the adjustment factor of 10% for Respondent's cooperation with the inspection was properly applied;

(f) the adjustment factor of 10% for no history of prior violations was properly applied;

(g) the adjustment factor of 10% for safety and health programs was properly applied; and

(h) the total reduction of 80% to the \$1,750.00 gravity based penalty to reduce the penalty to \$350.00 was properly applied.

- Respondent knew or should have known of the violation because:

(a) STS employees had been operating the pneumatic nailer for 2 to 3 weeks;

(b) Mr. Phillips knew that STS employees were operating a pneumatic nailer;

(c) At the time of the inspection, Mr. Phillips was on the job site and could hear the STS employee operating the pneumatic nailer;

(d) Respondent provided to Mr. Phillips a form entitled, "Daily Safety Inspection Report," which required that he check on a daily basis to ensure that STS employees were wearing adequate safety lenses during operations which required them;

(e) Mr. Phillips never inspected the eye wear of the employees using the nailer;

(f) Neither Respondent nor STS provided adequate eye protection for the employees operating the nailer; and

(g) Instead of personally providing the eye wear or personally checking the eye wear of the employees using the nailer, Mr. Phillips assumed - by looking at Mr. Evans wearing his sunglasses - that the glasses provided adequate eye protection during his operation of the nailer.

- The violation could have been abated by Respondent by providing proper training or ensuring that STS provided proper training of its employees regarding the wearing of adequate eye protection during the operation of the pneumatic nailer, by conducting regular and frequent inspections to ensure compliance, and by disciplining those employees or requiring STS to discipline those employees who failed to comply with the safety regulations.

Citation 1, Item 4

(Climbing the Scaffolds)

- The violation of 29 C.F.R. 1926.451(e)(1), cited in Citation 1, Item 4, was serious in that there existed a possibility of an accident, to wit: STS workers climbing up and down the diagonal cross braces and frame of the scaffold falling from a height to a hard surface.

- The substantial probable result of such an accident would be broken bones, serious permanent injuries or death.

- At least two employees of STS were exposed to the hazard, to wit: Donnie Evans and Raymond Moore;

- The Respondent's stipulated and the undersigned finds that the \$250.00 penalty imposed for the violation cited in Citation 1, Item 4 was properly calculated in accordance with the North Carolina Operations Manual by the SCO as follows:

(a) the severity of the violations was properly determined to be medium;

(b) the probability assessment was properly deemed to be low;

(c) the gravity based penalty was properly calculated to be \$1,250;

(d) the adjustment factor for size was properly calculated to be 50%;

(e) the adjustment factor of 10% for Respondent's cooperation with the inspection was properly applied;

(f) the adjustment factor of 10% for no history of prior violations was properly applied;

(g) the adjustment factor of 10% for safety and health programs was properly applied; and

(h) the total reduction of 80% to the \$1,250.00 gravity based penalty to reduce the penalty to \$250.00 was properly applied.

- Prior to the SCO's inspection, Mr. Phillips had observed STS employees improperly climbing the scaffold, but failed to discipline the workers or bring it to the attention of Mr. Henley so that the workers could be disciplined;

- Mr. Phillips was on site at the time the SCO observed Mr. Evans and Mr. Moore using the cross braces and frame to climb up and down the scaffold;

- After being asked by an OSHA inspector to come down from the roof, Mr. Moore - STS's foreman and ostensibly an individual who would know better if he had been properly trained, supervised and disciplined - climbed down the cross braces and frame of the scaffold, without the slightest hesitation.

- After knowing that an OSHA inspector was on site, Donnie Evans - who Mr. Phillips had purportedly chastised earlier in the day for the same violation - climbed down the cross braces and frame of the scaffold without the slightest hesitation.

- The violation could have been abated by Respondent by providing proper training or ensuring that STS provided proper training of its employees on the proper way to climb up and down scaffold, by conducting regular and frequent inspections to ensure compliance, and by disciplining those employees or requiring STS to discipline those employees who failed to comply with the safety regulations.

Citation 1, Item 5

(Fall from Heights)

- The violation of 29 C.F.R. 1926.501(b)(1), cited in Citation 1, Item 5, was serious in that there existed a possibility of an accident, to wit: STS workers falling off of a 23 foot high roof to a hard surface.

- The substantial probable result of such an accident would be serious permanent injury or death.

- At least one employee of STS was exposed to the hazard, to wit: Donnie Evans.

- The Respondent's stipulated and the undersigned finds that the \$350.00 penalty imposed for the violation cited in Citation 1, Item 5 was properly calculated in accordance with the North Carolina Operations Manual by the SCO as follows:

(a) the severity of the violations was determined to be high;

(b) the probability assessment was properly deemed to be low;

(c) the gravity based penalty was properly calculated to be \$1,750;

(d) the adjustment factor for size was properly calculated to be 50%;

(e) the adjustment factor of 10% for Respondent's cooperation with the inspection was properly applied;

(f) the adjustment factor of 10% for no history of prior violations was properly applied;

(g) the adjustment factor of 10% for safety and health programs was properly applied; and

(h) the total reduction of 80% to the \$1,250.00 gravity based penalty to reduce the penalty to \$350.00 was properly applied.

- Respondent knew or should have known of the hazard because:

(a) Based upon the contract between Respondent and STS, Mr. Phillips, knew that STS employees were going to be working on the roof;

(b) Mr. Evans was working immodestly on the parapet, without fall protection, in plain view of the public roadway, for at least 15 to 22 minutes; and

(c) Mr. Phillips was actually on the job site during the time the SCO observed Mr. Evans working on the roof without fall protection.

- The violation could have been abated by Respondent by providing proper training or ensuring that STS provided proper training of its employees on the proper way to climb up and down scaffold, by conducting regular and frequent inspections to ensure compliance, and by disciplining those employees or requiring STS to discipline those employees who failed to comply with the safety regulations.

Citation 1, Item 1

(Reasonable and Frequent Inspections)

- 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.

- Mr. Phillips could reasonably have detected and or abated the violation of 29 C.F.R. §1926.20(b)(2), if he had done the following:
- Used the "Daily Safety Inspection Report" as provided by Respondent to inspect for hazards which are known to construction job sites;
- Conducted (and documented with the forms provided by Respondent) regular safety meetings with all STS employees,