

**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 2002-4151
OSHA INSPECTION NO. 305089245
CSHO ID NO. T7732

v.

WHELCHER BUILDERS, INC.,

ORDER

RESPONDENT.

THIS MATTER was heard by the undersigned on January 7, 2004 in Charlotte, North Carolina.

The complainant was represented by Linda Kimbell, Associate Attorney General; the respondent was represented by Phillip Van Hoy.

At the outset of the hearing, the complainant moved to withdraw Citation 1, Item 1b and 1l. Without objection from the respondent, this motion was allowed.

After hearing and receiving the evidence and the arguments of counsel, the undersigned makes the following

FINDINGS OF FACT

1. The complainant as Commissioner of Labor for the State of North Carolina 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 licensed general contractor with its principal place of business in Charlotte, North Carolina. It employs 50 persons.
3. On February 20, 2002, Health Compliance Officer Thomas Elder of the North Carolina Department of Labor conducted a complaint inspection of respondent's worksite at the Watauga Medical Center ("WMC") in Boone, North Carolina.
4. The complaint was made directly to the Department of Labor and alleged that the respondent was requiring its employees to work without respirators in areas where asbestos was present and that these employees were working in a confined space without proper training.
5. The respondent was the general contractor for a renovation and expansion project at WMC, a hospital facility. The renovation involved three floors of the existing facility and the construction of an addition. The respondent had five employees working at the site.
6. Mr. Elder conducted an opening conference with representatives of WMC, then with respondent's project manager, Mike Davis. The inspection conducted by Mr. Elder was limited to areas jointly controlled by WMC and respondent.
7. A closing conference was conducted by Mr. Elder with Jim Stevens, who was then respondent's safety consultant and authorized representative. The proposed citation items which were the subject of this hearing were issued on July 18, 2002.
8. The activity of respondent's employees giving rise to the complaint to the complainant was the demolition of an existing wall in a bathroom on the third floor of the hospital. It was part of Room 311 on the third floor of WMC.
9. This wall was attached to a horizontal steel structural I-beam that was coated with sprayed on fireproofing material.
10. This wall was demolished by respondent's employees Scott Veach and Earl Eberts, who were assigned the task by employee Roger Wohlford.
11. The demolished wall had been constructed of three inch ceramic tile blocks attached to framing studs and backed with white fiber against the exterior wall of the facility.
12. Pursuant to 29 CFR 1926.1101(b), demolishing the wall was a Class III operation (of four classes). A Class III operation involves repairs or maintenance of a structure where asbestos containing material (ACM) or presumed asbestos containing material (PACM) is present and likely to be disturbed.
13. Materials used in constructing buildings prior to 1980 commonly contained asbestos, accounting for the importance of PACM. In such buildings the fireproofing/acoustical material sprayed onto structural members such as the I-beam attached to the demolished wall was commonly an ACM.
14. WMC was originally built in 1968. An addition was constructed in 1979.
15. The wall was demolished approximately three weeks before Mr. Elder's inspection. None of the debris remained to be sampled for the presence of asbestos. Mr. Elder did wipe samples, but the samples tested negative for asbestos.
16. In September, 2000, WMC contracted with Environmental Investigations to conduct an environmental survey of its facility prior to commencement of construction. This survey indicated that the insulation in the building was damaged and friable and contained detectable levels of asbestos.
17. In December, 2000, Environmental Investigations prepared technical specifications for asbestos abatement at WMC, including removal of asbestos fireproofing. Environmental Investigations also performed a comprehensive asbestos survey for WMC in January, 2001.
18. In early 2001, Environmental Investigations conducted an asbestos bulk analysis, sampling materials to determine if they contain asbestos. Samples were taken from the third floor in the area of the wall that was to be demolished.
19. WMC contracted with E. Luke Greene Co. ("ELG") to perform the demolition and asbestos removal incident to the construction at WMC. ELG was performing these tasks at the WMC facility during the time respondent was working on the project.
20. ELG generated daily reports of demolition and asbestos removal activity at WMC. These reports indicated that respondent demolished the wall and exposed ACM on January 28, 2002 and that ELG on January 29, 2002 cleaned up the wall demolition debris left by respondent. This debris contained ACM.
21. On January 30, 2002, ELG cleaned the fireproofing containing ACM from the beam exposed by the demolition of the wall in Room 311.
22. ELG's daily reports also indicated other instances of respondent's employees removing materials containing ACM.
23. Respondent demolished the wall using sledge hammers. This method would disturb ACM.
24. Prior to and after demolition of the wall, respondent performed no air sampling, so it was unable to determine if its employees were exposed to ACM.
25. The respondent provided the complainant with no data or documents indicative of respondent conducting a negative exposure assessment prior to or after the demolition. The respondent also did not provide to complainant any evidence of prior monitoring of employees.
26. The respondent performed no containment of the area surrounding the demolition, nor did it utilize negative air.
27. Respondent's failure to conduct an assessment created the hazard of exposure of employees to asbestos. As a result of exposure to asbestos, an employee could contract asbestosis, a disease of the lungs; mesothelioma, which is a cancer of the lungs; or stomach cancer.
28. There was testimony that published books and treatises have shown that exposure to asbestos can cause the above health problems. However, there was no persuasive evidence that the limited exposure of respondent's employees on the day the wall was demolished would create the possibility of an accident the substantially probable result of which would be serious injury to the respondent's employees who were working on the wall.
29. Documents provided by WMC from ELG and Environmental Investigations indicated the likelihood of exposure to asbestos of respondent's employees Scott Veach and Earl Eberts.
30. The respondent knew or should have known with reasonable diligence that these employees were exposed to ACM.
31. 29 CFR 1926.1101 (f)(2)(i) requires employers to conduct exposure assessments and monitoring, which assessments and monitoring must be performed by a competent person. This standard includes demolition where asbestos is present.
32. 29 CFR 1926.1101 (g)(3)(iii) prohibits sweeping, shoveling or other dry cleanup of dust and debris which contains PACM or ACM, regardless of levels.
33. Mr. Elder learned through respondent employee interviews that brooms and shovels were used to clean up the wall debris, which was placed in buckets and hand-carried away.
34. 29 CFR 1926.1101 (g)(9)(i) requires the use of wet methods on Class III asbestos removal. Wet method involves wetting down the wall in order to keep the dust down.
35. The respondent used only dry methods for removal of the Class III asbestos.
36. 29 CFR 1926.1101 (g)(9)(v) requires that employees must use respirators when performing Class III jobs such as disturbance of the fireproofing material on the I-beam adjacent to the demolished wall.
37. The respondent's employees demolishing the wall did not use respirators.
38. When the respondent's employees demolished the wall using dry methods, they were covered in white dust created by the demolition.
39. 29 CFR 1926.1101 (g)(9)(ii) requires that Class III work can only be performed using local exhaust ventilation.
40. The respondent's employees performing the demolition did not use any local exhaust ventilation.
41. 29 CFR 1926.1101 (g)(9)(iv) requires that the employer must contain the area of demolition using impermeable drop cloths and plastic barriers or equivalent.
42. The respondent did not contain the demolition area in any fashion.
43. 29 CFR 1926.1101 (i)(1) requires an employer to provide to employees and require their use of protective clothing, such as coveralls, head covering, gloves and foot covering.
44. The respondent's employees did not use any protective covering when performing the demolition work. They were wearing street clothes at the time.
45. 29 CFR 1926.1101 (j)(2)(i) requires an employer to establish an equipment room or area adjacent to the regulated area for decontamination of employees and equipment.
46. The purpose of this standard is to keep asbestos from being transferred to other persons and to keep it from being ingested.
47. Disturbance of asbestos containing material can release the asbestos fibers into the air from which they can be inhaled or ingested, creating the greatest risk of exposure. These asbestos fibers can remain suspended in the air for some period of time.
48. The respondent did not establish such an area in connection with demolition of the wall.
49. 29 CFR 1926.1101 (j)(2)(iii) requires that work clothing for Class III work be cleaned with a high efficiency particulate air (HEPA) filter.
50. The respondent did not perform any cleaning of the clothing of its employees performing the demolition of the wall. The employees were covered in white dust after demolishing the wall, but there is no evidence the dust contained asbestos.
51. 29 CFR 1926.1101 (k)(9)(v) requires that employees performing Class III operations receive training equivalent to the 16 hour operations and maintenance course developed by the Environmental Protection Agency for maintenance and custodial workers.
52. The respondent did not provide such training for its employees performing the wall demolition work.
53. The respondent's employees interviewed by Mr. Elder confirmed that they received no such training.
54. The employee exposure at most was limited to one regular work day.
55. There is conflicting evidence that there was any asbestos contained in the demolished wall.

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

CONCLUSIONS OF LAW

1. The above 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. Even though the respondent was not the asbestos removal contractor on the WMC project and despite the fact that there was one asbestos removal contractor on the project, the respondent was still required by the Act to comply with the asbestos standards.
4. The respondent did not comply with any of the cited standards.
5. The respondent's noncompliance created the possibility of an exposure to asbestos, but the complainant has not proved by the greater weight of the evidence that the substantially probable result of this exposure would be death or serious injury.
6. The violations of the cited standards are nonserious violations.

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

1. Citation 1, Item 1a is affirmed as a nonserious violation of 29 CFR 1926.1101 (f)(2)(i) with no penalty.
2. Citation 1, Item 1c is affirmed as a nonserious violation of 29 CFR 1926.1101 (g)(3)(iii) with no penalty.
3. Citation 1, Item 1d is affirmed as a nonserious violation of 29 CFR 1926.1101 (g)(9)(i) with no penalty.
4. Citation 1, Item 1e is affirmed as a nonserious violation of 29 CFR 1926.1101 (g)(9)(v) with no penalty. .
5. Citation 1, Item 1f is affirmed as a nonserious violation of 29 CFR 1926.1101 (g)(9)(ii) with no penalty.
6. Citation 1, Item 1g is affirmed as a nonserious violation of 29 CFR 1926.1101 (g)(9)(iv) with no penalty.
7. Citation 1, Item 1h is affirmed as a nonserious violation of 29 CFR 1926.1101 (i)(1) with no penalty.
8. Citation 1, Item 1i is affirmed as a nonserious violation of 29 CFR 1926.1101 (j)(2)(i) with no penalty.
9. Citation 1, Item 1j is affirmed as a nonserious violation of 29 CFR 1926.1101 (j)(2)(iii) with no penalty.
10. Citation 1, Item 1k is affirmed as a nonserious violation of 29 CFR 1926.1101 (k)(9)(v) with no penalty.
11. All violations not previously abated shall be immediately abated.

This 31st day of May, 2004.

RICHARD M. KOCH
HEARING EXAMINER