

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT, DOCKET NO. OSHANC 2002-4168
OSHA INSPECTION NO. 305042947
v. CSHO ID NO. M1375

HAMPTON ROADS MECHANICAL
CONTRACTORS, INC.

ORDER

RESPONDENT.

APPEARANCES

Complainant:

Sonya M. Calloway
Assistant Attorney General
North Carolina Department of Justice

Respondent:

David Grew, Chief Executive Officer
Hampton Roads Mechanical Contractors,

BEFORE

Hearing Examiner: Carroll D. Tuttle

THIS CAUSE coming on for hearing and being heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina on January 15, 2004 at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was present and represented by Ms. Sonya M. Calloway, Assistant Attorney General, North Carolina Department of Justice. David Grew appeared on behalf of the Respondent.

Respondent was duly served with Notice of Hearing of this proceeding on December 1, 2003 in accordance with the Rules of Procedure of the Safety and Health Review Board of North Carolina.

Based upon the evidence presented by Complainant at the hearing, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed a citation issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).
2. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of the Act (N.C.G.S. § 95-133).
3. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
4. The undersigned has jurisdiction over the case (N.C.G.S. § 95-135).
5. Respondent was a subcontractor, hired by the general contractor, Vertexco Corporation, Inc., on a project to renovate Bias Hall on the campus of Elizabeth City State University located at 1704 Weeksville Road in Elizabeth City, North Carolina.
6. On July 2, 2002 Scott Mabry, a Health Compliance Officer with the North Carolina Department of Labor, conducted a partial inspection pursuant to a complaint against Vertexco Corporation, Inc. for which the inspection of Respondent was related.
7. During said inspection Officer Mabry observed suspect asbestos in the crawlspace under Bias Hall in an area where Respondent's employees were assigned to work. During the inspection, Officer Mabry took photographs, collected samples of suspect asbestos and interviewed employees.
8. Officer Mabry conducted an opening conference with Mr. Brian Charest, foreman for Respondent.
9. On August 5, 2002, Complainant issued to Respondent Citation Number One, Item 1a alleging a serious violation of 29 CFR 1926.1101 (e) (1); Item 1b alleging a serious violation of 29 CFR 1926.1101 (e) (6); Item 1c alleging a serious violation of 29 CFR 1926.1101 (f) (2) (i); Item 1d alleging a serious violation of 29 CFR 1926.1101 (g) (9) (iv); Item 1e alleging a serious violation of 29 CFR 1926.1101 (k) (9) (v); Item 1f alleging a serious violation of 29 CFR 1926.1101 (o) (1) and Item 1g alleging a serious violation of 29 CFR 1926.1101 (o)(4) (ii). Although grouped together, each item of said citation carried a proposed penalty of \$700.00.
10. Respondent timely filed its Notice of Contest. This Board has jurisdiction over the subject matter and the parties to the action.
11. Evidence presented by the Complainant offered through the testimony of Officer Scott Mabry showed that Officer Mabry conducted his inspection of Respondent's worksite pursuant to a complaint received on June 27, 2002 from one of Respondent's employees working on the site against the general contractor, Vertexco Corporation, Inc. Said complaint alleged that the general contractor had not abated or assessed the site for asbestos material that was being disturbed by employees and various trades that had to work in the crawlspace under Bias Hall. As a result, Respondent's employees were being exposed to dust and fibers from pipe insulation and other asbestos products that were left in the crawlspace in the building.
12. Officer Mabry testified and the Court finds that in accordance with the standards, Class III asbestos work is repair and maintenance operations where asbestos containing material, including thermal systems insulation and surfacing asbestos containing material and presumed asbestos containing material are likely to be disturbed.
13. Officer Mabry testified and the Court finds that his investigation revealed that the building in question was built in 1938 and, therefore, in accordance with the standards, would be presumed to contain asbestos as any building in existence prior to 1980 is presumed to contain asbestos. As such, Officer Mabry testified in pertinent part that pending verification of whether samples taken were in fact asbestos containing material, or ACM, he deemed said samples to be presumed asbestos containing material, or PACM.
14. Officer Mabry testified and the Court finds that prior to working for the Department of Labor he had worked primarily in and around asbestos for a number of years and was very familiar with asbestos surveys, lab reports for asbestos and identifying suspect asbestos.
15. Officer Mabry testified and the Court finds that during his inspection of the crawlspace, he was allowed to freely enter the crawlspace and it did not appear that access to the crawlspace was limited in anyway as there were no signs warning about a potential for exposure to asbestos. He also testified and the Court finds that there were no respirators in use nor were there any prohibitions against eating, drinking, smoking, chewing tobacco or gum, or applying cosmetics in the crawlspace.
16. During said inspection, Brian Charest, Respondent's foreman, told Officer Mabry that an asbestos inspection had taken place over the weekend of June 29, 2002 due to a report of suspect asbestos on June 25, 2002 by Respondent's employees. Officer Mabry further testified and the Court finds that an oral notice had been given by William Moore and Associates, a contractor who was hired to conduct the asbestos inspection, to Respondent indicating that the space was free from asbestos at the time of Officer Mabry's inspection.
17. Officer Mabry's investigation revealed that previously on June 22, 2002, suspect asbestos in the crawlspace had also been reported by Respondent's employees and Atlantic Environmental Services, an asbestos removal contractor, came in and cleaned the space on June 24, 2002.
18. In addition, Officer Mabry testified and the Court finds that his investigation revealed that suspect asbestos had also been found sometime prior to June 13, 2002 as William Moore and Associates inspected the crawlspace and issued a written notice on June 13, 2002, that no asbestos was found in the crawlspace.
19. A letter detailing Respondent's employees' discovery of asbestos on June 22 and 25, 2002 was admitted as Complainant's Exhibit #3 and was addressed to Vertexco Corporation, Inc., the general contractor, and printed on Respondent's letterhead. Said letter also detailed that Respondent's employees began working again on June 25, 2002 before again finding suspect asbestos.
20. Officer Mabry testified and the Court finds that he immediately saw suspect asbestos on the ground of the crawlspace in the form of insulation, when he entered the site on July 2, 2002 and that it was no more than ten feet from the entry of the crawlspace and was in plain view. He also testified and the Court finds that he noticed thermal insulation was hanging off of pipes that had been cut from the walls in preparation to replace the pipes in the crawlspace.
21. Officer Mabry testified and the Court finds that the exposed employees were employed by Hampton Roads Mechanical Contractors and that they were replacing the pipes in the crawlspace, and had to crawl around in the insulation on the ground of the crawlspace. It appeared to Officer Mabry that more suspect asbestos was being sloughed off into crawlspace by the cutting and pulling of pipes inside the walls in an attempt to connect them with new pipes in the crawlspace. He opined that there was suspect asbestos in the insulation in the walls as some of it was hanging on the pipes just outside of the walls.
22. Officer Mabry opined that work had in fact been done in the crawlspace as pipes had been cut and the purpose for which the exposed employees had been hired was to cut old pipes away and replace them with new ones. Officer Mabry also testified and the Court finds that Respondent had been hired to replace the boiler in the building. Officer Mabry further testified and the Court finds that he considered the kind of work performed by the exposed employees to be repair and maintenance operations.
23. Officer Mabry testified and the Court finds that one form of suspect asbestos was thermal system insulation, which he described as insulation applied to pipes, fittings, boilers, breeching, tanks, ducts or other structural components to prevent heat loss or gain.
24. Officer Mabry testified and the Court finds that the fact that there was thermal system insulation being sloughed off and lying on the ground of the crawlspace in a building older than 1980, led him to treat and identify the insulation not only as suspect asbestos but also as presumed asbestos containing material, PACM.
25. Officer Mabry testified and the Court finds that he believed that asbestos was being disturbed as presumed asbestos containing material, PACM, in the form of thermal insulation appeared to be sloughed from the walls into the crawlspace, and was constantly being crawled on and crushed on the ground by Respondent's employees.
26. Officer Mabry testified and the Court finds that in accordance with the standards, asbestos is disturbed if activities disrupt the matrix of asbestos containing material or presumed asbestos containing material, crumbled or pulverized asbestos containing material or presumed asbestos containing material, or generated visible debris from asbestos containing material or presumed asbestos containing material.
27. Complainant's Exhibits 1a and 1b, photographs taken from the scene in the crawlspace, were admitted into evidence, and were used to illustrate Officer Mabry's testimony of observing suspect asbestos on the pipes just outside the walls and on the ground of the crawlspace.
28. Officer Mabry testified and the Court finds that in accordance with the standards asbestos containing material or ACM, is any material that contained more than one percent asbestos.
29. Officer Mabry testified and the Court finds that he took two samples, one from the insulation hanging on the pipes which protruded from the walls and one from the ground of the crawlspace. Officer Mabry testified and the Court finds that as per lab results received from Analytix Corporation, said samples were in fact asbestos, as the reports indicated they contained 80 and 90% chrysotile asbestos respectively. The lab reports were offered and admitted into evidence as Complainant's Exhibit #2.
30. Officer Mabry also testified and the Court finds that in fact Respondent's employees were working with Class III asbestos, as he determined that they were working with ACM, PACM and TSI.
31. Officer Mabry testified and the Court finds that he opined that based on the lab reports and the age of the building, Respondent's employees in the crawlspace were performing Class III asbestos work as there were repair and maintenance operations conducted which appeared to disturb thermal insulation both on the ground and from the pipes in the wall, and said thermal insulation was presumed asbestos containing material and was, in fact, also asbestos containing material as it contained 80 to 90% chrysotile asbestos.
32. Given the potential for exposure to ACM, PACM or thermal systems insulation, TSI, in the crawlspace, Officer Mabry testified and the Court finds that in accordance with 29 CFR 1926.1101 (e)(1), Respondent should have set up a regulated area, alerting others to the potential for said exposure. Thus, Officer Mabry testified and the Court finds that he recommended Complainant cite Respondent for violating said standard as Respondent failed to set up a regulated area by putting up signs, controlling access to the area, and limiting certain activities prohibited by the standard in the crawlspace.
33. Officer Mabry testified and the Court finds that he did not believe that Brian Charest, Respondent's foreman, was competent, through training or experience, to recognize the hazards associated with the potential for exposure to asbestos, in accordance with either 29 CFR 1926.1101 (e)(6), 1926.1101 (f)(2)(i), 1926.1101(o)(1), or 1926.1101 (o)(4)(ii). Thus Officer Mabry testified and the Court finds that he recommended that Complainant issue citations against Respondent for violations of said standards.
34. Officer Mabry testified and the Court finds that although he asked for documentation, he received no proof that a negative exposure assessment had been conducted in accordance with 29 CFR 1926.1101 (g)(9)(iv). He also testified that the crawlspace had not been contained in accordance with said standard nor had the operation been isolated as per said standard. Thus, Officer Mabry testified and the Court finds that he recommended that Complainant issue citations against Respondent for violations of said standard.
35. Officer Mabry testified and the Court finds that although he requested documentation of training, he received no written documentation nor oral affirmation that Respondent's employees had been given a 16 hour operations and maintenance course developed by the EPA for maintenance activities and custodial workers who conduct activities that will result in the disturbance of asbestos containing material, ACM. As such, Officer Mabry testified and the Court finds that he recommended that Complainant cite Respondent for violating 29 CFR 1926.1101(k)(9)(v).
36. Officer Mabry opined that an accident could have occurred as a result of each of the alleged violations.
37. Officer Mabry testified and the Court finds that should an accident have occurred as a result of any of the alleged violations, the substantially probable injury would have been a serious injury, which could consist of exposure to friable asbestos resulting in the potential for asbestos related illnesses such as mesothelioma, asbestiosis and/or lung cancer.
38. Officer Mabry testified and the Court finds that Respondent was aware of each of the conditions alleged in the above items or with reasonable diligence could have been aware of them given the fact that Mr. Charest, the foreman, was on site at all times in plain view of each of the alleged hazards, management knew or could have known with due diligence whether or not a competent person was in charge of the worksite and management knew or could have known with due diligence whether or not employees had been trained in accordance with EPA requirements.
39. Officer Mabry testified and the Court finds that Respondent could have corrected the hazard(s) alleged in Item 1a by setting up a regulated area for Class III asbestos work in the crawlspace.
40. Officer Mabry testified and the Court finds that Respondent could have corrected the hazard(s) alleged in Items 1b, 1c, 1f and 1g by training Mr. Charest, the foreman, to recognize the hazards associated with the potential for exposure to asbestos.
41. Officer Mabry testified and the Court finds that Respondent could have corrected the hazard(s) alleged in Item 1d by containing the area using impermeable dropcloths and plastic barriers or their equivalent.
42. Officer Mabry testified and the Court finds that Respondent could have corrected the hazard(s) alleged in Item 1e by training employees working in the crawlspace with a 16 hour operations and maintenance course developed by the EPA for maintenance activities and custodial workers who conduct activities that will likely result in the disturbance of asbestos containing material, ACM.
43. Officer Mabry testified and the Court finds that the alleged violations were classified as high severity and low probability in accordance with the North Carolina Field Operations Manual.
44. Officer Mabry testified and the Court finds that although each of the items were grouped, in accordance with the North Carolina Field Operations Manual, the gravity based penalty was \$1,750 and said penalty was adjusted by 60% to a proposed penalty of \$700 based on the following factors: size 30%, cooperation 10%, safety and health programs 10% and history 10%.
45. Evidence presented by the Respondent through testimony of Mr. David Grew, Chief Executive Officer for Respondent, tended to show that he believed Respondent had done all that it could by continuing to stop work when suspect asbestos was found and alerting the general contractor, Vertexco Corporation, Inc. of suspect asbestos on three separate occasions; and by relying on experts hired by Vertexco Corporation, Inc. to clean the crawlspace.
46. Mr. Grew also testified and the Court finds that all pipe fitters as well as the foreman, Mr. Charest, had at least five years of training in mechanical contract work. However, Mr. Grew denied that any of the employees working in the crawlspace had been given a specific 16 hour course developed by the EPA on the hazards of working with asbestos containing material that is likely to be disturbed.
47. Respondent offered a notebook filled with business records from Respondent, namely letters to and from Respondent, the general contractor, Vertexco Corporation, Inc, the owner, Elizabeth City State University, about suspect asbestos dated from June 12, 2002 to July 9, 2002; meeting minutes with Vertexco Corporation, Inc.; Asbestos Inspection Reports and Air Sampling Results dated from June 13, 2002 to July 1, 2002; and a certificate from Complainant issued to the owner, Elizabeth City State on July 2, 2002 indicating that no conditions warranting citations were warranted. Said Exhibit was admitted into evidence as Respondent's Exhibit #1 and contained 16 items.

CONCLUSIONS OF LAW

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

1. The Court has jurisdiction of this cause and the parties are properly before this Court.
2. Respondent is subject to the provisions of OSHANC (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
3. Respondent violated 29 CFR 1926.1101 (e) (1) in that Respondent's employees in the crawlspace were performing Class III asbestos work as there were repair and maintenance operations conducted which appeared to disturb thermal insulation both on the ground and from the pipes in the wall. Due to the age of the building in question, said thermal insulation was presumed asbestos containing material and was, in fact, also asbestos containing material as it contained 80 to 90% chrysotile asbestos. Given the potential for exposure to ACM, PACM or TSI, in the crawlspace, Respondent should have set up a regulated area, alerting others to the potential for said exposure. Respondent failed to set up a regulated area by limiting access to the crawlspace; failing to warn employees of the potential for exposure to asbestos; failing to require employees to use respirators while in the crawlspace; and failing to prohibit eating, drinking, smoking, chewing tobacco or gum, or applying cosmetics in the crawlspace. Thus Citation 1 Item 1a should be affirmed.
4. Respondent violated 29 CFR 1926.1101 (k)(9)(v) in that Respondent's employees working the crawlspace had not been given a 16 hour operations and maintenance course developed by the EPA for maintenance activities and custodial workers who conduct activities that will likely result in the disturbance of asbestos containing material, ACM. Thus Citation 1 Item 1e should be affirmed.
5. Respondent's violations of 29 CFR 1926.1101 (e) (1) and 29 CFR 1926.1101 (k)(9)(v) could have caused an employee working in the crawlspace to develop serious illness such as an asbestos related disease.
6. Respondent knew or could have known through due diligence that no regulated area had been set up in the crawlspace and that it had not provided employees working in the crawlspace with a 16 hour course developed by the EPA on the hazards of working with asbestos containing material that is likely to be disturbed.
7. Given the diligent efforts on the part of Respondent as to the remaining items, 1b, 1c, 1d, 1f and 1g, Complainant has not proven by the greater weight of the evidence that said items should be affirmed.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED ADJUDGED AND DECREED that Citation Number One, Items 1a alleging a serious violation of 29 CFR 1926.1101 (e) (1) and 1e alleging a serious violation of 29 CFR 1926.1101 (k) (9)(v) are affirmed. Citation 1 Items 1b, 1c, 1d, 1f and 1g are dismissed accordingly.

This the 16th day of March, 2004.

Carroll D. Tuttle
Administrative Law Judge Presiding