

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

COMMISSIONER OF LABOR OF
NORTH CAROLINA,

COMPLAINANT,

v.

DOCKET NO. OSHANC 2002-4176
OSHA INSPECTION NO. 305042939
CSHO ID NO. M1375

ORDER

VIRTEXCO CORPORATION,

RESPONDENT.

APPEARANCES:

Complainant:

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

Respondent:

Carlylse McDaniel, Safety Director

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 June 27, 2003 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. Carlylse McDaniel appeared on behalf of the Respondent.

Respondent was duly served with Notice of Hearing of this proceeding on April 29, 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 the general contractor 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 Respondent at the site.
7. During said inspection Officer Mabry observed suspect asbestos in the crawlspace under Bias Hall in an area where Respondent's sub-contractors employees were assigned to work. During the inspection, Officer Mabry took photographs and interviewed employees.
8. Officer Mabry conducted an opening conference with Mr. Kevin Kernodle, site superintendent for Respondent.
9. On August 5, 2002 as a result of the inspection, Complainant issued to Respondent Citation Number One, Item 1a alleging a non-serious violation of 29 CFR 1926.1101 (o) (1) and Item 1b alleging a non-serious violation of 29 CFR 1926.1101 (o) (4) (ii). No penalty was assessed for this citation.
10. Respondent timely filed its Notice of Contest. This Board has jurisdiction over the subject matter and the parties to the action.

CITATION NUMBER ONE, ITEM 1a

11. Citation Number One, Item 1a alleges a non-serious violation of 29 CFR 1926.1101 (o) (1) in that in the construction worksite in question, Respondent did not designate a competent person having the qualifications and authorities for ensuring worker safety and health required by Subpart C, General Safety and Health Provisions for Construction (29 CFR 1926.20 through 1926.32).

CITATION NUMBER ONE, ITEM 1b

12. Citation Number One, Item 1b alleges a non-serious violation of 29 CFR 1926.1101 (o)(4)(ii) in that while performing Class III asbestos work, a competent person was not trained in aspects of asbestos handling appropriate for the nature of the work, to include procedures for setting up glove bags and mini-enclosures, practices for reducing asbestos exposures, use of wet methods, the contents of 29 CFR 1926 and the identification of asbestos.
13. 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 a sub-contractor working on the site against Respondent, said complaint alleged that the general contractor, Respondent, 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 the employees were being exposed to dust and fibers from pipe insulation and other asbestos products that were left in the crawlspace in the building.
14. Officer Mabry testified and the Court finds that prior to entering the crawlspace, he observed a survey from Elizabeth City State indicating that the crawlspace was free from asbestos, but disclaiming that certain inaccessible areas were not tested, such as inside of the walls, might contain asbestos. A copy of this survey was offered and admitted into evidence as Complainant's Exhibit #5.
15. Officer Mabry testified and the Court finds that his investigation revealed that the building in question was built in 1938 and therefore would be presumed to contain asbestos as any building in existence prior to 1980 is presumed to contain asbestos.
16. 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.
17. Officer Mabry testified that he was allowed into the crawlspace without any discussion about potential hazards for asbestos exposure and was told that an inspection had taken place over the weekend of June 29, 2002 due to a report of suspect asbestos on June 25, 2002. He further testifies that there was an oral notice from the contractor who did the inspection, William Moore and Associates, that the space was free from asbestos at the time of Officer Mabry's inspection. A copy of a survey from said inspection dated July 1, 2002 which had not been received by Officer Mabry at the time of his inspection, was offered and admitted into evidence as Complainant's Exhibit #3 as well as part of Respondent's Exhibit #1, Item 12.
18. Officer Mabry also testified and the Court finds that he was presented with paperwork indicating that suspect asbestos had been discovered on or about June 13, 2002 and that as a result William Moore and Associates came in and inspected the crawlspace and took samples. An asbestos inspection report was issued to Respondent on June 13, 2002 indicating that the no suspect asbestos containing material were found in the crawlspace. A copy of the report was introduced and admitted into evidence as Complainant's Exhibit #2 and later also introduced by Respondent as a part of Respondent's Exhibit #1 and is listed as Item 3 of said exhibit.
19. Officer Mabry testified and the Court finds that on or about June 22, 2002 more suspect asbestos was reported in the crawlspace and Atlantic Environmental Services, an asbestos removal contractor, came in and cleaned the space on June 24, 2002.
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 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 testified and the Court finds that one form of suspect asbestos as thermal system insulation, which he described as insulation used applied to pipes, fittings, boilers, breeching, tanks, ducts or other structural components to prevent heat loss or gain.
23. 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 as suspect asbestos.
24. Officer Mabry testified and the Court finds that he believed that asbestos was being disturbed as suspect asbestos 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 from the employees of the sub-contractor, Hampton Roads Mechanical Contractors, Inc.
25. Officer Mabry testified and the Court finds that in accordance with the standards, asbestos was disturbed if activities disrupted 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.
26. 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. Complainant's Exhibit's 1a and 1b 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.
27. Officer Mabry testified and the Court finds that his investigation revealed that Respondent and its subcontractor, Hampton Roads Mechanical Contractors, were involved in repair and maintenance work involving asbestos as general construction, electrical and mechanical work were taking place.
28. Officer Mabry testified and the Court finds that in accordance with the standards, a competent person is someone who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous or dangerous to employees, and who has the authority to take prompt corrective measures to eliminate the hazards.
29. Officer Mabry testified and the Court finds that Ken Kernodle, had been designated as the competent person on the site but indicated that he was not able to identify suspect asbestos and had not received any training on asbestos and its hazards. Mr. Kernodle told Officer Mabry that he had the authority to take immediate corrective measures if suspect asbestos was found but that he had to rely on someone else to point suspect asbestos out to him.
30. Officer Mabry testified and the Court finds that he did not believe Mr. Kernodle, although designated as a competent person, was in fact competent as he could not recognize the hazards of suspect asbestos and had not been trained to do so.
31. Officer Mabry testified and the Court finds that after interviewing Mr. Kernodle and employees from Hampton Roads Mechanical Contractors, Inc., Mr. Kernodle had supervisory authority over Hampton Roads Mechanical Contractors, Inc.'s employees, including the ability to stop work for safety hazards.
32. Officer Mabry testified and the Court finds that the only exposed employees were those of Hampton Roads Mechanical Contractors, Inc.
33. Officer Mabry testified and the Court finds that as per lab results received from Analytics Corporation, the samples that he took from the crawlspace were in fact asbestos, as the reports indicated they contained 80 and 90% chrysotile asbestos respectively. The lab reports were offered and admitted as Complainant's Exhibit #4.
34. Officer Mabry testified and the Court finds that in accordance with the standard asbestos containing material was any material that contained more than one percent asbestos.
35. Officer Mabry also testified and the Court finds that in accordance with the standard, Class III asbestos work was 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.
36. Officer Mabry testified and the Court finds that he opined that based on the lab reports, the employees in the crawlspace were performing Class III asbestos work as there was repair and maintenance work being performed which appeared to disturb thermal insulation which contained 80 to 90% chrysotile asbestos both on the ground and from the pipes in the wall.
37. An accident could have occurred as a result of each of the alleged violations.
38. Should an accident have occurred as a result of any of the alleged violations, the substantially probable injury would have been a non-serious injury.
39. Respondent was aware of each of the conditions alleged in the above items or with reasonable diligence could have been aware of them due to at least three failed attempts to clean the space while allowing Mr. Kernodle to act as the designated competent person without the ability or specific training under the standards to identify the hazards of suspect asbestos.
40. Respondent could have corrected the hazard(s) alleged in Item 1a by designating a competent person having the qualifications and authorities for ensuring worker safety and health required by Subpart C, General Safety and Health Provisions of Construction (29 CFR 1926.20 through 1926.32), specifically by providing asbestos training to Mr. Kernodle.
41. Respondent could have corrected the hazard(s) alleged in Item 1b by training a competent person in aspects of asbestos handling appropriate for the nature of the work, namely by training Mr. Kernodle in accordance with the standards on asbestos hazards.
42. The violations were classified as "non-serious" severity and "low" probability in accordance with the North Carolina Field Operations Manual, due to the nature of the violation as training-related.
43. Evidence presented by the Respondent through testimony of Mr. Carlylse McDaniel, safety director for Respondent who was not employed at the time of the inspection.
44. Mr. McDaniels testified that Respondent had not trained Mr. Kernodle on asbestos hazards, and that specifically Mr. McDaniel did not believe training was necessary unless asbestos removal was taking place. Mr. McDaniel averred that no removal was taking place.
45. Mr. McDaniel testified that Mr. Kernodle was in charge of the site as the site superintendent.
46. Mr. McDaniel testified that he believed Respondent had done all that it could by continuing to stop work when suspect asbestos was found and hiring experts to inspect and clean the space.
47. Mr. McDaniel clarified during his testimony that suspect asbestos was found on June 12, 2002, June 17, 2002 and June 25, 2002.
48. Mr. McDaniel testified that he didn't see what difference it would have made if Mr. Kernodle had been trained, as he didn't believe training would have assisted Mr. Kernodle in identifying suspect asbestos, since the experts hired by Respondent weren't able to identify suspect asbestos.
49. Respondent offered a notebook filled with business records from Respondent, namely letters to and from Respondent about asbestos dated from June 12, 2002 to August 28, 2002, as Respondent's Exhibit #1. Said Exhibit was admitted into evidence and contained sixteen 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 (o) (1) in that Respondent designated Mr. Kernodle as a competent person, without ensuring that he had the qualifications and authorities for ensuring worker safety and health required by Subpart C, General Safety and Health Provisions for Construction (29 CFR 1926.20 through 1926.32).
4. Respondent violated 29 CFR 1926.1101 (o)(4)(ii) in that while performing Class III asbestos work, Mr. Kernodle, the designated competent person was not trained in aspects of asbestos handling appropriate for the nature of the work, to include procedures for setting up glove bags and mini-enclosures, practices for reducing asbestos exposures, use of wet methods, the contents of 29 CFR 1926 and the identification of asbestos.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED ADJUDGED AND DECREED that Citation Number One, Item 1a alleging a non-serious violation of 29 CFR 1926.1101 (o) (1) and Item 1b alleging a non-serious violation of 29 CFR 1926.1101 (o) (4)(ii) are affirmed.

This the 23rd day of July, 2003.

Carroll D. Tuttle
Administrative Law Judge Presiding