

**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 2002-4187  
OSHA INSPECTION NO. 305093429  
CSHO ID NO. K3723

v.

MOTSINGER BLOCK PLANT, INC.,

**ORDER**

RESPONDENT.

THIS MATTER was heard by the undersigned on May 6, 2003, in Winston-Salem, North Carolina. Complainant was represented by Ralf F. Haskell, Special Deputy Attorney General. Respondent was represented by Neal N. Motsinger, Vice President of respondent company. Also present for the hearing was Mary C. Perkinson, Health Compliance Officer, Department of Labor, OSH Division.

After reviewing the record file and after hearing the evidence and arguments of counsel and Neal Motsinger, the undersigned makes the following:

**FINDINGS OF FACT**

1. 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).
2. Respondent is a North Carolina Corporation in the business of manufacturing concrete blocks. The essential process involves respondent's employees using front-end loaders to take measured portions of shale and sand from piles on the property, dump the materials in a cement mixer, pour measured portions of Portland cement dust through augers from a silo into the cement mixer, add a measured portion of water, use the cement mixer to mix the materials until homogenous, pour the finished concrete into block molds for curing, and stack the finished product for shipping.
3. Health Compliance Officer (HCO), Mary Perkinson, and Safety Compliance Officer (SCO) Jerry Whitfield, inspected respondent's block plant ("the plant" or "the site") located at 199 Disher Road, Winston-Salem, North Carolina on July 2, 2002. The inspection was a result of a complaint being filed by a man representing himself to be respondent's employee and alleging various health and safety violations at the plant.
4. The HCO and SCO held an opening conference with Smitty Motsinger, the Respondent's manager at the plant. They presented their credentials to Mr. Smitty Motsinger, explained that they were there to do a partial inspection based upon allegations in the purported employee's complaint and received authorization from Mr. Smitty Motsinger for a partial inspection of the site.
5. Respondent had three employees working on the site being inspected, including Mr. Smitty Motsinger.
6. The HCO observed and photographed the condition of the premises and interviewed respondent's employees, including Mr. Smitty Motsinger. In order to enforce the Act, the HCO issued two citations on September 9, 2002, alleging violations of 29 C.F.R. §1910.132(a) (personal protective equipment); 29 C.F.R. §1910.146(c)(2) (failure to post a proper sign); and 29 C.F.R. §1910.1200(g)(1) (failure to maintain a material safety data sheet).

**29 C.F.R. §1910.132(a)**

**(Personal Protective Equipment)**

7. During the inspection, two employees on the site and Mr. Smitty Motsinger informed the HCO that in March or April, 2002, the two employees and Mr. Smitty Motsinger had climbed to the top of and into the cement silo in order to chip out some hardened cement which had formed when rain water seeped into top of the silo.
8. Prior to performing this task, respondent had the cement dust pumped out of the cement silo.
9. In order to accomplish this task, the men climbed up a free standing ladder approximately 8 feet to the roof of the plant and then climbed up metal rungs welded to the side of the silo approximately another 8 feet.
10. Respondent did not provide to its employees a fall arrest system to prevent its employees from falling from the top of the silo onto the plant roof or from the plant roof onto the ground.
11. The violation cited in Citation 1, Item 1 was properly deemed serious in that there existed a possibility of an accident, to wit: one of respondent's employees falling from an unprotected height.
12. The substantial probable result of such an accident would be broken bones or death.
13. Respondent's manager was aware of this situation because he also had climbed to unprotected heights without using personal protective equipment or a fall arrest system.
14. The \$100.00 penalty imposed for the violation cited in Citation 1, Item 1 was in accordance with the North Carolina Department of Labor Manual 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 \$3,500.00;
  - (d) the adjustment factor of 60% for the size of the employer was properly applied;
  - (e) the adjustment factor of 35% for respondent's cooperation with the inspection and for their health and safety program was properly applied;
  - (f) the adjustment factor of 10% for no history of prior violations was properly applied; and
  - (g) the 105% total reduction to the \$3,500 gravity based penalty to reduce the penalty to the minimum penalty of \$100.00 was properly applied.
15. The abatement necessary to correct the violation was for respondent to guard the rungs of the silo and ladder to the roof so that employees could not fall from an unprotected height or to provide personal protective equipment, such as harnesses and ropes, to its employees so that the employees could tie themselves off and protect themselves from falling from unprotected heights.
16. After the inspection, respondent did purchase for its employees a harness system for future use when climbing to the roof or to the top of the cement silo.

**29 C.F.R. §1910.146(c)(2)**

**(Failure to Post Sign)**

17. The cement silo at the job site is a "permit required confined space" in accordance with 29 C.F.R. §1910.146 *et seq.*
18. During her inspection, HCO noticed that respondent had not posted a sign on the cement silo, warning its employees that they needed permission from their employer to access the inside of the silo in order to clean it or for any other purpose. .
19. According to the two employees on site during the inspection and Mr. Smitty Motsinger, respondent had never posted a "permit required confined space sign" on the silo, either before respondent's accessed the inside of the top of the silo in March or April, 2002 or afterwards.
20. The lack of a sign should have been apparent to respondent, through its managers. 21. This citation was properly deemed to be non-serious and no penalty was assessed.
22. Respondent has abated this violation by posting a "permit required confined space" type of warning on the cement silo.

**29 C.F.R. §1910.1200(g)(1)**

**(Material Safety Data Sheet Not Provided for Sand)**

23. Respondent, by and through Mr. Smitty Motsinger, provided the HCO with material data safety sheets regarding the shale and cement used in the manufacturing process.
24. Respondent failed to provide to the HCO, a material data safety sheet regarding the sand used in the manufacturing process.
25. Respondent should have known that it was required to have such a material data safety sheet because it had these sheets relating to other chemicals used in the manufacturing process.
26. This citation was properly deemed to be non-serious and no penalty was assessed.
27. Respondent has abated this violation by obtaining and maintaining a material data safety sheet regarding the sand used in the manufacturing process.

**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. Respondent is subject to the provisions and jurisdiction of the Act.
3. The Complainant proved by a preponderance of the evidence that respondent violated the section of the Act as set forth in the Findings of Fact above, that the violations were designated properly and that the penalties were properly calculated.

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

1. Citation 1, Item 1 is hereby **affirmed** as a serious violation and the penalty is hereby imposed in the amount of \$100.00;
2. Citation 2, Item 1 is hereby **affirmed** as a non-serious violation and no penalty is imposed;
3. Citation 2, Item 2 is hereby **affirmed** as a non-serious violation and no penalty is imposed;
4. The penalty shall be paid within ten (10) days of the filing date of this Order;
5. Respondent shall continue to abate said violations by providing a fall arrest system to any of its employees who climb to the roof or to the top of the cement silo; by keeping a "permit required confined space" sign on the silo; and by maintaining a material data safety sheet regarding the sand it uses in its manufacturing process.

This the 7th day of May, 2003.