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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

TRIAD BUILDERS OF KING, INC.

RESPONDENT.

DOCKET NO. OSHANC 2003-4295
OSHA INSPECTION NO. 306499401
CSHO ID NO. 04517

ORDER

THIS MATTER was heard by the undersigned on January 20, 2004, in Winston-Salem, North Carolina. Complainant was represented by Newton Pritchett, Assistant Attorney General. Respondent was represented by Keith Smith, Vice-President and part owner of Triad Builders of King, Inc.

Also present for the hearing were Ralf Haskall, Special Deputy Attorney General; Jerry Whitfield, Safety Compliance Officer (SCO) with the North Carolina Department of Labor, Occupational Safety and Health Division; Calvin Weatherman and Pete Bundy, consultants with Safety Tech; and Jimmy Davis, Superintendent of Triad Builders of King, Inc.

ISSUE PRESENTED

Did complainant meet its burden of proving by a preponderance of the evidence that respondent violated 29 C.F.R. §1926.501(b)(1) when two employees of respondent's subcontractors stood closer than two feet from the edge of an unprotected front side of a building which was over 6 feet above a lower level without fall protection?

Is respondent responsible for the violations of its subcontractor?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

The Violation Issue

1. 29 C.F.R. §1926.501(b)(1) provides, in pertinent part, as follows:

   Unprotected sides and edges: Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

2. 29 C.F.R. §1926.500(b) provides, in pertinent part, as follows:

   Controlled access zone (CAZ) means an area in which certain work (e.g. overhand bricklaying) may take place without the use of guardrail systems, personal fall arrest systems, or safety net systems and access to the zone is controlled... .

   Overhand bricklaying and related work means the process of laying bricks and masonry units such that the surface of the wall to be jointed is on the opposite side of the wall from the mason, requiring the mason to lean over the wall to complete the work. Related work includes mason tending and electrical installation incorporated into the brick wall during the overhand bricklaying process... .

   Unprotected sides and edges means any side or edge (except at entrances to points of access) of a walking/working surface, e.g. floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high... .

3. 29 C.F.R. §1926.501(b)(9) provides, in pertinent part, as follows:

   Overhand brick laying and related work.

   (i) Except as otherwise provided in paragraph (b) of this section, each employee performing overhand bricklaying and related work 6 feet (1.8 m) or more above lower levels, shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or shall work in a controlled access zone... .

4. 29 C.F.R. §1926.502(g) provides, in pertinent part, as follows:

   Controlled access zones. Controlled access zones [see §1926.501(b)(9) and §1926.502(k)] and their use shall conform to the following provisions:

   (2) When used to control access to areas where overhand bricklaying and related work are taking place:

   (i) The controlled access zone shall be defined by a control line erected not less than 10 feet (3.1 m) nor more than 15 feet (4.5 m) from the working edge. (Emphasis added)

   (ii) The control line shall extend for a distance sufficient for the controlled access zone to enclose all employees performing overhand bricklaying and related work at the working edge and shall be approximately parallel to the working edge.

   (iii) Additional control lines shall be erected at each end to enclose the controlled access zone.

   (iv) Only employees engaged in overhand bricklaying or related work shall be permitted in the controlled access zone... .

   (3) Control lines shall consist of ropes, wires, tapes, or equivalent materials, and supporting stanchions ... .

5. 29 C.F.R. §1926.502(k), provides, in pertinent part,

   that if "employees [are] engaged in ...precast concrete erection work...[and] can demonstrate that it is infeasible or creates a greater hazard to use conventional fall protection equipment [then] the fall protection plan must conform" to the provisions contained within the regulation, including, but not limited to, the preparation of a written alternative comprehensive plan by a qualified person.

The Responsibility Issue

(Multi-Employer Work Site Doctrine)

6. 29 C.F.R. §1926.10 provides, in pertinent part, as follows:

   This subpart contains the general rules... for construction, alteration, and/or repair ...[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... .

7. 29 C.F.R. §1926.16 provides, in pertinent part, as follows:

   (a) The prime contractor and any subcontractors 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.

8. 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.

9. 29 C.F.R. §1926.32(j) 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.

10. 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.

After reviewing the record file, hearing the evidence and arguments of counsel, and after considering applicable legal authorities, 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 Safety and Health Act of North Carolina (the Act).

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

3. On May 2, 2003, Safety Compliance Officer, Jerry Whitfield, (hereafter "the SCO") made a general scheduled inspection at respondent's job site located at 501 Reynolds Boulevard, Winston-Salem, North Carolina. The building under construction was a 20,211 square foot Hanes Hosiery Community Center consisting of a gym and activities rooms (hereinafter "job site").

4. Upon arriving at the job site, the SCO observed two men standing within 2 feet of the front edge of the building, not engaged in any apparent activity, and not protected from falling by guard rails, safety nets, or personal fall protection equipment.

5. The SCO drove a mile and a half down the road, took a photograph of the building from afar and then drove back and onto the job site, where he observed the two men still standing within two feet of the roof's edge, not engaged in any apparent work activity.

6. When he drove onto the job site, the SCO observed a man, who he later identified as Douglas Martin, respondent's assistant superintendent, standing by an administrative trailer approximately 150 feet from the building and in plain view of the two men on the roof's edge.

7. The SCO photographed one of the men standing on the edge of the roof. (Complainant Exhibit #3) In the photograph, there is a forklift with a forklift operator on the ground below where the man is standing at the edge of the roof. Although it is not apparent from the photograph, the forklift platform was piled with concrete blocks.

8. The SCO initiated an opening conference with Jimmy Davis, respondent's superintendent and Douglas Martin. The SCO properly presented his credentials and obtained permission for the inspection from Mr. Davis. At a later time during the inspection, Calvin Weatherman and Pete Bundy of the safety consulting firm of Safety Tech joined the SCO and Mr. Davis.

9. During the informal conference, Mr. Davis informed the SCO that he knew the two men were standing on the edge of the roof without fall protection. Mr. Martin left the trailer during the opening conference. Later, when the SCO and Mr. Davis left the trailer, all of respondent's employees were in a group standing on the ground.

10. Mr. Davis informed the SCO that the employees on the roof were those of subcontractor Julio Castro Masonry and that they were on the roof to move concrete blocks into position so that the masons could use them to raise the height of the building wall two courses (or two concrete blocks higher).

11. Mr. Castro informed the SCO that the employees who were standing on the edge of the roof when he arrived were employees of Julio Castro Masonry and that they were on the roof to raise it two courses. The SCO performed an opening conference with Mr. Castro and determined that the two employees on the edge of the roof were Mr. Ruiz and Mr. Francisco.

12. Mr. Davis informed the SCO that the height of the front edge of the building on which the employees were standing was 14 feet.

13. Respondent had two employees on site, to wit: Superintendent Davis and Assistant Superintendent Martin. Overall, respondent employed 15 at the time of the inspection.

14. Respondent did not create the hazard which is the subject of the citation.

15. Respondent does not direct the daily means, method, procedures or techniques of its subcontractors' work

16. Respondent was subject to a verbal contract with Castro in which respondent reserved the following rights, among others:

   (a) the right to inspect Castro's work from time to time to ensure compliance with all applicable safety and health standards. The method for such inspections was that safety consultants from Safety Tech made visits one to two times a month to inspect for hazards on the job site;

   (b) the right to instruct Castro's employees in the safe and proper method of performing their work duties. The method for such instruction was weekly "safety meetings" conducted by respondent that the subcontractors were required to attend; and

   (c) the right to compel Castro to comply with all safety, health and other laws, ordinances, rules and regulations applicable to the project. The means for this would be that if the Safety Tech consultants saw a hazard during their bi-monthly inspection or if Mr. Davis saw a hazard as he was walking through the job site, respondents could direct Castro to cure the hazard immediately and if it were not cured immediately, Mr. Davis could cause a halt to all work until the hazard was cured.

17. On May 2, 2003, the SCO conducted a closing conference with Mr. Davis. Mr. Weatherman and Mr. Bundy were present. Several days later, the SCO conducted a closing conference with respondent's Vice-President and part owner, Keith Smith.

18. At the closing conference, Mr. Weatherman represented to the SCO that Mr. Castro's workers had been engaged in "overhand brick laying."

19. Based upon his observations, his photographs and the information received from respondent and Julio Castro at the opening and closing conferences, and in order to enforce the Act, the SCO issued a citation to respondent on May 9, 2003, pursuant to the multi-employer work site doctrine, alleging a serious citation of 29 C.F.R. §1926.501(b)(1).

20. Respondent violated 29 C.F.R. §1926.501(b)(1) in that two of Julio Castro Masonry's employees were standing within two feet of the edge of roof, without guard rails, fall protection systems or personal fall protection equipment.

21. The violation cited in Citation 1, Item 1 was serious in that there existed a possibility of an accident, to wit: Julio Castro Masonry workers falling off of the roof.

22. The substantial probable result of such an accident would be broken bones requiring hospitalization or lost time from work and potentially permanent partial disability.

23. At least two employees of Julio Castro Masonry were exposed to the hazard.

24. None of respondent's employees were exposed to the hazard.

25. The $250.00 penalty imposed for the violation cited in Citation 1, Item 1 was properly calculated in accordance with the North Carolina Operations Manual by Complainant as follows:

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

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

   (c) the gravity based penalty was properly calculated to be $2,500;

   (d) the adjustment factor for size was properly calculated to be 60%;

   (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 90% to the $2,500.00 gravity based penalty to reduce the penalty to $250.00 was properly applied.

26. At the hearing, respondent's witnesses testified that they were not required to use guard rails, safety nets, or personal protective equipment for the men on the roof because respondent and Julio Castro Masonry had declared the entire roof a "controlled access zone." They testified that the only men on the roof were engaged in overhand brick laying or "work related thereto. They testified that the two men standing within 2 feet of the edge of the roof were engaged in work related to overhand brick laying, to wit: waiting to unload concrete blocks to be raised by the forklift on the ground below. However, and as required by 29 C.F.R. §§1926.500, 501 and 502, neither respondent nor Julio Castro Masonry had installed control access zone barriers, flags, stanchions or other demarcations on the roof of the job site, or anywhere else, declaring and marking the roof as a "controlled access zone." As only one example, respondent failed to conform to the standard which required that: "[the] controlled access zone shall be defined by a control line erected not less than 10 feet (3.1 m) nor more than 15 feet (4.5 m) from the working edge.' 29 C.F. R. §1926.502(g)(2)(i). (Emphasis Added)

27. At the hearing, respondent argued that the convention fall arrest systems were infeasible in this case or created a greater hazard than the one which the SCO cited. However, respondent presented no evidence that a qualified person had prepared a comprehensive and written alternative plan in accordance with 29 C.F.R. §1926.502(k).

28. Respondent is responsible for the violations of the employees of Julio Castro Masonry because they had control over the job site and they had actual knowledge of Castro's employees standing within two feet of the edge of the roof with no fall protection.

29. Respondent could have abated this hazard by providing or ensuring that Julio Castro Masonry provided fall protection to any employee who was going to be exposed to the edge of the rooftop, by confirming or ensuring that Castro conformed to the requirements of a controlled access zone or by having or ensuring that Castro had a qualified person draft an alternate written plan providing for the safety of Castro's employees.

30. The date by which the violation was to be abated was May 23, 2003.

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. Respondent was a general contractor on the job site.

4. The work that respondent's employees did in inspecting the work sites for compliance with construction standards was directly and vitally related to the construction project. Romeo Guest Associates, Inc., OSHANC 96-3513 (1998); Grossman Steel & Aluminum Corp., ¶ 20,791 (RC 1976); Bechtel Pwr. Corp., 4 BNA OSHC 1005, 1975-1976 CCH OSHD P 20,503 (No. 5064, 1976) aff'd *per curiam* 548 F.2d 248 (8th Cir. 1977)

5. Respondent was a controlling employer with supervisory capacity over the job site. Romeo Guest Associates, Inc., OSHANC 96-3513 (1998); Grossman Steel & Aluminum Corp., ¶ 20,791 (RC 1976); Anning-Johnson Co. v. U.S. Occupational Safety and Health Review Common, 516 F.2d 1081 (7th Cir. 1975)

6. Respondent was required, within its regular supervisory capacity, to make reasonable efforts to anticipate hazards to Julio Castro Masonry's employees and to make reasonable efforts to inspect the job site to detect violations that Castro's employees may have created. Romeo Guest Associates, Inc., OSHANC 96-3513 (1988); Secretary of Labor v. David Weekly Homes, OSHRC Docket No. 96-0898, ___BNAOSHC___(Rev. Comm. 2000)

7. Respondent knew that two of Julio Castro Masonry's employees were standing within two feet of the edge of the roof with no fall protection.

8. 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 violation was serious and that the proposed penalty assessed for Citation 1, Item 1 was figured appropriately.

9. The method of abatement would be for respondent to have identified the hazard and required Julio Castro Masonry to provide appropriate fall protection for its employees, within the requirements of the Act.

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

1. Citation 1, Item 1 is hereby affirmed and the penalty is hereby imposed in the amount of $250.00;

2. The penalty shall be paid within ten (10) days of the filing date of this Order; and

3. In the future, if respondent observes a subcontractor's employees within two feet of the edge of a roof which is 6 feet or higher without fall protection, it shall take steps to abate the hazard or have its contractor abate the hazard immediately.

This the 19th day of February, 2004.

_____
Ellen R. Gelbin
Administrative Law Judge