

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

J&S MASONRY, INC.,

RESPONDENT.

DOCKET NO. OSHANC 2003-4304
OSHA INSPECTION NO. 306498288
CSHO ID NO. H0726

ORDER

THIS MATTER was heard by the undersigned on June 24, 2004 in Charlotte, North Carolina, after being scheduled for hearing on this date with prior written notice to all parties.

The complainant was represented by Newton Pritchett and Linda Kimbell, assistant attorneys general. The respondent was present in the persons of its owners, Jeff Manhollan and his wife, Sue Overcash Manhollan.

At the outset of the hearing, the complainant moved pursuant to Review Board Rule .0303 for entry of default against the respondent on all citation items except Citation 1, Item 1a and Citation 2, Item 1. These were the only citation items specifically identified as contested in respondent's Statement of Position. The file reflects that an informal conference with complainant was requested by respondent and held on June 27, 2003. At that informal conference, complainant's officer Patrick O'Brien completed and Jeff Manhollan signed complainant's Form OSHA 21 which indicates that respondent was contesting all citation items. This form was retained by Mr. O'Brien for filing in the event the informal conference did not produce a settlement.

The undersigned finds that complainant's retention of Form OSHA-21 and the subsequent filing of it, coupled with the lack of a settlement of this matter as a result of the informal conference, indicated that complainant was on notice that respondent was, or at the least may be, contesting all citation items, notwithstanding the later filed Statement of Position. The complainant offered no evidence that it was misled by the inconsistent filings of the respondent and offered no evidence that it was prejudiced thereby. For these reasons, the complainant's motion for default was denied.

The complainant also moved to amend three citation items. The first proposed amendment was to amend Citation 1, Item 1c to correct a typographical error in the cited standard, from 29 CFR 1926.452(h)(2) to 29 CFR 1926.451(h)(2). The respondent objected, but offered no evidence that it was prejudiced by this proposed amendment. That citation item was proposed as a repeat serious violation, and in the text of the item identifies the prior cited violation, which contains the correctly identified standard. The narrative description of the alleged violation also would assist the respondent in locating the correct standard such as to put respondent on notice of the correct standard. Based on these considerations, the complainant's motion to amend as to this citation item was allowed.

The second proposed amendment was to amend Citation 1, Item 1e, another repeat serious item, to correct another typographical error in the cited standard from 29 CFR 1926.452(c)(2)(1) to 29 CFR 1926.451(c)(2)(ii). The respondent objected based on the fact that, in this circumstance, the cited standard is incorrect in both the new proposed citation item and the prior citation referenced as the basis for the assertion that the alleged violation was a repeat violation. The complainant offered as evidence a letter dated July 1, 2003 from Patrick O'Brien to Mr. Manhollan advising him of this typographical error and citing the correct standard. For this reason, the respondent could show no prejudice resulting from this proposed amendment and it was allowed.

The third proposed amendment was to amend Citation 2, Item 1 from repeat nonserious to nonserious, which eliminated the proposed penalty of \$100.00. Since this amendment benefited respondent, it was allowed without objection.

After hearing and receiving the evidence and the arguments of representatives of the parties, 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 compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").
2. The respondent is a partnership owned by Jeff Manhollan and Sue Overcash Manhollan. The respondent is a masonry contractor located in Iron Station, North Carolina and has a total of 14 employees.
3. On April 2, 2003, Sybil Bray, a safety compliance officer for complainant, conducted an inspection of a construction site located at 1235 East Boulevard in Charlotte, North Carolina.
4. This was a general scheduled inspection, selected randomly by complainant's computer.
5. The project consisted of construction of new buildings and renovation of an existing building in a shopping center at the corner of East Boulevard and Kenilworth Avenue. The buildings sit close to the streets and work activities on the street elevation can be observed from the street right of way.
6. The general contractor for this project was Maroff Construction. The respondent was the masonry subcontractor on the project.
7. Ms. Bray was accompanied by health compliance officer Pete Calhoun as she drove to the inspection site. As her car waited at the stoplight at the intersection where the site is located, she saw workers on the scaffold erected on the street side of the building.
8. Ms. Bray parked her car and walked to the general contractor's trailer. On the way she observed another worker on a different scaffold located on an off-street elevation. She photographed this condition, which photograph was offered into evidence.
9. Ms. Bray conducted an opening conference with the general contractor and Chris Morris, respondent's foreman. During this opening conference, she learned that the workers on the scaffold were respondent's employees.
10. When Ms. Bray commenced her inspection, all respondent's employees were off the scaffold. The respondent had eight employees on the site. These employees were engaged in activities related to laying brick on the facade of the buildings.
11. It was apparent from the photographs taken by Ms. Bray that the scaffold surrounding the buildings was erected for the primary purpose of installing the brick façade. The respondent acknowledged in the hearing that the scaffold belonged to it. Mortar and bricks could be readily observed on the scaffold.
12. Ms. Bray conducted an employee interview with Chris Morris, who acknowledged that he, along with other employees of respondent, had been working on the scaffold that day.
13. Ms. Bray observed and photographed scaffolding on the site where employees were working, with a number of gaps substantially greater than 1 inch between the walkboards or planks. This condition was observed at a height of approximately 18 feet above the ground, which was compacted dirt covered with construction debris. Workers' jackets were hanging on the scaffold at that height.
14. In the interview with Mr. Morris, he did not state that the scaffold was being dismantled or that it was being used solely for a walkway, which are exceptions to the standard which prohibits gaps in the walkboards.
15. This scaffold also did not have guardrails on the ends of those sections which were more than 10 feet above ground. The photographs taken by Ms. Bray showed this condition.
16. There was proper guarding in a large number of the scaffold sections. A personal fall arrest system was not in use by respondent on the site.
17. There were no toe boards on the scaffold in areas where there were tools, material or equipment on the scaffold and employees were working below.
18. There was no canopy or catch system on the scaffold. The area below the scaffold was barricaded, but only on the street side.
19. Scaffolds of this type are required to have bracing laterally of the vertical members in order to provide stability to the scaffold. The photographs taken by Ms. Bray showed the cross bracing was missing at the 12 foot level on the Kenilworth Avenue scaffold.
20. Ms. Bray also took photographs of the base of two of the scaffold sections, which were supported on concrete blocks and boards instead of mudsills and other more stable bases.
21. Each deficiency in the condition of the scaffold as described above created the possibility of an accident, the substantially probable result of which would be serious injury, such as contusions, broken bones or even death.
22. The lack of proper guarding and fitted walkboards could cause an employee to fall from the scaffold. The lack of a toe board could cause materials or equipment to fall off the scaffold and land on employees working below. The lack of proper bracing and an unstable base support could cause part of the scaffold to unexpectedly shift or collapse.
23. Chris Morris informed Ms. Bray that he was aware of these conditions. These violations could have been corrected or avoided by adherence to the standards, which was feasible under these conditions.
24. The respondent was cited on March 22, 2001 for violations of the same standards as alleged were violated in Citation 1, Items a-e, as amended. These citations were issued pursuant to inspection number 303845182. Since these citation items were not contested by the respondent, they are deemed final citations.
25. The prior citations were issued within three years of the issuance of Citation 1 in this case.
26. The proposed penalty was calculated pursuant to the directives of the North Carolina Operations Manual for serious repeat violations, which requires that the normal gravity based penalty be doubled for a repeat serious violation. The respondent was given the maximum credit of 60% for size and the maximum credit of 10% for cooperation. The respondent is not entitled to credit for history or safety and health programs in view of the violations being repeat serious.
27. Through her own investigation, Ms. Bray was unable to locate a fire extinguisher on the jobsite. She was also unable to locate a 55 gallon drum with fire buckets or a half-inch garden hose, which are acceptable alternatives to a fire extinguisher.
28. Mr. Morris advised Ms. Bray that a fire extinguisher was in the respondent's truck on the site, but when they went to the truck, there was no fire extinguisher in the truck. When asked, Mr. Morris could not locate on the site either a 55 gallon drum or an allowable garden hose.
29. The lack of such fire emergency equipment created the possibility of an accident the substantially probable result of which would be delayed emergency response and possible smoke inhalation.
30. The respondent was unable to provide to Ms. Bray a written hazardous communication program on the site. The respondent also did not have any MSDS sheets on the jobsite, even though the respondent was using on site mortar mix and motor oil, which are substances which can cause skin irritation.
31. Mr. Morris advised Ms. Bray that the employees had not been provided with information and training on hazardous chemicals on the site at the time of commencing work on the site or when a new hazard was introduced.
32. The lack of proper hazardous chemical documentation and training created the possibility of an accident, the substantially probable result of which would be exposure to and potential harm from hazardous chemicals of which the employees were unaware.

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

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. The respondent is subject to the provisions of the Act.
3. The complainant has proved by the greater weight of the evidence a violation of the cited scaffold standards as alleged in Citation 1, Items a-e, as amended. Such violations are repeat serious violations.
4. The complainant has proved by the greater weight of the evidence a violation of the fire extinguisher standard as alleged in Citation 2, Item 1, which violation is a nonserious violation.
5. The complainant has proved by the greater weight of the evidence a violation of the hazardous chemical standards as alleged in Citation 3, Items a-c. Such violations are nonserious violations.
6. The proposed penalty has been calculated correctly pursuant to the North Carolina Operations Manual.

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

1. The complainant's motion for default against respondent is DENIED.
2. The complainant's motion to amend the citations is ALLOWED as to all three requests.
3. Citation 1, Item 1a is AFFIRMED as a repeat serious violation of 29 CFR 1926.451(b)(1) with a penalty of \$2,100.00.
4. Citation 1, Item 1b is AFFIRMED as a repeat serious violation of 29 CFR 1926.451(g)(1) with a penalty grouped with that of Citation 1, Item 1a.
5. Citation 1, Item 1c is AFFIRMED as a repeat serious violation of 29 CFR 1926.451(h)(2) with a penalty grouped with that of Citation 1, Item 1a.
6. Citation 1, Item 1d is AFFIRMED as a repeat serious violation of 29 CFR 1926.452(c)(2) with a penalty grouped with that of Citation 1, Item 1a.
7. Citation 1, Item 1e is AFFIRMED as a repeat serious violation of 29 CFR 1926.451(c)(2)(ii) with a penalty grouped with that of Citation 1, Item 1a.
8. Citation 2, Item 1 is AFFIRMED as a nonserious violation of 29 CFR 1926.150(c)(1)(i) with no penalty.
9. Citation 3, Item 1a is AFFIRMED as a nonserious violation of 29 CFR 1910.1200(e)(1) with no penalty.
10. Citation 3, Item 1b is AFFIRMED as a nonserious violation of 29 CFR 1910.1200(g)(8) with no penalty.
11. Citation 3, Item 1c is AFFIRMED as a nonserious violation of 29 CFR 1910.1200(h)(1) with no penalty.
12. The penalty shall be paid within twenty (20) days of the filing of this Order.
13. All violations not previously abated shall be immediately abated.

This 14th day of July, 2004.

RICHARD M. KOCH
HEARING EXAMINER