

**BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

S T WOOTEN CORPORATION,

RESPONDENT.

APPEARANCES:

Complainant:

**Ralf Haskell, Special Deputy Attorney General
Marissa Ellerbe, Assistant Attorney General
North Carolina Department of Justice**

Respondent:

**J. Anthony Penry
Attorney for Respondent**

BEFORE:

Hearing Examiner: Monique M. Peebles

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on August 11, 2005, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Mr. Ralf Haskell, Special Deputy Attorney General and Marissa Ellerbe, Assistant Attorney General. The respondent was represented by attorney J. Anthony Penry. Present for the hearing for the Department of Labor, OSHA Division, was Mr. Christopher Scott Mabry, Health Compliance Officer II ("HCO"). Present at the hearing for the respondent were Mr. William Hammock, Project Superintendent of ST Wooten Corporation and Mr. Joe Lucas, Safety Director of ST Wooten Corporation.

After reviewing the record file, hearing the evidence presented at the hearing, with due consideration of the arguments and contentions of all parties, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. 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 N.C. Gen. Stat. §§ 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").
2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about November 22, 2004, contesting a citation issued on October 12, 2004 to Respondent, ST Wooten Corporation. ("Respondent" or "ST Wooten").
3. Respondent, a corporation which does business in the State of North Carolina and maintains a place of business in Wilson, NC and is subject to the provision of the Act (N.C. Gen Stat § 95-128) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10).
4. Respondent is a general construction contractor engaged in the business of constructing buildings and other structures and managing or supervising subcontractors engaged in such construction work. Respondent employs about 1200 employees.
5. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
6. On September 14, 2004, HCO Mabry, with the North Carolina Department of Labor, was driving North on US 1 when he observed employees of subcontractor, Earth Structures Inc., ("Earth") working on top of a retaining wall, approximately 20 feet high from the ground below.
7. The worksite was located at New Highway 98 Bypass at US-1 in Wake Forest, North Carolina. (Hereinafter referred to as "the site")
8. HCO Mabry made a U-turn, traveled a short distance north on US-1 and stopped at a Lowes store to make a purchase. Upon leaving Lowes, he again observed Earth employees as they were putting a cap on the top of a retaining wall. He took a photograph through the windshield of his car of the work being done. (Exhibit C-1)
9. HCO Mabry drove to Galaxy Drive, approximately 100 feet from the site, and took another photograph, again through the windshield of his car. (Exhibit C-2) When HCO Mabry observed the three Earth employees, they appeared to be working behind the parapet wall which appeared in his opinion to be 25-30 inches high.
10. The Earth employees were not wearing fall protection equipment or hard hats.
11. HCO Mabry also observed one employee wearing what appeared to be a dust mask (respirator) on the top of his baseball hat.
12. HCO Mabry did not observe Respondent's employees being exposed to any hazards on the job site.
13. A short time later, while HCO Mabry was in his car writing notes, it began to rain heavily. He observed the Earth employees leave the site and he did not inspect the site on September 14, 2004.
14. HCO Mabry returned to the site on September 15, 2004 late morning, before lunch, to conduct a partial inspection of the site. He met with a ST Wooten employee in the ST Wooten trailer and the employee called the project superintendent, William Hammock. ST Wooten was the general contractor for this construction project.
15. HCO Mabry presented his credentials and was given permission to conduct the inspection. He held an opening conference with Hammock and Kevin Cole, foreman of Earth, was also present. HCO Mabry discussed the specific allegations during the opening conference. Hammock immediately suspended construction of the retaining wall.
16. ST Wooten began the Highway 98 Bypass construction project on January 24, 2004.
17. The length of the job was 1 1/2 miles and Hammock used his pick up truck to inspect various work being performed by Wooten employees and other subcontractors.
18. By September 14 & 15, 2004, the project was in Phase 2 and four subcontractors, including Earth, were performing major work at this time.
19. On September 14 & 15, 2004 Hammock was responsible for inspecting the work of subcontractors who were performing grading work, storm drain work, drilling & bridge-work and blasting work.
20. Earth was responsible for constructing two retaining walls adjacent to Capital Boulevard near the stoplight at Galaxy Drive and Retail Drive. Earth began working on the project in June 2004.
21. The retaining walls are made of concrete interlocking panels about 6 feet high that are stacked on top of one another. Backfill is then placed behind the wall and it is braced with timbers. This creates the parapet wall, which protects the edge of the walking/working surface. Using an excavator, a cap or coping, a decorative concrete slab weighing 1500 pounds per joint, is then placed on top of the wall.
22. The retaining wall is stair-stepped (tapered) so that there are portions of the wall where the drop to the ground below is minimal. The height of the parapet wall also varies depending on the amount of backfill behind it.
23. The ST Wooten trailer was approximately 175 meters from the retaining wall construction. From the vantage point of the trailer, Hammock was unable to see the backfill behind the parapet wall.
24. Prior to September 15, 2004, Hammock did observe trucks coming in with the coping over a one-week period of time.
25. Hammock was also aware that Earth completed the paneling and backfill and he did not inspect the wall prior to coping.
26. Hammock was aware Earth employees were working on a walking working surface, however, he and Cole both were not aware personal fall protection was necessary.
27. Hammock was not aware that Earth had begun coping on September 14 or September 15, 2004.
28. None of the Earth employees requested a respirator from ST Wooten.
29. Hammock was not aware respirators were being used by any employee of Earth.
30. HCO Mabry conducted a closing conference with Hammock and Cole and on October 12, 2004 he recommended that citations be issued as follows:

Citation 1 Item 1: Repeat Serious

Citation 1, Item 1 alleges a repeat serious violation of 29 C.F.R. 1926.501(b)(1): " Employee(s) on a walking working surface (horizontal and vertical surface) with an unprotected side or edge which is six feet (1.8m) or more above a lower level were not protected from falling by the use of guardrail systems, safety net systems or personal fall arrest system:

- (a) Project site - where the general contractor allowed employees of the subcontractor who were placing a concrete cap on a retaining wall to work without being protected by any type of fall arrest system exposed to a 20' minimum fall to the ground (and roadway) below.

The proposed penalty for this violation was \$6300.00.

Citation 2 Item 1: Serious

Citation 2, Item 1 alleges a serious violation of 29 C.F.R. 1926.100(a):

"Employee(s) working in areas where there is a possible danger of head injury from impact , or from falling or flying objects, or from electrical shock and burns, were not being protected by protective helmets:

- (a) Project site - where the general contractor allowed employees of the subcontractor who were placing a concrete cap on a retaining wall to work without being protected by protective helmets (hardhats) from impact while the concrete cap was suspended overhead.

The proposed penalty for this violation was \$2000.00.

Citation 3 Item 1: Nonserious

Citation 3, Item 1 alleges a nonserious violation of 29 C.F.R. 1910.134(c)(2)(i): "Appendix D of this section was not provided to employees whose use of respirators was determined to be voluntary by the employer.

- (a) Project site - where the general contractor allowed employees of the subcontractor who were placing a concrete cap on a retaining wall to work while using a concrete saw without verifying they had been provided with Appendix D of the respiratory protection standard.

The proposed penalty for this violation was \$0.00.

Citation 1: Walking/Working Surface

31. In order to prove a serious violation of an OSH standard the Complainant must prove that a hazard existed, the employees were exposed, the hazard created the possibility of an accident, the substantial probability of an accident could be death or serious physical injury and the employer knew or should have known of the condition or conduct that created the hazard.
32. The issue presented in this case is whether the complainant proved by a preponderance of the evidence that a hazard existed.
33. Personal fall arrest systems, guardrail systems or safety net systems are required when an employee is working on a walking working surface with an unprotected edge.
34. §1926.500 requires the guardrail system or wall protecting the edge of a walking/working surface to be at least 39 inches high.
35. The walking working surface at the retaining wall construction site was protected by a parapet wall.
36. HCO Mabry opined that the parapet wall was less than 39 inches high based on his estimate of the average height of the workers being 5'10" and his observation that the wall in relation to the Earth employees in the photograph, appears to be just above the knee or mid thigh high.
37. In his opinion, the parapet wall, as he observed it, created a serious fall hazard if the employee lost his balance or was knocked over the wall to the ground 20 feet below.
38. HCO Mabry did not take measurements of the parapet wall at any time on September 14, 2004 when he observed the work being performed or September 15, 2004 during the inspection.

DISCUSSION

Under the multi-employer worksite doctrine, a general contractor's duty under N.C.G.S. §95-129(2) to comply with "occupational safety and health standards or regulations" runs to employees of subcontractors on the jobsite. However, that duty is a reasonable duty and the general contractor is only liable for those "violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity." Grossman Steel, supra, at 24,791. In addition, the general contractor cannot "anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations created by others." Id. It is only responsible for those hazards that it could reasonably have detected because of its supervisory capacity. The general contractor is required to make reasonable efforts to anticipate hazards to subcontractor's employees and reasonable efforts to inspect the jobsite to detect violations that its subcontractors may create.

Romeo Guest, OSHANC 96-3513, Slip Op at 6-7, (RB 1998).

Citation 2: Hardhats

39. Although Hammock never observed Earth employees not wearing hardhats, at some time between when Earth started the retaining wall project in June and prior to September 14, 2004, Hammock reminded them several times about the safety of wearing hardhats at all times they were in area which required head protection.

Citation 3: Use of Respirators

40. Respondent general contractor was not aware and reasonably should not have been aware that the one Earth employee wearing the respirator on his head had (1) voluntarily requested the respirator from it's employer and (2) not been provided Appendix D by it's own employer.
41. There was no evidence presented that Hammock saw the Earth employee wearing the respirator or should have seen him wearing the respirator during an inspection such that it would have prompted him to inquire whether the employee had (1) voluntarily requested the respirator from it's employer and (2) not been provided Appendix D by it's own employer.

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. Complainant has failed to prove by the greater weight of the evidence that a fall hazard existed wherein there was insufficient evidence to prove the parapet wall was less than 39 inches.
4. Complainant has failed to prove by the greater weight of the evidence that the respondent violated 29 CFR 1926.501(b)(1).
5. Complainant has failed to prove by the greater weight of the evidence that under the multi-employer doctrine, the respondent could reasonably have detected hazards created by Earth employees not wearing hard hats while performing coping.
6. Respondent made reasonable efforts to inspect the site to detect violations that Earth may have created.
7. Complainant has failed to prove by the greater weight of the evidence that the respondent violated 29 CFR 1926.100(a).
8. Complainant has failed to prove by the greater weight of the evidence that under the multi-employer doctrine, the respondent could reasonably have detected hazards created by Earth employees voluntarily wearing respirators without being provided Appendix D.
9. Complainant has failed to prove by the greater weight of the evidence that the respondent violated 29 CFR 1910.134(c)(2)(i).

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED** that Citation 1, Item 1 alleging a repeat serious violation of 29 CFR 1926.501(b)(1) is hereby dismissed; Citation 2, Item 1 alleging a serious violation of 29 CFR 1926.100(a) is hereby dismissed; and Citation 3, Item 1 alleging a nonserious violation of 29 CFR 1910.134(c)(2)(i) is hereby dismissed.

This the 16th day of September 2005.

Monique M. Peebles
Administrative Law Judge