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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

BURT SMITH ROOFING,
and its successors,

RESPONDENT.

Insp. No.307444315
CSHO ID NO. V3325
OSHANC NO. 2004-4400

AMENDED ORDER

THIS MATTER was heard by the undersigned, Ellen R. Gelbin, on December 17, 2004, in Winston-Salem, North Carolina. Complainant was represented by Jane Gilchrist, Assistant Attorney General. Also present at the hearing for the Attorney General was Victoria Voight, Special Deputy Attorney General. Present at the hearing for the North Carolina Department of Labor, OSHA Division, were Andrew Small, Safety Compliance Officer; Doug Jones, Supervisor; and David Bil. Respondent was represented by its owner, Burt Smith.

After reviewing the record file and after receiving the evidence and arguments of counsel and Burt Smith, 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 North Carolina Corporation in the roofing business.

3. As a result of a complaint, Safety Compliance Officer, Andrew Small (hereafter "the SCO") drove to 1809 Hobbs Road, Greensboro, North Carolina to inspect roofing work being conducted on a residence.

4. When he arrived, the SCO found no roofing activities being conducted at the site of the complaint, but did see workers on the roof of the residence next door at 1807 Hobbs Road.

5. In plain view from his vantage point on the public street, the SCO observed a worker on the roof of 1807 Hobbs Road with what appeared to be no fall protection.

6. As a result of the Construction Emphasis Program as it applied to Guilford County, North Carolina at the time, the SCO entered the premises of 1807 Hobbs Road (hereafter "job site") for the purpose of conducting a general scheduled inspection.

7. The SCO held an opening conference with Rosolino Garcia, who represented himself to the SCO as the Respondent's foreman on site. The SCO presented his credentials to Mr. Garcia, explained that he was there to do an inspection. Mr. Garcia then contacted the owner, Burt Smith, to inform him that the SCO was on site. Mr. Garcia gave the SCO permission to inspect the premises.

8. When Mr. Smith arrived, the SCO held an opening conference with Mr. Smith and received his permission to continue the inspection.

9. Respondent had 6 employees on site and 7 employees overall.

10. The SCO observed and photographed the condition of the premises and interviewed Respondent's employees, including Mr. Garcia and Mr. Smith. The SCO conducted a proper closing conference with Mr. Smith. In order to enforce the Act, the SCO issued two citations on April 29, 2004, alleging violations of the following standards:

Citation 1, Item 1a
29 C.F.R. §1926.451(g)(1)
(Fall Protection From Height of More than 10 Feet)

11. 29 C.F.R. §1926.451(g)(1) provides, in pertinent part, as follows:

> *Each employee* on a scaffold more than 10 feet ... above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold ... .

12. In order to prove a serious violation of an OSH standard, the Complainant must prove the following:

a. A hazard covered by the cited standard existed;

b. employees were exposed;

c. the hazard created the possibility of an accident;

d. the substantial probability of an accident would result in death or serious physical injury and;

e. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel Construction Co., 2 OSHANC 311, 73 N.C. pp. 426 (Ct. of Appeals 1984)) of the condition or conduct that created the hazard.

13. Respondent's employees were working on a scaffold on the job site more than 10 feet from the ground (Complainant's Exhibits #5-9).

14. As required by§1926.451(g)(1) *et seq*, Respondent did not provide fall protection to its employees who were working on the scaffold more than 10 feet above the ground.

15. The violation cited in Citation 1, Item 1a 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.

16. The substantial probable result of such an accident would be broken bones or death.

17. Respondent's foreman was aware of this situation because he was present on site and able to observe Respondent's employees on the scaffold. He knew that Respondent did not provide to its employees a fall arrest or guardrail system.

18. The $2,100 penalty imposed for the violation in Citation 1, Item 1a was in accordance with the Act and the NC Department of Labor Field Operations Manual, as follows:

a. the severity of the violations was properly determined to be high;

b. the probability assessment was properly deemed to be medium;

c. the gravity based penalty was properly calculated to be $3,500;

d. The adjustment factor of 60% for size was properly applied;

e. the adjustment factor of 10% for Respondent's cooperation with the inspection was properly applied;

f. the adjustment factor of 0% for no history of prior violations was properly applied because on March 27, 2001, Respondent was issued a Citation for a violation of the same standard based upon an inspection conducted on February 27, 2001. Although Respondent paid the former penalty without contest, the current violation is within three years of the date the citation was issued in the prior case;

g. the 70% total reduction to the $3,500 gravity based penalty to reduce the penalty to $1,050 was properly applied; and

h. the penalty was properly doubled to $2,100 as a result of it being a repeat citation of the same standard within three years.

19. The abatement necessary to correct the violation was for Respondent to provide to its employees working on scaffolds more than 10 feet high either the fall protection, the fall arrest system or the guard rail system as provided in the Act.

Citation 1, Item 1b
29 C.F.R. §1926.501(b)(11)
(Fall Protection from Steep Roof with Unprotected Sides and Edges
6 Feet or More above Lower Elevations)

20. 29 C.F.R. §1926.501(b)(11) provides, in pertinent part, as follows:

> Steep roofs. Each employee on a steep roof with unprotected sides and edges 6 feet ... or more above lower levels shall be protected from falling by guardrail systems with toe-boards, safety net systems, or personal fall arrest systems.

21. Respondent's employees were working on the sun room roof at the job site.

22. By the definition contained in 29 C.F.R.§1926.500, the sun room roof was a "steep roof" in that its pitch was greater than 4 in 12 (vertical to horizontal).

23. Respondent's employees were working on the sun room roof without fall protection as required by §1926.501(b)(11). (Complainant's Exhibits #1-2, 15-17).

24. The SCO also observed upon the primary roof of the house, a wooden plank affixed to the roof with brackets which appeared to be used for storing roofing materials or as a toe board for the workers. The SCO observed a ladder extending from the sun roof to the primary roof of the house. (Complainant's Exhibits #15-17).

25. Mr. Smith and Mr. Garcia informed the SCO that Respondent did not provide guardrail systems with toe-boards, safety net systems, or personal fall arrest systems on its roofing projects.

26. The primary roof had a steep pitch in that it was greater than 4 in 12 (vertical to horizontal). It was also higher than 6 feet from the lower level.

27. Respondent's employees had been working on the primary roof of the house without fall protection as required by §1926.501(b)(11).

28. The violation cited in Citation 1, Item 1b 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.

29. The substantial probable result of such an accident would be broken bones or death.

30. Respondent's foreman was aware of this situation because he was present on site and able to observe Respondent's employees on the roof. He knew that Respondent did not provide to its employees a fall arrest or guardrail system.

31. This citation was properly deemed "repeat" in that Respondent was cited for a violation of the same standard in March, 2001 as a result of an inspection on February 27, 2001. The violation of the same standard was observed on the date of the current inspection, March 22, 2004, which was within 3 years of the issuance of the 2001 citation.

32. The citation was properly grouped with Citation 1, Item 1a and no additional penalty was assessed.

Citation 2, Item 1a
29 C.F.R. §1926.451(b)(1)(i)
(Platforms on all Working Levels not Fully Planked)

33. 29 C.F.R. §1926.451(b)(1)(i), provides, in pertinent part, as follows:

> *Each platform* unit (e.g. scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between the adjacent units and the space between the platform and the uprights is no more than 1 inch ... wide ... .

34. The scaffolds used by Respondent were not fully planked as required by §1926.451(b)(1)(i) (Complainant's Exhibits 5-7).

35. The failure of Respondent to fully plank the working platforms of the scaffold created a hazard.

36. The hazard created by the lack of full planking created the possibility of an accident, to wit: employees falling from a height to a lower level.

37. The substantial probable injury from such a fall would be broken bones or death.

38. At least one of Respondent's employees was exposed to the hazard.

39. Respondent's foreman was aware of this situation because he was present on site and able to observe Respondent's employees on the scaffold.

40. The $1,050 penalty imposed for the violation cited in Citation 2, Item 1a was in accordance with the Act and the North Carolina Department of Labor Field Operations Manual, as follows:

a. the severity of the violations was properly determined to be high;

b. the probability assessment was properly deemed to be medium;

c. the gravity based penalty was properly calculated to be $3,500;

d. the adjustment factor of 60% for the size of the employer was properly applied;

e. the adjustment factor of 10% for respondent's cooperation with the inspection was properly applied;

f. the adjustment factor of 0% for no history of prior violations was properly applied because on March 27, 2001, Respondent was issued a Citation for a violation of the same standard based upon an inspection conducted on February 27, 2001. Although Respondent paid the former penalty without contest, the current violation is within three years of the date the citation was issued in the prior case;

g. the 70% total reduction to the $3,500 gravity based penalty to reduce the penalty to $1,050 was properly applied.

41. The abatement necessary to correct the violation was for Respondent to fully plank the scaffolds on which its employees work.

Citation 2, Item 1b
29 C.F.R. §1926.451(b)(5)(ii)
(Platforms Greater than 10 Feet in Length Shall not
Extend over its Support more than 18 Inches)

42. 29 C.F.R. §1926.451(b)(5)(ii) provides, in pertinent part, as follows:

> Each platform greater than 10 feet in length shall not extend over its support more than 18 inches ... unless it is designed and installed so that the cantilevered portion of the platform is able to support employees without tipping, or has guardrails which block employee access to the cantilevered end.

43. Respondent extended a walk board greater than 10 feet in length between two scaffolds. (Complaint Exhibits #5-8 and 20,21).

44. The walk board extended more than 18 inches over the scaffold tubing of the scaffold constructed on the right side of the house.

45. Respondent had placed the "cantilevered" portion of the walk board on top of an existing scaffold platform, thus reducing to nil the likelihood that the extended portion of the walk board would tilt or tip up and cause a worker to fall.

46. The space between the scaffold platform upon which the walk board rested and the platform directly above it was too vertically narrow for a worker to stand and would not have allowed access to the roof area. Thus, there was no likelihood that a worker would stand upon the extended portion of the walk board in violation of the Act.

47. Complainant failed to carry its burden of proof regarding Citation 2, Item 1b.

Citation 2, Item 1c
29 C.F.R. §1926.451(e)(5)(i)
(Ramps and Walkways 6 Feet Above Lower Levels
Shall Have Guardrail Systems)

48. 29 C.F.R. §1926.451(e)(5)(i) provides in pertinent part, as follows:

> Ramps and walkways 6 feet ... or more above lower levels shall have guardrail systems which comply with Subpart M of this Part - Fall Protection.

49. Respondent placed a walk board between two scaffolds. (Complainant's Exhibits #7 and 8).

50. Respondent's employees used the walk board as a ramp or walkway between two scaffolds.

51. The walk board was more than 6 feet above the lower ground level.

52. Respondent failed to provide fall protection for the employees working on the walk board between the scaffolds.

53. The failure of Respondent to provide fall protection to its employees working on the walk board constituted a hazard.

54. The hazard created the possibility of an accident, to wit: employees falling from a height to a lower level.

55. The substantial probable injury from such a fall would be broken bones or death.

56. At least two of Respondent's employees were exposed to the hazard.

57. Respondent's foreman was aware of this situation because he was present on site and able to observe Respondent's employees on the scaffold.

58. The citation was properly grouped with Citation 2, Item 1a and no additional penalty was assessed.

59. The abatement necessary to correct the violation was for Respondent to provide fall protection when employees are working on ramps or walkways more than 6 feet above a lower level.

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 sections of the Act as set forth in the Findings of Fact 1-41 and 48-59 above and that the violations cited in Citation 1, Items 1a and b and Citation 2, Items 1a and c were designated properly and that the penalties were properly calculated.

4. The Complainant failed to prove by a preponderance of evidence that Respondent violated the standard set forth in Citation 2, Item 1b.

DISCUSSION

In his Response to the Complaint, in his testimony and arguments at the hearing and in his post-hearing written submission, Respondent's owner, Burt Smith, set forth seven material issues of fact, law or discretion.

First, Respondent argued that the employees working on the job site were not Respondent's employees within the definition of the Act, but were independent contractors. However, Mr. Garcia, represented himself to the SCO as Respondent's foreman and Respondent failed to raise as a defense in its written Response that the workers were not his employees. Thus, the undersigned does not find this argument persuasive. In addition, even if the workers on the site were independent contractors, 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 Comm'n, 516 F.2d 1081 (7th Cir. 1975) Thus, Respondent was required, within its regular supervisory capacity, to make reasonable efforts to anticipate hazards to independent contractors working on the job site and to make reasonable efforts to inspect the job site to detect violations that independent contractors may have created. Romeo Guest Associates, Inc., OSHANC 96-3513 (1988); Secretary of Labor v. David Weekely Homes, OSHRC Docket No. 96-0898, ___BNAOSHC___(Rev. Comm. 2000) Respondent should have known that roofers were working on the job site without fall protection because its foreman was on site supervising and the foreman reported to the SCO that the workers had never used the fall protection required by the Act.

Second, Respondent argued that fall protection as required by the Act was unnecessary because in the 18-year history of his company, neither he nor his workers had ever experienced a serious injury as a result from a fall from a height. It is well-settled in North Carolina that this argument, "... simply amounts to a claim that there is no good reason to anticipate an accident until at least one has already occurred, which is nonsense." Brooks v. Daniel Construction Company, 73 N.C. App. 426, 432 (1985). The Court of Appeals in Daniel Construction concluded that, "Human error is not a rare phenomenon. A mark of ordinary prudence, we believe, is to anticipate human errors that are likely to injure people... and take precautions against them before, rather than after, injuries occur." *Id*. Based upon the evidence presented at the hearing and the law in North Carolina, the undersigned finds that hazards did exist on the job site which created the hazard of a fall from a height.

Third, Respondent's owner argued that - although he did not provide the protection required by the Act, he did take steps within the industry standard to protect workers and, thus, had successfully prevented any serious injuries in the 18-year company history. Burt Smith testified that the steps he took to prevent injuries were as follows: (1) he only retained "associates" who were skilled, experienced and safe and who looked out for each other as "family," (2) any worker could refuse to work if he felt the conditions were unsafe and (3) the associates secured roof scaffolds onto the roof to prevent the workers from falling. The roof scaffolds consisted of wooden planks affixed to the roof with brackets as seen in Complainant's Exhibits #9 and 15-17. Assuming *arguendo,* that the Respondent's actions were consistent with industry standard, the actions would still not comply with the requirements of the Act. The North Carolina Court of Appeals has spoken about the weight to be given industry practice in determining whether there has been a violation of an OSH personal protection standard:

> In order to establish that Daniel violated 29 CFR 1926.28 as charged in the citation, OSHA had to prove that under the circumstances which existed a reasonably prudent employer would have recognized that carrying heavy objects above their unprotected feet was hazardous to the employees doing the carrying and would require them to wear safety toe shoes. (citations omitted). . . But as applied by the First and Third Circuits, the practice in the industry is but one circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard. These courts have noted, quite properly we think, that equating the practice of an industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry.

Daniel Construction Company, 2 NCOSHD 311, 315-317 (1985), 73 N.C. App. 426, 326 S.E. 2d 339 (1985). Thus, industry practice is only one of many factors to be considered in determining whether Respondent knew or should have known that hazards existed at the work site. The photographs of the work site show workers working on the roofing project standing on platforms, walk boards and roofs, but do not show any worker actually using a "roof scaffold" for safety purposes. Hiring competent and safe employees is not sufficient to prevent the types of injuries contemplated by the Act in that even competent and otherwise safe employees can be distracted for the split second it takes to step backwards on a platform which is not fully planked, or lose their foot grip on a steep roof or the like. Mr. Smith testified that he has fallen off roofs on several occasions without injuring himself. The fact that he has fallen off of roofs is evidence in itself that it does happen to competent and safety-minded men. The fact that he has not been seriously injured only evidences how lucky he is.

Fourth, Respondent argued that requiring his workers to use safety harnesses and lanyards while working on steep roofs is more dangerous than not having any fall protection. Mr. Smith testified that there was no feasible location at which to tie off such a device at the top of the roof. He argued that someone without fall protection would have to climb up to the apex of the roof in order to tie off the lanyards. He also argued that it would be infeasible to keep moving the tie-off point at the apex as each man finished a portion of the roof and moved laterally more than 6 feet. He argued that ropes can get caught on objects and twisted with the ropes of other workers, causing an increased fall hazard. Finally, he argued in general that other fall protection measures are financially infeasible. Impossibility of compliance is an affirmative defense which must be pled affirmatively in a Respondent's answer. Brooks v. Austin Berryhill Fabricators, Inc.,102, N.C.App. 212, 401 S.E.2d 795 (1981). Respondent did not plead impossibility of compliance in its answer and thus is precluded from arguing this defense. Even if, *arguendo,* Respondent did plead impossibility of compliance in its answer, Respondent failed to prove impossibility of compliance by a preponderance of the evidence. To establish the defense, the employer must establish either that compliance with the standard would preclude performance of the required work or that compliance would be functionally impossible. The employer must also show that alternative means of protection were unavailable. Brooks v. Austin Berryhill Fabricators, Inc., 102, N.C. App. 212, 401 S.E.2d 795 (1981). While Mr. Smith spoke to the impossibility of using harnesses and lanyards, he failed to persuade the Hearing Examiner that the tangling of ropes on the roof would lead to serious injury of the workers. He also failed to prove by a preponderance of the evidence that other types of fall protection required by the Act would be physically or financially infeasible.

Fifth, Respondent argues that the violations should not have been classified as "repeat" because the date of the violations in this case (March 22, 2004) was not within three years of the inspection which led to the citations in the prior case (February 27, 2001). The North Carolina General Statutes provide that an employer may be assessed a civil penalty who has repeatedly violated the requirements of the Act within the previous three years. N.C. Gen. Stat. §95-138(a) Knowledge of the previous violation by an employer is presumed at the time that the "citation and assessment" becomes final and not subject to review by any court. The policy behind this statute is that, until a citation and assessment becomes final, it is subject to being vacated and/or dismissed and thus, is not a "prior violation." Only when Citations and penalties have become "final" can an employer be held to the knowledge that he is liable for a "prior violation." In an uncontested citation, the final order would be effective 15 working days from the employer's receipt of the citation. N.C. Gen. Stat. §95-137(b). The first Citations were issued to Mr. Smith on March 27, 2001. Mr. Smith did not contest the Citations or penalty and paid the fine. It is unclear from the record on which date he paid the fine. However, even if Mr. Smith paid the fine on March 27, 2001, the date that the first Citations were actually issued, the violations observed by the SCO on March 22, 2004 are within three years of that date.

Sixth, Respondent objected to the admission of any evidence of the SCO's inspection on March 23, 2004 - the day after the initial inspection. The basis for his argument is that, on March 22, 2004, the SCO promised that the inspection was at its conclusion and would not be continued when he returned to deliver paperwork to Mr. Smith the next day. The undersigned does not need to address this issue because each and every violation and penalty affirmed above was amply supported by the SCO's testimony of the evidence he collected and the observations he made on March 22, 2004 - the initial inspection date.

Seventh, Respondent complained that the Complainant has kept the identity of the original informant confidential. The Act provides for some anonymity for those who complain about workplace safety issues based upon the need for openness in order to "assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions...by providing an effective enforcement program." N.C. Gen. Stat. §95-126(b)(2)g. In order to reduce the risk of possible retaliation against informers, the North Carolina General Assembly promulgated the Act to provide, in pertinent part, as follows:

> Upon the written request of and at the expense of the requesting party, official inspection reports of inspections conducted pursuant to this Article shall be available for release in accordance with the provisions contained in this subsection and subsection (e) of this section. **The names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections or investigations conducted pursuant to this Article that would name or otherwise identify the witnesses or complainants, shall not be released to any employer or third party and shall be redacted from any copy of the official inspection report provided to the employer or third party... .**

N.C. Gen. Stat. §95-136(e)(1). The statute provides that if the Complainant intends to proffer a "witness statement" as evidence or call a confidential witness to testify at the hearing, it must provide to Respondent prior to the hearing an unredacted copy of each witness statement it intends to offer either through evidence or through a confidential witness. *Id.* Complainant did not proffer any witness statements nor call any confidential witnesses to testify at the hearing. The SCO's initial observation of one of Respondent's workers on a steep roof without fall protection was made from a public street. The affirmation herein of the Citations and penalties assessed was based solely upon the SCO's own observations, interviews and investigation of the job site on March 22, 2004.

Eighth, Respondent argues that the SCO was not properly qualified to perform an inspection of a roofing project because he had never been engaged in roofing work and he was physically incapable of inspecting the roof from upon the roof itself. The SCO was duly qualified to testify as an expert witness in this case based upon his education, training and work experience. He served as an North Carolina OSHA compliance officer from 1978 through 1986, taking the basic training courses and periodic continuing education courses, which involved, in part, construction issues related to the roofing industry. During that 8 year period, he carried out his duties inspecting job sites, including those involving construction. He then worked for 9 years as the Safety Director at Winston-Salem State University. For the next 6 years, he again served as an SCO in the Winston-Salem OSHA office, attending continuing education courses involving construction standards. His duties included inspection of construction sites, including roofing jobs. Despite the fact that the SCO has never performed work as a roofing contractor or laborer, the undersigned finds him wholly qualified to inspect a roofing job site, including the one in question. The issue of whether the SCO is or is not physically capable of ascending to a steep roof is not relevant. The SCO was capable of observing and photographing from his vantage point on the ground, all of the violations for which he cited Respondent and the undersigned affirmed above.

While Respondent presented additional factual and legal allegations and arguments, the Hearing Examiner could discern no further material issues of fact, law or discretion.

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

1. Citation 1, Item 1a is hereby **affirmed** as a serious repeat violation and the penalty is hereby imposed in the amount of $2,100;

2. Citation 1, Item 1b is hereby **affirmed** as a repeat serious violation and is properly grouped with Citation 1, Item 1a, with no additional penalty imposed;

3. Citation 2, Item 1a is hereby **affirmed** as a serious violation and the penalty is hereby imposed in the amount of $1,050;

4. Citation 2, Item 1b is hereby **vacated and dismissed.**

5. Citation 2, Item 1c is hereby **affirmed** as a serious violation and is properly grouped with Citation 2, Item 1a, with no additional penalty imposed;

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

This the 16th day of February, 2005.

____

Ellen R. Gelbin
Hearing Examiner