

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

OSHANC NO. 2004 - 4405
OSHA INSPECTION NO. 307445601
CSHO ID NO. K7526

v.

STEEL SUPPLY AND ERECTION
COMPANY
and its successors,

ORDER

RESPONDENT.

APPEARANCES:

For Complainant: Sonya Calloway, Assistant Attorney General

For Respondent: Eric Newton, President of Respondent

Administrative Law Judge: R. Joyce Garrett

THIS MATTER came on for Hearing before the Undersigned on January 12, 2005, Guilford County Courthouse, Courtroom 3D - Third Floor, 201 South Eugene Street, Greensboro, North Carolina. Complainant was represented by Sonya Calloway, Assistant Attorney General, North Carolina Department of Labor. Respondent was represented by Eric Newton, President of Respondent.

The sole issue at the Hearing is whether Respondent is liable for a repeat nonserious violation of 29 CFR 1926.752 (b). The Citation alleged that at a construction site on North Main Street in Kernersville, North Carolina Respondent began steel erection before receiving written notification "that the concrete in the footings, piers and walls or the mortar in the masonry piers and walls had attained either 75% of the intended minimum compression design strength or sufficient strength to support the loads imposed during steel erection based on an appropriate ASTM standard test method of field-cured samples".

A review of the history of Respondent shows that in January 2003 Respondent had received a citation for violation of 29 CFR 1926.752(b) at a work site near Church Street in Greensboro (the "Previous Citation"). Benny Smith was the job foreman at the time of the inspection of the Church Street site by Inspector Walter Kissick in December 2002. The Previous Citation became final in February 2003. The Previous Citation was based on Respondent not obtaining the written notification under 29 CFR 1926.752(b) prior to performing steel erection activities involving erecting heavy I-beams on 50 foot columns with concrete footings and anchor bolts in the concrete, and did not involve erecting bar joist on 11 foot high masonry walls for installation of a roof. Respondent was aware of the requirements of 29 CFR 1926.752(b) based on the Previous Citation.

At the Hearing Respondent admitted that it had not received written notification required by 29 CFR 1926.752(b) on the Kernersville work site, but asserted that mortar in a masonry wall is different from concrete and asserted that it did not know that 29 CFR 1926.752(b) was applicable to the masonry wall work.

Respondent requested that the current Citation be dismissed based on inappropriate comments made by the Inspector during the inspection of the Kernersville's work site. If inappropriate comments were made it is very unfortunate; however, the law clearly identifies the elements which are the basis for determining the occurrence of a repeat nonserious violation. Those elements do not include consideration of inappropriate comments.

Under current law, the burden of proof is on the Complainant to establish each element of the contested citation by a preponderance of the evidence. A nonserious violation exists where

1. a violative condition exists;
2. employees of the employer are exposed;
3. compliance with the standard would have eliminated (or reduced) the hazard;
4. the employer knew of the violative condition, or with the exercise of reasonable diligence could have known of the violative condition; and
5. "there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." Mark A. Rothstein, Occupational Safety and Health Law §312, at 332 (3rd ed. 1990); Stephen A Bokat & Horace A Thompson III, Occupational Safety and Health Law 263 (1988).

A violation of an OSHA standard is 'repeat' if there is a " 'subsequent violation by the same employer substantially similar to a prior violation or violations' where the employer knew or should have known of the standard by virtue of the prior citation or citations." Associated Mechanical Contractors, Inc., 118 N.C. App. 54, 453 S.E.2d 545 (1995), reversed, 342 NC 825 (1996).

Violations designated as 'repeat nonserious' must be established by evidence supporting both designations (ie evidence supporting the repeat designation as well as evidence supporting the nonserious designation).

In this case the evidence establishes (1) that the Respondent did not obtain written notification that the mortar in the masonry walls had attained either 75% of the intended minimum compressive design strength or sufficient strength to support the loads imposed; (2) that at least one employee of Respondent was standing on bar joists supported by the masonry walls; (3) that obtaining the required written notification before commencing steel erection work would have confirmed whether there was sufficient strength to support the loads; (4) Respondent's foreman knew that the written notification had not been obtained and was aware of 29 CFR 1926.752(b) from the Previous Citation, and was aware, or with reasonable diligence could have been aware, that the standard was applicable to mortar in masonry walls; and (5) there was a direct and immediate relationship between not obtaining the required written notification and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm since the mortar in the wall had been tested and was certified to be more than 75% cured.

The evidence also establishes (1) that there had been a prior violation of 29 CFR 1926.752(b); (2) that the prior violation had been by the same employer, with the same person being the foreman; (3) that the violative condition was for failure to obtain written notification of the adequacy of the strength of the structure supporting the steel being erected; and (4) that Respondent's foreman was trained as a 'competent' person and thus knew or should have known of the applicability of the standard to mortar in masonry walls by virtue of the prior citation.

Based upon the record and the testimony presented at the Hearing, the Undersigned makes the following Findings of Fact:

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 and with enforcement of the Occupational Safety and Health Act of North Carolina.
2. Respondent is an entity which was transacting business in the State of North Carolina and is subject to the Occupational Safety and Health Act of North Carolina.
3. All parties are properly named in the Citation. This Court has jurisdiction over the Respondent and Complainant and the subject matter of this Hearing.
4. Service of the Citation and of the Notice of Hearing was proper and adequate.
5. Neither Complainant nor Respondent has any procedural objection to this Hearing.
6. On April 23 to April 26, 2004 Walter Kissick, an Inspector for Petitioner, conducted an inspection of Respondent's work site on North Main Street in Kernersville, North Carolina.
7. The Inspector conducted an opening conference with Benny Smith, Respondent's supervisor on site. Respondent was a subcontractor on the site. Respondent had more than one employee working on site at the time of the inspection.
8. The steel erection work being performed by the Respondent involved putting steel joist on approximately 11 foot high masonry walls (which had mortar) for the installation of the roof. At least one employee was standing on bar joist placed on the 11 foot high wall.
9. Respondent had not obtained from the General Contractor the written notification required by 29 CFR 1926.752(b). Respondent knew that the written notification had not been obtained. Respondent commenced steel erection without the written notification.
10. Respondent was cited for a repeat nonserious violation of 29 CFR 1926.752(b) with a penalty of \$100.00 (the "Penalty").
11. The Penalty was calculated in accordance with the Field Operations Manual as applied to employers in the State of North Carolina.
12. By Citation issued on January 15, 2003 Respondent had previously been cited for a violation of 29 CFR 1926.752(b) in connection with steel erection work it was performing on Wendover Avenue in Greensboro, North Carolina. The alleged violation became the subject of a final determination and the matter became final in February 2003 (the "Prior Citation").
13. The steel erection work involved in the Prior Citation was the erection of heavy steel I-beams and columns rather than bar joist and masonry walls; however, the basic activity, steel erection, was the same. The foreman at the job site at the time of the inspection was Benny Smith. The Prior Citation was based on Respondent failing to obtain written notification of the adequacy of the strength of the structure supporting the steel being erected
14. Inspector Kissick had given Respondent a copy of 29 CFR 1926.752(b) in connection with the Previous Citation.
15. Respondent's foreman, Benny Smith, had received training as a 'competent person' and received a 'competent person' card.
16. At least one of Respondent's employees was standing on the joist which had been erected, approximately 11 feet above ground.
17. The Inspector testified that there was a possibility of an accident because of the violation of the standard but that a serious injury was not likely.
18. Respondent allowed its employees to perform steel erection work without knowing whether or not the wall would support the load.
19. Obtaining the required written notification before commencing steel erection work would have confirmed whether there was sufficient strength to support the loads.
20. Respondent's foreman knew that the written notification had not been obtained and was aware of 29 CFR 1926.752(b) from the Previous Citation.
21. Respondent's foreman was aware, or with reasonable diligence could have been aware, that the standard was applicable to mortar in masonry walls.
22. There was a direct and immediate relationship between not obtaining the required written notification and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm since the mortar in the wall had been tested and was certified to be more than 75% cured.

Based on the Findings of Fact and applicable law the Undersigned makes the following

CONCLUSIONS OF LAW

1. The 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. This action was properly brought and the Undersigned has jurisdiction to hear the matter.
3. The Complainant proved by a preponderance of the evidence that Respondent violated 29 CFR 1926.752(b), that the violation is properly classified as 'repeat nonserious', and that the penalty is proper.

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

Citation I Item 1 for violation of **29 CFR 1926.752(b)** be and the same is hereby **AFFIRMED**

This the 24th day of February, 2005.