

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

CAROLINA STONE SETTING CO., INC.,

RESPONDENT.

DOCKET NO. OSHANC 2005-4549
OSHA INSPECTION NO. 308784214
CSHO ID NO. Z4925

ORDER

THIS MATTER was scheduled for hearing before the undersigned on April 11, 2006 in Raleigh, North Carolina. The Complainant was represented by Daniel D. Addison, Special Deputy Attorney General, and Respondent appeared pro se through its President, William Brian White.

Before taking evidence, Complainant asked that its Motion to Amend the Complaint be considered. Respondent did not object to the amendment and the Motion was approved and the Complaint is hereby AMENDED as proposed by Complainant.

Complainant's witnesses were: Jeanine A. Alston, Safety Compliance Officer, North Carolina Department of Labor, Occupational Safety and Health Division; W. Gentry Jones, the Safety Director for Shellco, the General Contractor at the site in question in this case; and Chuck Murdock, a Safety and Health Compliance Officer with the North Carolina Department of Labor, Occupational Safety and Health Division. Respondent's witness was: William Brian White, President, Carolina Stone Setting Co., Inc.

ISSUES PRESENTED

Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.501(b)(1) by allowing its employee to extend his body outside fall protection perimeter cables when he was 14 feet above ground and no other fall protection was being provided?

Did Respondent carry its burden of establishing that it was appropriate to implement a fall protection plan that complied with 29 CFR 1926.502(k) in lieu of implementing any of the systems described in 29 CFR 1926.501(b)(2) or (12)?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.501(b)(1) provides as follows:

(b)(1) 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.

29 CFR 1926.501(b)(2) provides as follows:

Leading edges. (i) Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with §1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

29 CFR 1926.501(b)(12) provides as follows:

Precast concrete erection. Each employee engaged in the erection of precast concrete members (including, but not limited to the erection of wall panels, columns, beams, and floor and roof öteses) and related operations such as grouting of precast concrete members, who is 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems, unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with §1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

29 CFR 1926.502(k) provides as follows:

(k) Fall protection plan. This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work (See §1926.501(b)(2), (b)(12), and (b)(13)) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment. The fall protection plan must conform to the following provisions. . . .

After hearing and receiving the evidence, considering the arguments of counsel and reviewing post-hearing submissions, the undersigned makes the following

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed a citation issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126, et seq.

2. The Commissioner of Labor is responsible for enforcing OSHANC (N.C. Gen. Stat. § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat. §95-127(10) and is subject to the Act.

4. On June 22, 2005, Respondent was a subcontractor at a construction site at 10051 Glenwood Avenue in Raleigh, North Carolina, where the general contractor was Shellco, Inc. Respondent was engaged in the installation of precast concrete panels on the exterior frame of a four-story office building being constructed.

5. On June 22, 2005, Complainant's representative, Jeanine A. Alston, Safety Compliance Officer for the Occupational Safety and Health Division of the North Carolina Department of Labor, went to the 10051 Glenwood construction site to respond to a complaint that had been received regarding scaffolding workers not wearing fall protection gear.

6. Alston arrived at the site and drove on a service road that went through or around the site and observed from her car a worker in the process of installing precast concrete panels on the side of the second story of a building under construction. What Alston observed would have been observable by the public as there were no barricades preventing admittance nor "Keep Out" signs.

7. Alston took pictures from inside and outside her car that depicted what she observed. Exhibits 1-4 were admitted as evidence at the hearing of this matter to demonstrate the violation observed by Alston.

8. Two of Alston's pictures, as identified below, show a workman leaning through and between the perimeter cables on the second floor and touching a precast panel that was attached to ropes and rigging that were still attached to a crane. The worker was assisting with the hanging of the precast concrete panels by attempting to position the concrete in place.

9. Complainant's Exhibit 2 shows the worker's body facing the camera and bent forward at the waist at approximately a right angle such that the upper one half of his body was between the upper and lower cables of the perimeter fall protection. The upper half of the worker's body was on the outside of the cables and unprotected from a fourteen foot fall hazard. The worker appears to be staring straight down at the panel or at the ground, and his hands are on the top edge of the panel.

10. Complainant's Exhibit 4 shows the same worker on the other end of the same precast panel in a picture that shows approximately the same posture as in Exhibit 2. It is not possible to tell from the picture whether three-fourths of the worker's body is outside the cabling as was testified to by SCO Alston, but a substantial part of the worker's body is between the cables, not unlike what is pictured in Exhibit 2.

11. In Exhibit 4, the employee is either leaning on the panel edge or he is guiding the panel into position. Whichever activity the worker was engaged in performing, a substantial portion of the worker's body was outside the protection of the perimeter cabling.

12. Respondent's President, White, is pictured in both exhibits observing the installation.

13. The perimeter fall protection on the edge of the second floor consisted of two flagged cables that stretched from column to column. The lower cable was at approximately knee height and the other was at approximately chest height. No other fall protection was in use.

14. The worker was wearing no personal fall arrest equipment and there were no safety nets.

15. When the worker extended part of his body outside the perimeter cabling, he was not protected from falling from the second story.

16. A worker falling from the second story of this building site would face a substantial probability of serious physical harm or death.

17. Respondent's President was aware of the purpose and function of the fall prevention cabling along the perimeter or edge of the structure.

18. Respondent's President was aware that the worker was not wearing any personal fall arrest equipment and that there were no nets to catch a worker's fall.

19. Fall prevention cabling that runs along the perimeter or edge of a structure will not prevent falls if a substantial portion of the worker's body is outside the cabling.

20. Respondent representative White testified that Respondent had established a fall protection plan, but no plan was produced or offered into evidence.

21. Respondent offered evidence through the testimony of White that the use of any of the fall protection provisions of 29 CFR 1926.501(b)(2) and (12) created a greater hazard to a worker as Respondent contended that a worker could need to escape a sudden dropping of the precast panel and would need to move quickly back. Respondent contended that the use of a harness and lanyard system would increase the danger of the worker tripping on his lifeline as he attempted to escape the debris and hazards created by a dropped panel.

22. Respondent did not provide an alternate form of fall protection system when the guardrail protection was breached.

23. Workers engaged in the installation of precast concrete panels such as were depicted at this location may need, at times, to extend portions of their bodies outside the perimeter protection cabling to guide and position the panels into place.

24. At the opening/closing conference on June 24, 2005, conducted by SCO Alston, Respondent's representative, Jose Mendez, stated that he had spoken to the worker in question himself about not wearing fall protection. Mendez said nothing at the conference to suggest that wearing fall protection was not practical nor that it would present other hazards to the worker.

25. As a result of the inspection, a citation was issued to the Respondent on August 4, 2005.

26. Respondent submitted a timely Notice of Contest and requested formal pleadings.

27. Complainant filed its formal Complaint on November 22, 2005, and Respondent filed its Answer by letter dated January 13, 2006, which was filed on January 19, 2006.

28. 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 could be 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. App. 426 (1984) of the condition or conduct that created the hazard.

29. The Complainant established that a hazard existed by showing that the worker was exposed to the risk of a fall as there was no effective fall protection mechanism; the worker was an employee of the Respondent; the hazard of having no fall protection mechanism created the possibility of an accident, the substantial probability of which was death or serious injury, and the employer knew of the hazard as its President was observing the worker at the time of the violation.

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 of the Act.

3. Respondent was obligated to provide workers installing precast concrete panels on the edge of the building more than six feet above a lower level with fall protection consisting of guardrail systems, safety nets or personal fall arrest devices. The only exception to this requirement provides that Respondent is required to overcome a presumption that the systems required are feasible and not creating a greater hazard, then developing a fall protection plan which meets the requirements of paragraph (k) of 29 CFR 1926.502.

4. Respondent did not overcome the presumption that it is feasible and will not create a greater hazard to implement at least one of the fall protection systems provided in 29 CFR 1926.501(b)(2) or (12).

5. Flagged perimeter cabling is the equivalent of a guardrail system, but once a worker extends his body through the cables, he loses the fall protection benefit of the guardrail and the Respondent must provide an alternate fall protection system, or, if justified, a fall protection plan.

6. The inspection of Respondent's site by the SCO taking pictures from a service road did not violate Respondent's right to be free from warrantless searches as provided by the Fourth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. The SCO saw what was observable by the public. *See, Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114 (1974) relying on *Hester v. U.S.*, 265 U.S. 57, 44 S.Ct. 445 (1924) where Justice Holmes refused to extend the provisions of the Fourth Amendment to sights seen in the "open fields".

7. The Complainant met its burden of proving by the preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.501(b)(1) by failing to protect its employee from falling when he was required to work outside the guardrail system on the edge of the building.

8. Respondent did not carry its burden of establishing that it was appropriate to implement a fall protection plan that complied with 29 CFR 1926.502(k) in lieu of implementing any of the systems described in 29 CFR 1926.501(b)(2) or (12).

9. The Complainant properly calculated a penalty of \$175 for a serious violation.

DISCUSSION

Respondent contended that it should not have been cited for the violation herein because it had determined that the use of a personal fall arrest system would have created a greater hazard to the employee than the use of no fall prevention. Respondent argued that a worker wearing a personal fall arrest device would be put at greater danger in an emergency when he or she needed to escape from a falling concrete panel and its debris. Respondent considered the risk of tripping or becoming entangled in the lines that anchored the employee to the building interior to be greater than the danger that the employee could suffer from falling off the building. The fundamental problem with Respondent's argument is in its failure to follow the instructions of the applicable regulations.

Respondent's first obligation under the provisions of 29 CFR 1926.501(b)(2) and (12) and 29 CFR 1926.502(k) is that it must overcome the presumption that at least one of the three named fall prevention systems in those two paragraphs of the CFR, to wit, guardrail, safety net or personal fall arrest, are feasible and will not create a greater hazard to implement. The guardrail that was installed on the site was rendered ineffective by the worker having leaned a substantial portion of his body through the top and bottom cable; thus, there was effectively no fall arrest value from the guardrail. There was no safety net installed, so there was no argument that a net could have provided fall protection. Respondent argued that the use of the personal fall arrest system would have increased the danger to the worker, for example, either by his tripping on the line that anchored the system to the interior of the building, the lock on the device impeding the movement of the worker, or, if the worker fell, it would dangle the worker over the edge where the concrete panel could possibly hit him. Respondent's suggestions raised possibilities that could occur, but the presumption must be overcome that it is feasible and will not create a greater hazard to implement one of the systems. Respondent's President appeared to testify from experience with fall protection systems and noted that the company had never had an employee fall. Complainant's witnesses testified that a personal fall arrest system would have been both feasible and not a greater hazard. The testimony of Complainant's witnesses succeeded in counterbalancing Respondent's evidence such that Respondent did not overcome the presumption that it was feasible and would not create a greater hazard to implement one of the systems. A similar situation presented itself in the case of *Brooks v. Bonitz Insulation Co., Inc.*, OSHANC No. 80-667 where there was testimony that the use of life lines would create a hazard, but there was no evidence of probability, frequency, or severity of any injury to be covered by the use of life lines. In the case being decided herein, the testimony by Respondent did not adequately establish probability, frequency or severity of any injury to be suffered by the use of personal fall arrest devices. Respondent needed to establish such evidence to attempt to meet its burden of overcoming the presumption found in the regulations.

In addition to the preceding points, Respondent's employee, Mr. Mendez, told the SCO at the opening/closing conference that he had told the worker in question that he needed to be using a personal fall arrest system. Consequently, it is not necessary to analyze further the evidence regarding whether Respondent complied with the provisions of 29 CFR 1926.502(k) in its purported creation of a fall protection plan; however, it is useful to look at the provisions of 502(k). This regulation requires that the plan conform to ten designated criteria. Respondent testified that it had a plan, but the plan was not offered as evidence. Without presenting its plan, Respondent faced a difficult hurdle to convince others that it had done the necessary thinking and planning to justify and establish an alternative to the three systems named in 29 CFR 1926.501(b)(2) and (12).

Respondent attempted to rely on the provisions of a sample plan offered by Appendix E to Subpart M of §1926. The sample plan provision that explains why personal fall arrest protection will not be adequate relies on a procedure that requires two employees to maneuver around each other. *Section IV., Appendix E to Subpart M of §1926.* Factually, this situation differs from the one observed by the SCO and which resulted in the citation where only one employee was engaged in the installation. The introductory comments to the Sample Fall Protection Plan at this appendix states that it is "for illustrative purposes only" and does not necessarily provide a "valid acceptable rationale (unless the conditions at the job site are the same as those covered by these sample plans)[emphasis added]. . . ." The Respondent did not show how its method of installation was the same as the provision of the sample plan; thus, it did not prove that at this job site the rationale from the sample plan justified Respondent's action or lack of action.

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

a. Citation 1, Item 1 is affirmed as a serious violation of 29 CFR 1926.501(b)(1) and a penalty of \$175 is imposed.

b. The penalty shall be paid within twenty (20) days of the filing date of this Order.

This the 30th day of September, 2006.

Reagan H. Weaver
Hearing Officer