

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2006-4650
OSHA INSPECTION NO. 310303870
CSHO ID NO. F8091

v.

STEEL SUPPLY AND ERECTION
COMPANY,

ORDER

RESPONDENT.

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 27th day of November, 2007 in the Board Room, Main Floor, N. C. Medical Society Building, 222 North Person Street, Raleigh, North Carolina by Oscar A. Keller, Jr., Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Jane Hautin, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Eric Newton, President of Respondent, Steel Supply and Erection Company, failed to show up for the hearing.

ISSUES PRESENTED

1. Did Complainant prove by the greater weight of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.20(b)(2) for failure to conduct frequent and regular safety inspections?

STATUTES AND REGULATIONS AT ISSUE

1. 1926.20(b)(1) states:

It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

2. 1926.20(b)(2) states:

Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

3. N.C. Gen. Stat. § 95-127(18) (2005) states:

A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

Having reviewed and considered the record and the briefs of the parties and the arguments of the parties, the North Carolina Occupational Safety and Health Review Commission hereby AFFIRMS the decision of the Hearing Examiner and makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations 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 (Complainant) 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).

4. The Respondent, Steel Supply and Erection Company, is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On July 20, 2006, Compliance Safety Officer (CSO) Darius Chisholm conducted an occupational safety and health inspection of Respondent's construction jobsite at 125 North Pointe Boulevard in Statesville, North Carolina.

6. As a result of this inspection on August 4, 2006, Complainant issued Citation 1, Item 1 for an alleged serious violation of 29 CFR 1926.20(b)(2) with a proposed penalty of \$1,050.00, for failure to conduct frequent and regular safety inspections.

7. By letter dated September 11, 2006, served on the Department of Labor on September 13, 2006 and filed with the Review Commission on September 15, 2006, Respondent contested Citation 1, Item 1.

8. Respondent's Statement of Position admitting the violation but denying the designation as serious and objecting to the penalty was filed with the Review Commission on October 2, 2006.

9. This matter was heard by the Honorable Richard Koch, Hearing Examiner, on December 13, 2006 in Charlotte, North Carolina.

10. At the Hearing the Respondent was represented by its corporate president, Eric Newton.

11. On January 31, 2007, Hearing Examiner Koch issued his order affirming Citation 1, Item 1 as a serious violation of 29 CFR 1926.20 (b)(2) with a penalty of \$1,050.00. This order was filed with the Review Commission on February 5, 2007.

12. Respondent filed its Petition for Review with the Review Commission on February 26, 2007.

13. On March 7, 2007, Chairman Keller granted Respondent's Petition for Review.

14. The parties filed their briefs and the appeal was heard at the November 27, 2007 Quarterly meeting of the Review Commission.

15. The Respondent failed to show up for the hearing before the Review Commission on November 27, 2007.

16. After waiting about 30 minutes, Nancy Swaney, administrative assistant for the Review Commission, called Respondent's assistant to see if he was going to show up for the hearing. Ms. Swaney talked to Respondent by phone and he said that a bulletin board with the date of the hearing got misplaced during the move and asked if the hearing could be postponed until 1:00 p.m. of this same day in order to give him time to drive from Asheboro to Raleigh.

17. The Review Commission members decided that all of the Review Commission members were present as well as the attorneys for the Complainant and all had set aside the morning to hear the appeal and were not available for the afternoon.

18. Mr. Eric Newton, president of Respondent, did not give his business affairs the attention that a reasonably prudent business person would give to his business affairs and good cause did not exist to postpone the hearing until 1:00 in the afternoon of November 27, 2007.

19. Nancy Swaney called Respondent's president, Eric Newton, and informed him that the hearing would not be postponed until 1:00 p.m. and there was no need for him to drive up to Raleigh.

20. The full Review Commission proceeded with the Hearing with just the Complaint making her arguments.

21. The Commission adopts the Hearing Examiner's findings of fact numbered 1 through 13.

22. Poole employees were standing on top of and outside the bucket of the aerial lift exposed to a fall of 20 feet without any fall protection while performing the welding work. (T p 24).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.

2. The Commission has jurisdiction of this cause and the parties are properly before this Commission.

3. The Complainant has proven by the greater weight of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.20(b)(2) for failure to conduct frequent and regular safety inspections.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Commission "the Commission shall schedule the matter for hearing, on the record, (emphasis added) except that the Commission may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba James Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

In order to prove a serious violation of an OSH standard the Commissioner of Labor must prove by a preponderance of the evidence and by substantial evidence the following:

1. A hazard covered by the cited standard existed;

2. employees were exposed;

3. the hazard created the possibility of an accident;

4. the substantial probability of an accident could be death or serious physical injury and

5. 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 (Ct. of Appeals 1984)) of the condition or conduct that created the hazard.

The Respondent arguably in his petition for review and in his brief challenges the citation on the basis of items 4 and 5 above. His argument for review is that failure to inspect does not in of itself create a dangerous situation and that can be taken as a statement that the substantial probability of an accident for failure to inspect could not be death or serious physical harm. However, the conditions on the site that he failed to detect by not performing an inspection was a fall from heights of 20 feet that could have resulted in serious injury or death. His other argument is that there was no evidence that the conditions that he failed to detect had been in existence for any longer than the actual day of the inspection and that he did not know and could not have known with the exercise of reasonable diligence of the presence of the violation. He argues that since a serious violation pursuant to G.S. 95-127(18) requires either actual knowledge or constructive knowledge and he had neither, he could not be charged with a serious violation. He argues that he did not go on the site on those 3 previous days and did not have actual knowledge of any violations and since the conditions did not exist on those previous days he could not have had constructive knowledge. There was testimony by the compliance officer that the lack of fall protection conditions existed on three of the previous days and the Hearing Officer gave greater credibility to the compliance officer's testimony than to the testimony of the Respondent. The fact that he did not go on the site for those previous days is evidence that he failed to provide for frequent and regular inspections of the jobsites, as he was charged.

Pursuant to N.C. Gen. Stat. § 95-138(a), the Review Commission has the following authority in assessing penalties:

... the North Carolina Occupational Safety and Health Review Commission in the case of an appeal, shall have the authority to assess penalties against any employer who violates the requirements of this Article, or any standard, rule, or order adopted under this Article, as follows:

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(2) A penalty of up to seven thousand dollars (\$7,000) shall be assessed for each serious violation.

N.C. Gen. Stat. § 95-138(a)(2) (Emphasis added). In addition in determining the appropriateness of the penalty, the Commission is required to apply the 4 statutory criteria of N.C.G.S. 95-138(b), the size of the business, the gravity of the violation, the good faith of the employer and the record of previous violations. After examining the facts of this case with respect to those 4 statutory criteria the full Commission has determined that the penalty of \$1,050.00 assessed by the Commissioner of Labor and affirmed by the Hearing Examiner is appropriate.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's January 31, 2007 Order in this cause is, **AFFIRMED** and the Respondent is found to have committed a serious violation of 29 CFR 1926.20(b)(2) for failure to conduct frequent and regular safety inspections with a penalty of \$1,050.00. The Respondent is **FURTHER ORDERED** to pay the penalty of \$1,050.00 within 30 days of the date of this order.

This the 3rd day of March, 2008.

OSCAR A. KELLER, JR., CHAIRMAN

RICHARD G. PEARSON, MEMBER

JANICE SMITH GERALD, MEMBER