

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

COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

NIBLOCK DEVELOPMENT CORP.,

RESPONDENT.

OSHANC NO. 2006-4626  
INSPECTION NO. 310111141  
CSHO ID NO. N6184

**ORDER**

THIS MATTER was heard by the undersigned on December 13, 2006 in Charlotte, North Carolina.

The complainant was represented by Daniel D. Addison. Special Deputy Assistant Attorney General; the respondent was represented by Christopher D. Mauriello.

When the matter was called for hearing, counsel for the parties presented the undersigned with a set of numbered pre-hearing stipulations dated December 13, 2006 and signed by counsel. These stipulations contain both agreed facts and agreed conclusions of law. These stipulations were signed by the undersigned on December 13, 2006 and are adopted by the undersigned. These stipulations are attached to this Order and are incorporated by reference.

The sole issue for consideration is whether the respondent is responsible under the Occupational Safety and Health Act of North Carolina (the "Act") for Act violations committed by a subcontractor of its subcontractor.

After hearing and receiving the evidence, the stipulations of the parties attached to this Order and the arguments of counsel, the undersigned makes the following

**FINDINGS OF FACT**

1. The attached pre-hearing stipulations, to the extent that the same constitute agreed facts are adopted as Findings of Fact for this Order.
2. The respondent is a real estate developer and general contractor located in Concord, North Carolina.
3. The respondent was the general contractor for the house under construction on Lot #424 in Laurel Pines subdivision in Concord (the "Project").
4. Billy Framing Construction, Inc. ("Billy Framing") was the respondent's framing subcontractor on the Project.
5. Billy Framing had been providing framing for respondent since August, 2005, although one of its owners, Jose Rodolfo Esparza, had provided framing for respondent for over seven years.
6. Without the knowledge of respondent, Billy Framing subcontracted the framing for the Project to Carlos Rosulio Jiminez Martines ("Martines"). However, respondent's contract with Billy Framing did not prohibit such subcontracting and did not require Billy Framing to notify respondent that it had subcontracted the work.
7. The employees of Martines were the workers who committed the violations of the Act as described in the Citation items. Martines had 8 or 9 workers on the Project at the time of the complainant's inspection.
8. Complainant's safety compliance officer Jerry Barker observed these violations from over 300 feet away.
9. The respondent had a construction office trailer in Laurel Pines which was approximately mile from the Project, although the Project was not visible from the trailer.
10. Mr. Esparza testified that a ladder was used to access the second floor, which he stated was all framed in one-half day on the date of the inspection. He also testified that there was fall protection in a van on the site. In the opening conference with Mr. Barker on the date of the inspection, Mr. Esparza did not mention the ladder or the existence of fall protection, even though he can speak and understand English.
11. Lance Bowman is respondent's area manager. He also attended the opening conference with Mr. Barker. Mr. Bowman testified that the second floor framing on the Project had been ongoing for four days and that the temporary stairs provided by respondent had been at the Project for four days.
12. No one at the opening conference mentioned to Mr. Barker that a ladder was being used for accessing the second floor of the Project. Likewise, no one said to Mr. Barker that fall protection harnesses were in a van on the site.
13. Mr. Esparza's testimony described above is not credible. The undersigned specifically finds that the employees of Martines were framing the second floor for four days and were not using fall protection in connection with that work. These employees were also accessing the second floor work area during these four days by means of the temporary stairs, which did not have a hand rail as required by the Act.
14. Alex Kerr was respondent's superintendent for the Project. He was not working the day of the inspection. He did not testify at the hearing. No other superintendent was assigned to the Project for the day of the inspection.
15. Ordinarily the respondent's superintendents inspect each of the houses assigned to them on a daily basis. They are required to maintain written records of their inspections and note matters of importance, such as violations of the Act. There are no written records of inspections of the Project for the four days preceding the inspection, although Mr. Bowman testified that Mr. Kerr was at the Project the day before the inspection working on a framing problem.
16. The respondent had several other superintendents working in the Laurel Pines subdivision during that period of time. The respondent required its superintendents to be observant of issues or problems, including violations of the Act, occurring on houses that were not their direct responsibility. There was no evidence of inspection of the Project by any other of respondent's superintendents during the relevant time the second floor of the Project was being framed.
17. The undersigned specifically finds that one of the following two circumstances existed on the Project in the four days prior to the inspection. Either Mr. Kerr (1) did not inspect the Project during that period while the second floor on the Project was being framed by workers without using fall protection and using temporary stairs or (2) he did inspect but did not require the workers to install a railing on the steps and did not require them to use fall protection.
18. Billy Framing had been cited by the complainant for violations of the Act, specifically fall protection, in 2005 while working for respondent in another of its subdivisions. These violations were known to respondent. Mark Anthony Michaud, respondent's controller, met with representatives of Billy Framing and attended Billy Framing's opening conference with complainant in that matter. Mr. Michaud testified that after these violations, respondent's production manger had told him "to keep a close eye on Billy".
19. Mr. Bowman acknowledged that respondent had the authority to supervise the work of its subcontractor and their subcontractors, that it had the authority to suspend the work of such entities for violations of the Act and that it was responsible for the safety of the workers of such entities.
20. While respondent had a written safety program for fall protection, neither Billy Framing nor Martines had such a written program. The respondent did not require either Billy Framing or Martines to have a written safety program.

Based on the foregoing Findings of Fact, the undersigned makes the following

**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. The attached pre-hearing stipulations, to the extent that the same constitute agreed Conclusions of Law, as so adopted for this Order.
3. The respondent has proved by the greater weight of the evidence a violation by respondent of the provisions of 29 CFR 1926.501(b)(13) because Billy Framing and Martines did not provide fall protection for Martines's workers on the Project and respondent had actual or constructive knowledge of this violation and did not exercise reasonable diligence to inspect the Project or correct violations of the Act known by it to be occurring.
4. The respondent has proved by the greater weight of the evidence a violation by respondent of the provisions of 29 CFR 1926.1052(c)(1) because Billy Framing and Martines did not provide a hand rail for the temporary stairs at the Project and respondent had actual or constructive knowledge of this violation and did not exercise reasonable diligence to inspect the Project or correct violations of the Act known by it to be occurring.

**DISCUSSION**

This is a multi employee worksite case. In such cases, a general contractor has a duty to inspect its jobsites to detect safety violations committed by its subcontractors as well as its own employees. This duty extends to employees of subcontractors on the general contractor's jobsite, but only as to violations that could reasonably be detected by such an inspection. Commissioner of Labor v Weekley Homes, LP, 169 N.C. App. 17, 609 S.E. 2d 407 (2005).

The respondent cites Commissioner of Labor v Romeo Guest Associates, Inc., OSHANC 96-3513, Slip. Op., (RB 1998) to support its position that it is not responsible for the Act violations by Billy Framing and Martines. However, Weekly was decided after Romeo Guest and discusses its holding. It is not inapposite.

Here, respondent had the contractual right to control how its subcontractors performed their work. It could stop work if safety violations existed. It was aware that Billy Framing was not always compliant with the Act and that supervision of Billy Framing was necessary. The framing of the second floor of the Project had been ongoing for four days using an unguarded set of steps for access. The workers were not using fall protection. Mr. Barker observed these violations from over a football field away. These violations were ongoing and in plain view. Any superficial inspection on a periodic basis would have disclosed these violations.

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

1. Citation 1, Item 1 is affirmed as a serious violation of 29 CFR 1926.501(b)(13) with a penalty of \$2,100.00;
2. Citation 1, Item 2 is affirmed as a serious violation of 29 CFR 1926.1052 (c)(1) with a penalty of \$1,050.00;
3. Such penalties shall be paid within twenty (20) days of the date of this Order; and
4. All violations not previously abated shall be immediately abated.

This 31st day of January, 2007.

RICHARD M. KOCH  
HEARING EXAMINER