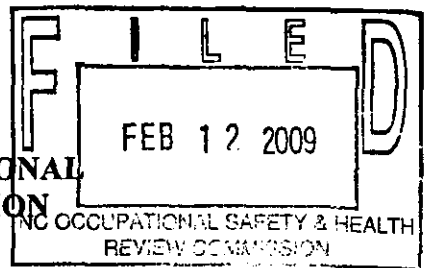


**BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION**



**COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,**

Complainant,

**DOCKET NO. OSHANC-2007-4742
OSHA INSPECTION NO. 311336606
CSHO ID: K4809**

v.

**DENNY HUNTER DBA DENNY
HUNTER CONSTRUCTION**

ORDER

Respondent.

APPEARANCES:

Complainant:

**Linda Kimball, Assistant Attorney General
North Carolina Department of Justice**

Respondent:

**Michael C. Lord, Williams Mullen
Attorney for Respondent**

BEFORE:

Hearing Examiner: Monique M. Peebles

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on November 12, 2008, at the North Carolina Medical Society Boardroom, 222 North Person Street in Raleigh, North Carolina.

The complainant was represented by Ms. Linda Kimball, Assistant Attorney General and the respondent was represented by attorney Michael C. Lord, Williams Mullen. Present for the hearing for the Department of Labor, OSHA Division, was Mr. Bruce Pearson, Safety Compliance Officer. Present at the hearing for the respondent were Mr. Denny Hunter, Owner & Operator of Hunter Construction and Mr. Jeffrey Carter, employee of Hunter Construction.

After reviewing the record file, hearing the evidence presented at the hearing, with due consideration of the arguments and contentions of all parties, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

DATABASE
2/12/09 mlh

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 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. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about October 11, 2007, contesting a citation issued on August 22, 2007 to Respondent, Denny Hunter dba Hunter Construction. ("Respondent" or "DH Co.").
3. Respondent, a corporation which does construction business in the State of North Carolina and maintains a place of business in Lee County, NC and is subject to the provision of the Act (N.C. Gen Stat § 95-128) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10).
4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
5. On July 9, 2007, Bruce Pearson, Safety Compliance Officer ("SCO Pearson") inspected Respondent's work site at 2413 Buck Horn Road in Sanford, North Carolina ("site") on the basis of a partial inspection after he was notified of a truss or roof collapse by the Lee County Fire Marshall.
6. SCO Pearson was informed that at approximately 4:05 the trusses collapsed and 3 employees were taken to the hospital. The Fire Marshall required DH Co. employees to stop work until OSHA arrived.
7. When SCO Pearson arrived at the site at 6:15 p.m., there was no construction going on.
8. SCO Pearson held an opening conference with Denny Hunter ("Hunter"), sole owner of Hunter Construction. He presented his credentials and was given permission by Hunter to inspect the activity at the church.
9. DH Co. was constructing a 50' x 90' fellowship hall building at Baptist Chapel Church in Sanford, NC.
10. SCO Pearson returned to the site on July 10, 2007 and July 12, 2007 where he took additional photographs and interviewed employees. He confirmed that three employees received injuries; three with multiple cuts and bruises and one with a broken arm.

11. SCO Pearson conducted a closing conference with Hunter on August 20, 2007 and he recommended that citations be issued as follows:

Citation 1 Item 1: Serious

Citation 1, Item 1 alleges a serious violation of NCGS § 95-129(1) of the Occupational Safety and Health Act of North Carolina: "The Employer did not furnish each of his employees conditions of employment and a place of employment free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to fall from/struck by hazards;

- (a) job site – on July 9, 2007 employee(s) were working at a height of approximately 10' above the lower level when the approximately 10'2" high truss structure they were working on collapsed due to inadequate (diagonal and/or lateral).

The proposed penalty for this violation was \$2100.00.

Citation 1 Item 2: Serious

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. 1926.102(a)(1): "Eye and face protective equipment was not used when machines or operations presented potential eye or face injury from physical, chemical, or radiation agents:

- (a) job site – where an employee was operating equipment such as, but not limited to, pneumatic nail gun without eye protection when exposed to struck by hazards.

The proposed penalty for this violation was \$350.00.

Citation 1 Item 3a: Serious

Citation 1, Item 3a alleges a serious violation of 29 C.F.R. 1910.501(b)(1): "Employee(s) on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level were not protected from falling by the use of guardrail systems, safety net systems or personal fall arrest system:

- (a) job site – where employee(s) were installing 49' 2" long prefabricated wood trusses while standing on top of the outside top plate at a height of approximately 10' above the ground (outside) and above the concrete slab (inside) without the use of a fall protection system.

The proposed penalty for this violation was \$2100.00.

Citation 1 Item 3b: Serious

Citation 1, Item 3b alleges a serious violation of 29 C.F.R. 1910.21(b)(2): "The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury;

- (a) job site – where employer failed to instruct employee(s) in the hazards associated with the installation of roof trusses and how to avoid these hazards through the installation of adequate temporary bracing.

Citation 1 Item 3c: Serious

Citation 1, Item 3c alleges a serious violation of 29 C.F.R. 1910.503(b)(1): The employer did not verify compliance with paragraph (a) of this section by preparing a written certification record:

- (a) job site – where the employer did not document fall protection training for employee(s) exposed to fall hazards.

12. Three different types of trusses were to be installed for this project ranging in weight from 102 lbs to 497 lbs to 676 lbs. Forty six trusses in all were to be installed.
13. At the time of the collapse, Respondent was in the process of installing the 45th truss. Thirty four trusses collapsed and 11 remained standing. (See exhibit C-3)
14. The 1st truss was braced with diagonal ground braces on the exterior, diagonal ground braces from the concrete on the interior and vertical ground braces to the 1st truss as well as metal truss spacers.
15. The bracing provided by Hunter provided counter-stability on 1st truss which supported trusses 1-10.
16. Trusses 11-45 were braced with the metal truss spacers and ground bracing every 5 trusses. No diagonal bracing was used.
17. SCO Pearson photographed the outside of the truss spacer box which read "Warning: Truss Spacers are not to be used for bracing" (See exhibit C-5) and on the actual metal truss spacer, it read "for spacing only not for bracing". (See exhibit C-6)

18. SCO Pearson was informed by the manufacturer of the metal truss spacers that the spacers were made of 22 gauge metal with no structural value and will bend easily. (See exhibit C-10)
19. SCO Pearson relied on the Truss Plate Institute recommendations on how to temporarily brace trusses to prevent accidents or collapse and he testified that diagonal or lateral bracing should be used as temporary bracing in accordance with the recommendations. He also testified that temporary bracing is used to prevent trusses from collapse until building construction is complete; lateral bracing keeps the truss in place from shifting.
20. SCO Pearson testified that top chord lateral restraints should have been used for bracing instead of the metal truss spacers that were used.
21. Hunter has been in the framing and construction business for 35 years and is familiar with the practice of erecting trusses. He has used the same method for erecting trusses for 35 years.
22. Hunter testified that his method is consistent with industry standards.
23. Hunter sets 1 truss at a time and hammers truss into top plate. After the truss is nailed, he would make troths (L shaped) on ground which was erected up to truss. He used truss spacers for bracing for 25 years. Hunter would also install floor (ground) bracing every 10'; every 5 trusses have floor braces.
24. In Hunter's opinion bracing in the shape of a triangle is stronger.
25. After all the trusses were erected, Hunter would then permanently brace with 2x4 continuous lateral bracing.
26. Hunter testified on cross that he relied on ground bracers and truss spacers to provide stability. He was informed by the manufacturer of truss spacers that they were not adequate for permanent bracing, he was not told to not use it as temporary bracing.
27. The bracing provided by Hunter did not provide counter-stability on the trusses that collapsed.
28. Jeff Carter, an employee of Respondent, testified that he started with Respondent in 1999 and received on-the-job training. They never followed lateral bracing like the recommendations because he testified it was unsafe to take off lateral bracing and it was extra work; not necessary.

29. Both Hunter and Carter testified that a strong gust of wind caused the trusses to collapse.
30. The wind speed at the airport, 8 miles from the site, around the time of the collapse was less than 6 mph.
31. The truss collapse was consistent with the direction of the wind.

Citation 1: Item 1a Truss Erection

32. In order to prove a serious violation of the general duty clause, the Complainant must prove that the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed; the hazard was recognized in the industry; the hazard was causing or was likely to cause death or serious physical harm; and there was a feasible and useful method to correct the hazard.
33. The issue presented in this case is whether the complainant proved by a preponderance of the evidence that the manner in which the respondent erected and subsequently braced the trusses created a hazard.

Discussion

The respondent argues that this was a freak accident, the SCO did not understand the process of Hunter's truss erection and that Hunter had 35 years of experience in erecting trusses. He argued that the Complainant must show a recognized hazard under the general duty clause and moreover that the Complainant did not show a better way of erecting trusses. Even in the light most favorable to the Respondent where a gust of wind caused the collapse, the fact remains, that there was no counter-stability in the manner Hunter erected the trusses to prevent such a collapse. If the manner in which the trusses are erected is such that it cannot withstand a "gust of wind", then it logically follows that the manner in which the trusses are erected creates a hazardous condition. All of the evidence, from testimony at the hearing and witness statements, suggests that there was not even a swaying or shifting before the collapse, the trusses just laid down. Carter testified that after the wind "hit me, a domino effect started at 12 (truss) and worked toward me in the direction of the wind". If Hunter, in his many years of experience chooses not to follow the Truss Plate Institute recommendations on adequate truss bracing, as determined by the Complainant as a better way to temporarily brace trusses, then Respondent must find a way to provide adequate counter-stability for temporary truss bracing.

34. The failure to adequately brace the trusses created a safety hazard, a truss collapse hazard, to Respondents employees.
35. Four employees were exposed to the risk.
36. A possible truss collapse due to the failure to adequately brace trusses is a hazard recognized in the industry.
37. A truss collapse fall hazard was created where employees of Respondent were working at a height of approximately 10 feet above the concrete surface below.
38. The substantial probable result of such an accident would be broken bones and /or death due to the weight of trusses and employee exposure.
39. Respondent was aware or with reasonable diligence should have been aware that the temporary bracing of trusses were inadequate.
40. Diagonal or top chord lateral restraints should have been used to correct the hazard.
41. Respondent could have also had engineer or builder lay out plans as how to properly temporarily brace to prevent collapse.
42. The SCO properly found the severity level to be high due to the risk of death or serious bodily injury and recommend the penalty of \$7,000.
43. Respondent was given the maximum credit for size and cooperation.
44. The proper adjusted penalty was \$2,100.

Citation 1: Item 2 Nail Gun

45. On July 10, 2007, the day after the collapse, SCO Pearson observed and photographed Respondent's employee, Jeffrey Carter, standing on the top plate of the framed structure with a pneumatic nail gun.
46. SCO Pearson saw him standing on the top plate and heard the gun being operated and took photographs. (See exhibits C-17, C-18 and C-19) SCO Pearson did not see Carter operating the pneumatic nail gun.
47. SCO Pearson determined that Respondent's employee was operating the pneumatic nail gun without eye protection.

48. Denny testified that they were not there on July 10 to put in any bracing. Carter was on top plate to get the gun and give it to someone else.
49. Carter testified that he was on top plate to retrieve gun. The pneumatic nail gun was used to shoot framing nails on ground.

Citation 1: Item 3a Fall Protection

50. Respondents' employees were working within webbing of the structure and on a 6" wide top plate when installing the trusses without fall protection.
51. SCO Pearson testified that scaffolds or ladders could have been used.
52. Respondent employees were working on a "A" frame ladder, a 4' to 10' ladder, where they could nail in 2 trusses before moving the ladder.
53. Respondent employees were unable to tie off because trusses were not permanent.
54. Scaffolds could only be put up as high as ceiling and were not high enough to undo crane.

Citation 1: Item 3b Training

55. There was no specific training and instruction provided to Respondent employees in the hazards created from temporary bracing.
56. They were not instructed on lateral and diagonal bracing.
57. They received "on the job training" and installed trusses in the same manner Hunter had been installing trusses for 25 years.
58. Not knowing how to properly install temporary truss bracing created the possibility that an accident, truss collapse, could occur.
59. The substantial probable result of such an accident would be broken bones and/or death.
60. Respondent could have instructed the employees on the Truss Plate Institute recommendations or on how to install diagonal or lateral bracing.
61. The penalty was grouped with Citation 1: Item 3a.

Citation 1: Item3c Written Certification

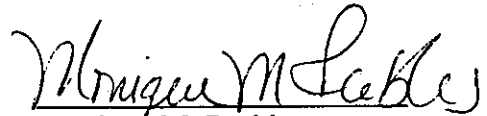
62. Prior to the inspection, Hunter said he covered fall protection training with his employees but did not have documentation.
63. Employees had fall protection training and knew what was required.
64. Hunter did provide training, but did not have any documentation.
65. Failure to provide written certification does not create the possibility of an accident.

CONCLUSIONS OF LAW

66. 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.
67. Respondent is subject to the provisions and jurisdiction of the Act.
68. Complainant proved by a preponderance of the evidence that respondent violated NCGS § 95-129(1), in that the Respondent did not furnish each of his employees a place of employment free from recognized hazards by erecting a structure with inadequate temporary bracing.
69. Complainant has failed to prove by the greater weight of the evidence that the respondent violated 29 CFR 1926.102(a)(1).
70. Complainant has failed to prove by the greater weight of the evidence that the respondent violated 29 CFR 1926.501(b)(1).
71. Complainant proved by a preponderance of the evidence that Respondent violated 29 CFR 1926.21(b)(2) in that training and instruction was not provided to employees on the proper installation of temporary truss bracing.
72. Complainant proved by a preponderance of the evidence that respondent violated 29 CFR 1926.503 (b)(1) in that there was no written certification record.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED** that Citation 1, Item 1 alleging a serious violation of NCGS § 95-129(1) is hereby affirmed; Citation 1 Item 2 alleging a serious violation of 29 CFR 1926.102(a)(1) is hereby dismissed; Citation 1, Item 3a alleging a serious violation of 29 CFR 1926.501(b)(1) is hereby dismissed; Citation 1, Item 3b alleging a serious violation of 29 CFR 1926.21(b)(2) is hereby affirmed; and Citation 1, Item 3c alleging a serious violation of 29 CFR 1926.503(b)(1) is hereby affirmed.

This the 10 day of February 2009.



Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

MICHAEL C. LORD
WILLIAMS MULLEN PC
P O BOX 19764
RALEIGH NC 27619-9764

by depositing same the United States Mail, Certified Mail and regular mail, postage prepaid at Raleigh, North Carolina, and upon:

LINDA KIMBELL
NC DEPARTMENT OF JUSTICE
Labor Section
P O Box 629
Raleigh NC 27602-0629

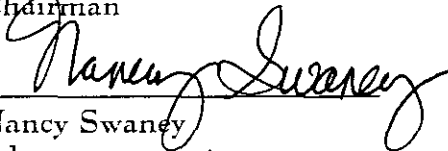
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
Legal Affairs Division
1101 Mail Service Center
Raleigh, North Carolina 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 13th DAY OF February, 2009.

OSCAR A. KELLER, JR.
Chairman



Nancy Swaney
Administrative Assistant,
NC Occupational Safety & Health Review Commission
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