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

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA	)	
COMPLAINANT,	)	**ORDER**
v.	)	
NATIONAL ERECTORS REBAR, INC. and its successors	)	**OSHANC NO: 2008-4768** **INSPECTION NO.; 311342935** **CSHO: V3922**
RESPONDENT.	)	

THIS MATTER came on for consideration by the undersigned pursuant to a Notice of Hearing dated October 1, 2008. The hearing was held at 222 N. Person Street in Raleigh, North Carolina. Complainant was represented by Tawanda Foster-Williams, Assistant Attorney General. Complainant's witness was Jorge Cardenas, Safety Compliance Officer, North Carolina Department of Labor, Occupational Safety and Health Division. Respondent was represented *pro se* by Mr. Lennis Cash, Safety Director for National Erectors Rebar, Inc. Respondent's witness was Lennis Cash.

Based upon the evidence presented at the hearing and with due consideration of all arguments and contentions of the parties' counsel or representatives, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly:

ISSUES PRESENTED

1. Did Complainant meet its burden of proving by a preponderance of evidence that Respondent violated 29 CFR 1926.501(b)(1) by not

protecting employees on a walking/working surface with an unprotected side or edge which was six feet or more above a lower level from falling by the use of guardrail systems, safety net systems or personal fall arrest systems?

2. Did Complainant meet its burden of proving by the preponderance of evidence that Respondent violated 29 CFR 1926.503(a)(1) by failing to provide a training program for each employee who might be exposed to fall hazards that would enable each employee to recognize the hazards of falling and that trained each employee in the procedures to be followed in order to minimize the hazards? Or, *in the alternative,*

3. Did Complainant meet its burden of proving by the preponderance of evidence that Respondent violated 29 CFR 1926.503(b)(1) by not preparing a written certification record showing compliance with 29 CFR 1926.503(a)?

SAFETY STANDARDS AND STATUTES AT ISSUE

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

> 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.

2. 29 CFR 1926.503(a)(1) provides as follows:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

3. 29 CFR 1926.503(b)(1) provides as follows:

> The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer. If the employer relies on training conducted by another employer or completed prior to the effective date of this section, the certification record shall indicate the date the employer determined the prior training was adequate rather than the date of actual training.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed a citation issued to enforce the Occupational Safety and health Act of North Carolina (hereinafter referred to as "OSHANC").

2. 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 OSHANC.

3. Respondent is a construction/rebar installation company and, as an employer, is subject to the provisions of OSHANC.

4. On or about October 15, 2007, Complainant's Safety Compliance Officer, Jorge Cardenas, began an inspection of the Respondent's construction worksite at 301 Fayetteville Street in Raleigh, North Carolina (hereinafter referred to as the "site"). During the course of the inspection, Officer Cardenas took photographs, made notes, interviewed employees and obtained documents. At the hearing SCO Cardenas testified as to his findings from his inspection activities.

5. CSHO Cardenas was assigned to inspect this site following a report of an accident where an employee of National Erectors Rebar, Inc. fell through a hole in the temporary

flooring of the 22nd story of the RBC Tower which was under construction at the corner of Fayetteville and Martin Streets in Raleigh, NC.

6. At the time of the accident there were three contractors on site. Hardin Construction was the general contractor for the project. Southern Panel Services was a sub-contractor hired by Hardin Construction, and National Erectors Rebar, Inc. was hired by Southern Panel Services to install rebar.

7. Mr. Fredy Casco-Murillo was an employee of National Erectors Rebar, Inc. and was working "installing chairs" on the temporary flooring before rebar was installed and concrete was poured when he accidentally fell through a hole that was approximately 3' X 32'. Mr. Casco-Murillo fell 14 feet to the next lowest level of the structure, landing on the concrete floor, steel rods and debris.

8. At the time Mr. Casco-Murillo fell through the hole, he was wearing a fall protection harness, but he was not tied off.

9. The pictures taken by SCO Cardenas (Complainant's Exhibits 3 and 4) show guardrails put up around the hole through which Mr. Casco-Murillo fell; however, the guardrails were not up at the time of the accident, and Respondent did not contend that the guardrails were up at the time of the accident. The hole was open and obvious.

10. Mr. Casco-Murillo had only been employed with the National Erectors Rebar crew for approximately 6 months and had not been trained sufficiently, if at all, in fall protection.

11. There is no evidence that the fall protection device worn by Mr. Casco-Murillo was tied off and that it just failed to work.

12. Shortly before Mr. Casco-Murillo fell through the hole, Mr. Eduardo Zepeda, Foreman for the crew, had been standing near him and the unguarded hole, giving instructions to the five man crew that was responsible for installing the "chairs".

13. There were four other workers on the 22nd story of the RBC Tower at the time of this accident who were also wearing harnesses, but they were not tied off either.

14. SCO Cardenas interviewed Mr. Lennis Cash, Safety Director for National Erectors Rebar, Inc. and asked Mr. Cash whether Mr. Casco-Murillo had been trained in fall protection. Mr. Cash initially said that Mr. Casco-Murillo had missed the fall protection training. At the hearing, Mr. Cash testified that SCO Cardenas was lying as to the claims that he, Mr. Cash, had said that Mr. Casco-Murillo had not been trained in fall protection.

15. Mr. Casco-Murillo had missed the fall protection training session that was offered because he had not been employed at the time the training was offered previously.

16. Fall protection training at the Respondent at the time of the accident was offered in a cycle and Mr. Casco-Murillo would have been eligible to attend the next training.

17. Mr. Cash strongly disputed claims by SCO Cardenas as to the absence of training for Mr. Casco Murillo and offered Exhibit R-3 (Complainant's Exhibit 12) as evidence that there had been training on fall protection for Mr. Casco-Murillo.

18. Exhibit R-3 has Mr. Casco-Murillo's name on it as an attendee, but the only thing on the exhibit to suggest that it was a record of fall protection training are the words, "fall Protection" listed under a heading, "Course Topics:". The only description of the training on the exhibit which was entitled, "Training Log," was generic questions for discussion relating to the cause of accidents and carelessness. Other than the topic listed

at the top of Exhibit R-3, there were no words to suggest that any substance relating to fall protection had been discussed in the 'course' identified by this Exhibit.

19. Mr. Cash also offered Exhibit R-4, pages 1 and its backside, as evidence of fall protection training given to Mr. Casco-Murillo. The name "Fredy Casco" is listed on the back side. This exhibit is not on the National Erectors form like Exhibit R-3 but is on a "Safety Talk" form from the Carolinas AGC the content of which is entirely discussing how to wear and use a full-body harness. There is no discussion of guard rails, safety netting or related aspects of fall prevention. Exhibit R-4, page 1 is not signed, although there is a Respondent official's name, Russell Foust, and a date printed at the top of the page. Page 4 of the same exhibit lists "Fall Protection" as a "common safety violation" that can be serious. Mr. Casco is listed as an attendee on this page, but nothing about fall protection is described.

20. At the time of the accident, Respondent's contract with Southern Panel Services, Inc. obligated it to cover any hole such as what Mr. Casco-Murillo fell through or install guard rails before the controlled access ropes were removed for the National Erectors crew to do its work.

21. Respondent acknowledged at the hearing that it is responsible for safety of its employees.

22. As a result of the inspection, on December 4, 2007, a citation was issued to Respondent alleging violations of 29 C.F.R. 1926.501(b)(1) [Item 1a] and 29 C.F.R. 1926.503(a)(1) or in the alternative, 29 C.F.R. 1926.503(b)(1) [Item 1b].

23. Respondent timely filed its Notice of Contest and this Commission has jurisdiction over the subject matter and the parties to this action.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. This Court has jurisdiction of this cause and the parties are properly before the Court.

3. The Complainant has proven by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 CFR 1926.501(b)(1) for having employees work above six feet without fall protection.

4. The Complainant has proven by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 CFR 1926.503(a)(1) for not providing a fall hazards training program to each employee exposed to that danger.

5. The assessed penalty of $2,100.00 in this matter is appropriate.

DISCUSSION

Citation I, Item 1(a) alleges a serious violation of 29 CFR 1926.501(b)(1). This provision provides that each employee on a walking surface with an unprotected side or edge which is 6 feet or more above a lower level shall be protected from falling by use of guardrail systems, safety net systems or personal fall arrest systems.

In order to prove a serious violation of an OSH standard the Complainant must prove the following:

1. A hazard 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.

It is uncontested in this matter that at the time of the accident, Fredy Casco-Murillo and other workers were working on the 22nd floor of the RBC Tower. The 22nd floor was approximately 14 feet above the next lowest level, the 21st floor. The walking/working surface was temporary flooring that consisted of plywood sheets that were placed on metal scaffolding supports. There were no guard rails around the open hole in the floor, which measured 3' X 32'. There were no safety nets at the time of this accident. The employees of National Rebar Erectors were wearing harnesses, but they were not tied off. The work of the employees was being directed by the foreman who stood close to the hole himself. The failure to protect the employees from the open hole in the floor created a serious hazard that was substantially likely to cause an accident that would result in death, broken bones or other serious injury. This hazard could have been abated by the employer installing guard rails, safety nets or properly tying off the personal fall arrest harnesses already being worn by the employees. The fact that the employees were wearing harnesses shows that Respondent knew of the possibility of harm to the employees, and if the Respondent had properly evaluated the conditions that existed, it should have known to insist that the employees tie off their harnesses.

Respondent's Safety Director argued at the hearing that this was a case of worker negligence. Presumably, Respondent was intending to argue that this was a case of isolated employee misconduct. The elements of the defense of isolated employee misconduct are as follows:

a. Respondent had work rules designed to prevent the violation

b. The rules were adequately communicated to the employees

c. Respondent had taken steps to discover violations of work rules

d. Respondent effectively enforced the rules when violations had been discovered

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In order for Respondent to establish this defense, it would have needed to introduce evidence that the employees were subject to work rules that required them to not only wear fall protection devices but to tie them off. By inference there may have been such rules in existence given that the workers were wearing harnesses, but there was no evidence admitted to show the existence of such rules, that they were adequately communicated to the employees, or that Respondent had taken steps to discover violations of the rules and to enforce the rules. Consequently, to the extent that Respondent intended to argue that the isolated employee misconduct rules applied, this defense failed for lack of evidence that it should apply.

Respondent also suggested that its contract with Southern Panel Services, Inc. required Southern Panel to make the working surface safe for Respondent's employees, and that the employee injury in this case was their fault. Respondent conceded however that it was responsible for the safety of its employees. The provisions of 29 CFR 1926.16 speak

to the obligations of the Respondent in this context. That regulation provides in paragraph (c) that:

> . . . With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.

And in paragraph (d), the regulations state that:

> Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act. (emphasis added)

The contractual obligations of Respondent's prime contractor do not eliminate or decrease the Respondent's responsibility for the safety of its employees.

Citation 1, Item 1(b) alleges a violation of 29 CFR 1926.503(a)(1) or in the alternative, 29 CFR 503(b)(1). 29 CFR 1926.503(a)(1) provides that:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

The injured employee, Mr. Fredy Casco-Murillo, had not been trained adequately, if at all, in fall protection. There is limited evidence that Mr. Casco-Murillo and his crew might have received some instruction in fall protection because he and the other members of his crew had harnesses on at the time he fell. None of the crew members were tied off, however. In addition, Respondent's Exhibit 3 had this employee's name, and others' on it as attendees; however, the exhibit -- and its questionable documentation of instruction on fall protection -- and the fact that the harnesses were being worn without being tied off, do not negate the facts found herein that the employer's training was cyclical and Mr. Casco-Murillo's fall protection training had not yet occurred. Cyclical training is not an excuse for putting an employee in harm's way without the benefit of the training that the regulations require.

Respondent's Exhibit R-4 also fails to establish that Respondent had instructed the employees sufficiently to recognize the hazards of falling since that exhibit was limited to how to wear and use a harness. As noted and found, there is no discussion of guard rails, safety netting or related aspects of fall prevention discussed in R-4. The regulation requires that the training "enable each employee to recognize the hazards of falling." The evidence in this record establishes that Mr. Casco-Murillo and his coworkers were not trained sufficiently to enable him or them to recognize the hazards of falling.

In summary, the lack of training on fall protection created a hazard, especially with Respondent hiring employees to work on top of 22 story buildings. Respondent's employees were exposed to dangers created by holes in the temporary floors on which they installed "chairs" as well as dangers of working near the edges of such buildings. Not understanding or recognizing the hazards of falling when working off the ground at heights over six feet creates a significant risk of accidents and the higher the employee gets off the ground, the more substantial is the risk that an accident will result in death or serious physical injury. Respondent knew or should have known of the lack of fall protection training, especially since it hired at least one employee after the last fall protection training and knew that that employee had not yet received the training.

While Respondent did attempt to offer evidence to rebut Citation 1, Item (1)(b) and the evidence offered by the Commissioner, it falls short. The Commissioner carried the burden of proof to establish the violation more probably than not. Thus, the Commissioner proved a violation of 29 CFR 1926.503(a)(1).

Having found a violation of Item 1b, there is no need to address the alternative question of certification of training.

ORDER

1. Based on the foregoing Findings of Fact, Conclusions of Law and Discussion it is hereby ORDERED, ADJUDGED, and DECREED, that Citation 1, Item 1(a) and Item 1(b) are upheld and the penalty for violation of Item 1(a) of $2,100 is AFFIRMED.

2. Payment of the penalty shall be made within thirty (30) days of the date this ORDER is entered.

This the 31 day of July, 2009.

Reagan H. Weaver
Administrative Law Judge