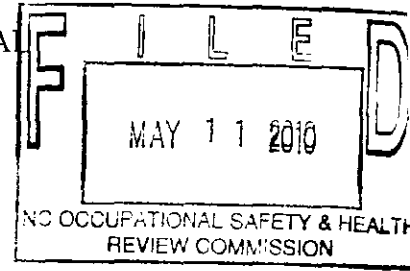


BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2008-4839
OSHA INSPECTION NO. 311941173
CSHO ID: I2782

vs.

DA THOMAS CONSTRUCTION
COMPANY INC.
and its successors

ORDER

Respondent.

APPEARANCES:

Complainant:

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

Respondent:

**Andy Gay, Daniel, Patrick, McNally, Gay & Jackson, LLP
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 March 30, 2010, at the North Carolina Medical Society Auditorium, 222 North Person Street in Raleigh, North Carolina.

The complainant was represented by Ms. Linda Kimbell, Assistant Attorney General and the respondent was represented by attorney Andy Gay, Daniel, Patrick, McNally, Gay & Jackson, LLP. Present for the hearing for the Department of Labor, OSHA Division, was Mr. Shay Wingate, Health & Safety Compliance Officer. Present at

the hearing for the respondent was David Thomas, Jr., president and owner of DA Thomas Construction, Inc.

The undersigned denies Respondent's motion to consider any evidence presented at the hearing as a defense of employee misconduct and the undersigned did not consider the evidence presented in the testimony of Respondent's expert witness Don Wiseman regarding whether the standard was applicable insofar as Mr. Wiseman was merely giving his own interpretation of what it meant.

After reviewing the record file and 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.

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 December 8, 2008, contesting a citation issued on November 21, 2008 to Respondent, DA Thomas Construction. ("Respondent" or "DA Thomas")
3. Respondent, a corporation which does construction business in the State of North Carolina and maintains a place of business in Franklin 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). Respondent employs 31 workers.
4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
5. On July 1, 2008, Shay Wingate, Health & Safety Compliance Officer ("HSCO Wingate") inspected Respondent's site at Vance-Granville Community College in Louisburg, North Carolina ("site") on the basis of a comprehensive inspection on the basis of a fatality.
6. HSCO Wingate conducted an opening conference with Mr. David Thomas, Jr., ("Thomas") Mr. Puckett and a representative from Thomas' insurance company. He presented his credentials to Thomas and was given permission to do the inspection.

7. Respondent is a general contractor in the commercial construction business and Respondent was engaged in the demolition and new installation of lighting in a 3 level classroom building at the site at the time of the fatality.
8. Mr. Eric Johnson ("Johnson") was the superintendent on the site and Mr. Gregory Salgado ("Salgado") was the Project Manager on the site and was responsible for hiring the subcontractors needed at the site.
9. Salgado hired several subcontractors including Christian Ruiz ("Ruiz"), owner of Construction Services or Construction Ruiz, who performed the work in removing the old lighting and installation of new lighting at the site.
10. HSCO Wingate took photographs and interviewed employees but did not take any written statements.
11. HSCO Wingate determined the Respondent was the controlling employer and a multi-employer worksite before recommending that citations be issued.
12. HSCO Wingate conducted a closing conference with Thomas and based on observed violations and witness statements recommended that citations be issued.
13. As a result of the recommendations of the compliance officer, on November 21, 2008 the Complainant issued Citations to Respondent as follows:

Citation 1 Item 1a: Serious

Citation 1. Item 1a alleges a serious violation of 29 CFR 1926.95(a): "Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices and protective shields and barriers, were not provided, used or maintained in a sanitary and reliable condition whenever it was necessary by reason of hazard encountered in or maintained in a sanitary and reliable condition whenever it was necessary by reason of hazard encountered in a manner capable of causing injury or impairment in the function of any part of the body through physical contact:

- (a) job site – where independent sub-contractors were allowed to work on energized electrical wires while installing ceiling lights in a 277V ballast. The proposed penalty for this violation was \$2100.00.

Citation 1 Item 1b: Serious

Citation 1, Item 1b alleges a serious violation of 29 C.F.R. 1926.20(b)(2):
“The employer’s safety and health program did not provide for frequent and regular inspections of the job sites, material, and equipment to be made by a competent person:

- (a) job site – where sub-contracted employees of Tek-Wall and Isaias Vargas Gonzales dba Isaias Vargas were performing renovations inside the classroom.
- (b) Job site- where the employer failed to take corrective action when independent sub-contractors were installing “Parabolic Troffler, 2’x4’, 3” Louver, 18-cell, 3-Lamp, Electronic MVOLT “Bl1st, that requires 3-32 watt T8 lamp ceiling lights and did not de-energize wires or use appropriate PPE.

- 14. The energy room where circuit/control panel was located was locked and security for the building had authority to lock and unlock the door at the request of Johnson.
- 15. The electrical circuit for the classroom where the Ruiz subcontractors were working, including the decedent, Fabian Hernandez, was not deenergized, so the power was not blocked to the classroom.
- 16. Ruiz subcontractors used the light switch, turning it on and off to test if the lighting was working properly.
- 17. Electricians are able to safely work on energized wires with protective equipment and insulated tools.
- 18. The decedent was electrocuted while working on installing new lighting in the classroom at the site while the electrical wires were energized.
- 19. His tools were not insulated and he was not wearing protective equipment such as head gear, arm shields or protective gloves.
- 20. HSCO Wingate testified that he was told that no one from Respondent’s company did safety inspections and Thomas testified that Johnson did safety inspections every day.
- 21. Thomas testified that respondent did not conduct safety meetings at the site but he had someone there walking around.
- 22. Respondent did not ask Ruiz subcontractors if the lines were energized or deenergized.
- 23. Respondent did not ask Ruiz subcontractors if they were using insulated tools.

24. There were no clearly visible safety violations at the site prior to the fatality.
25. Respondent relied on the subcontractor's Ruiz' expertise as electricians who can safely work on energized wires with proper tools and Respondent had no reason to believe that the work was not being performed safely.

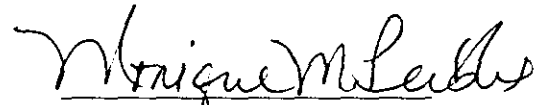
CONCLUSIONS OF LAW

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 and jurisdiction of the Act.
3. Complainant did not carry its burden of proof to establish Respondent's lack of reasonable diligence as the general contractor in inspecting the site to detect violations that Ruiz, its subcontractor, may have created in working on energized wires without using insulated tools or personal protective equipment in violation of 29 CFR §1926.20(b)(2).
4. Whereas (1) there was no evidence that the work was not being performed safely and (2) there was no evidence that the manner in which the subcontractor Ruiz complied with its own safety obligations was unsafe, Respondent's reliance on the subcontractor Ruiz's expertise was appropriate and was not in violation of 29 CFR §1926.20(b)(2).
5. Not inquiring into whether Ruiz subcontractors were using insulated tools was not tantamount to unreasonable diligence in detecting safety violations on the part of Respondent in violation of 29 CFR §1926.20(b)(2).
6. Complainant failed to prove by a preponderance of the evidence that the Respondent was in violation of 29 CFR §1926.95(a).
7. Complainant failed to prove by a preponderance of the evidence that the Respondent was in violation of 29 CFR §1926.20(b)(2).

BASED UPON the foregoing FINDINGS OF FACT and
CONCLUSIONS OF LAW, **IT IS ORDERED ADJUDGED AND DECREED**
that Citation 1, Item 1a alleging a serious violation of 29 CFR 1926. 95(a) is

hereby dismissed with no penalty and Citation 1 Item 1b alleging a serious violation of 29 CFR 1926.20(b)(2) is dismissed with no penalty.

This the 7 day of May 2010.


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:

ANDY W GAY
DANIEL PATRICK McNALLY
GAY & JACKSON LLP
PO BOX 10
ZEBULON NC 27597

by depositing same the United States Mail, Certified 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

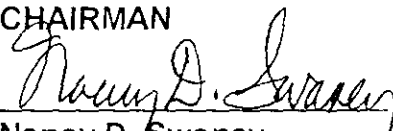
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

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

THIS THE 11th DAY OF May 2010.

OSCAR A. KELLER, JR.
CHAIRMAN


Nancy D. Swaney
Administrative Assistant
NC Occupational Safety & Health Review Commission
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