

BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR)
THE STATE OF NORTH CAROLINA)
)
COMPLAINANT,)
)
v.)
)
SHEA BUILDERS, LLC,)
and its successors,)
)
RESPONDENT.)
_____)



OSHANC NO. 2016-5762
INSPECTION NO. 318024619
CSHO ID NO. G7653

THIS MATTER was duly scheduled for hearing and was heard by the undersigned on July 6, 2016 in Charlotte, North Carolina.

The complainant is represented by Rory P. Agan, Assistant Attorney General; the respondent is represented by Philip M. Van Hoy of the law firm Van Hoy, Reutlinger, Adams & Dunn.

There were no preliminary matters or motions to consider and counsel for the parties made no opening statements or closing arguments. Instead, counsel for the parties agreed to obtain a transcript and submit post-hearing briefs.

After hearing and receiving the evidence and considering the post-hearing briefs, the undersigned makes the following

FINDINGS OF FACT

1. The complainant as Commissioner of Labor is charged by law with responsibility for compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").
2. The respondent is a limited liability company licensed as a general contractor in the State of North Carolina.
3. On the morning of October 6, 2015, Richard Kraemer, a health compliance officer for the complainant, conducted a "drive by" inspection of the Barrington subdivision under construction in Waxhaw, North Carolina, pursuant to the complainant's special emphasis program for construction in Union County, North Carolina.

4. As Mr. Kraemer drove into the subdivision from the public road, he observed residential construction underway on several lots and then a new residence under construction at 8308 Fairgreen Avenue, where workers were constructing second floor exterior walls.

5. Mr. Kraemer observed four workers working on the subflooring of the second floor on the "roof" of the first floor. He did not see any fall protection in place while this work was ongoing, either personal fall arrest equipment, guard rails or otherwise. The working area was more than six (6) feet above the ground.

6. Mr. Kraemer took a number of photographs of the jobsite, all of which were admitted into evidence.

7. Mr. Kraemer conducted an opening conference, during which he learned that the respondent was the general contractor in this subdivision. Andrade Framing, LLC ("Andrade") was the framing subcontractor for the 8308 Fairgreen Avenue house.

8. He also learned that Andrade had subcontracted its work on the 8308 Fairgreen Avenue house to Olivia Fausto Framing, LLC ("Fausto"). There were seven workers on the jobsite when Mr. Kraemer arrived, all of whom were Fausto employees. No other persons were on the jobsite, including any of respondent's employees.

9. At the time of the inspection, the respondent had multiple houses under construction in the Barrington Park subdivision. It normally had two employees on site, Superintendent Johnny Miller and Assistant Superintendent Robert Pool. The respondent had a construction office in the subdivision. This office was not physically close (¼ to ½ mile away) to the 8308 Fairgreen Avenue house and such house could not be seen from the construction office.

10. Mr. Miller was the employee of respondent responsible for the 8308 Fairgreen Avenue house. He was in meetings at a house in the subdivision at the time of Mr. Kraemer's arrival and came to the jobsite within one-half hour.

11. Mr. Miller was in the subdivision on the preceding day but left about 2:00 pm to attend to an off-site meeting. Neither he nor any employee of respondent observed any work done by Fausto the preceding afternoon or on the morning of the inspection. There is no dispute that no framing of the second floor occurred until the morning of October 6, 2015.

12. Mr. Kraemer testified that he took oral witness statements from the Fausto employees on the site but did not obtain signed witness statements. Obtaining written witness statements is a standard practice of the complainant in these cases. The lack of such statements bears on the issues of respondent's actual or constructive knowledge of the facts of fall protection on the second floor.

13. The complainant offered no evidence concerning the status of construction of the second floor on any preceding workday such as to make it persuasive from an evidentiary perspective that the respondent knew or reasonably could have known that there was work being performed at the 8308 Fairgreen Avenue jobsite that was noncompliant with the provisions of the Act, as alleged.

14. No person with the respondent admitted to actual or constructive knowledge of the work being performed on the second floor on the jobsite. No employee of the respondent created the cited hazards and no employee of the respondent was exposed to these hazards.

15. There was evidence that either Mr. Miller or Mr. Pool conducted a daily inspection of the jobsites under construction and noted safety issues. There was no such inspection on the afternoon before the inspection by Mr. Kraemer and no indication of the status of the work at the 8308 Fairgreen Avenue jobsite at that time.

16. There is no dispute about the lack of fall protection on the second floor of the structure relative to the provisions of the Act as of the time of the inspection by Mr. Kraemer. Also, there is no dispute that four employees of Fausto were exposed to this hazard.

17. There is no dispute that violation of the Act as generally reflected in the Citation Item occurred and that the proposed penalty was properly calculated pursuant to the Field Operations Manual, if it could be established that the respondent violated the provisions of the Act.

18. Citations relating to this jobsite condition were issued by the complainant to Andrade and to Fausto.

19. The respondent conducted monthly meetings with its subcontractors in this subdivision, which meetings included safety topics. Fausto was not a part of these meetings because it was not a regular subcontractor used in this subdivision. Andrade did not notify respondent that it was using Fausto to perform framing work on the 8308 Fairgreen Avenue house.

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 respondent is subject to the provisions of the Act.

3. The burden of proof is on the complainant to prove by the greater weight of the evidence that respondent had either constructive or actual knowledge of the cited condition and violation and that it violated the cited provision of the Act.

4. The complainant has failed to prove by the greater weight of the evidence that respondent had constructive or actual knowledge of the fall protection violation of Andrade or Fausto, for which it has been cited in this case.

5. Since the complainant failed to prove a violation by the respondent of the underlying cited standard, the Citation Item cannot be determined to be a repeat violation.

DISCUSSION


Under the Act, a general contractor's duties extend to the safety and health of employees of subcontractors on jobsites controlled by the general contractor. However, the general contractor's duty in such a situation is a reasonable duty and the general contractor is only liable for violations create by its subcontractors if it could reasonably have been expected to detect the violation. Commissioner of Labor v Weekly Homes, L.P., 169 N.C. App 17, 609 S.E. 2d 407, rev. denied, 359 N.C. 629, 616 S.E. 2d 227 (2005).

There is no dispute that respondent as general contractor was the controlling employer of the 8308 Fairgreen Avenue jobsite. However, the window of time for respondent to have discovered a fall protection violation in this situation was short (essentially part of one working day). Moreover, there was no evidence the respondent had actual notice of the violation. There was scant evidence that the respondent had constructive notice of the violation, which was not enough for complainant to carry its burden of proof of a violation of the cited standard by the respondent.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED that this Citation and the Item proposed in this matter is DISMISSED.

This 2nd day of October, 2016.



RICHARD M. KOCH
HEARING EXAMINER

CERTIFICATE OF SERVICE

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

PHILLIP M. VAN HOY
VAN HOY, REUTLINGER, ADAMS & DUNN, PLLC
737 EAST BLVD
CHARLOTTE, NC 28203

RORY AGAN
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 28 DAY OF October 2016.

ARLENE K. EDWARDS
CHAIRMAN



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