

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

FILED

JUN - 2 2021

COMMISSIONER OF LABOR OF THE  
STATE OF NORTH CAROLINA

COMPLAINANT,

v.

STEELFAB, INC.  
and its successors

RESPONDENT.

NC Occupational & Safety  
Review Commission  
ORDER

OSHANC NO. 2018-6033  
INSPECTION NO. 318124393  
CSHO ID: G8007

THIS MATTER was before the undersigned for hearing via the Lifesize video conference platform on March 10, 2021 beginning at 10:00 A.M.

The Complainant was represented by Rory P. Agan, Assistant Attorney General; the Respondent was represented by John J. Doyle, Jr., of Constangy, Brooks Smith & Prophete, LLP.

Based on the evidence, consisting of testimony and admitted documents, the undersigned makes the following

FINDINGS OF FACTS

1. The complainant as the Commissioner of Labor is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina ("the Act").
2. The respondent is a North Carolina corporation which is authorized to do business in North Carolina. The respondent is a fabricator of steel products used in the construction of buildings and other structures.
3. In July, 2017 the respondent entered in a written contract with Choate Construction Company ("Choate"), the general contractor, to provide steel products and steel erection for a Staples warehouse being constructed at 3725 Westinghouse Boulevard in Charlotte, North Carolina.

4. The respondent subcontracted the steel erection part of its contract to Eastern Constructors Incorporated (“Eastern”), which undertook the steel erection activities on this project.

5. Choate’s bid packages for jobs involving steel, require that the fabrication, transportation/delivery and erection of the steel projects be bid on by one contractor. This is a common practice in the steel fabrication industry. The respondent bids on the steel erection in order to provide the steel fabrication, but always subcontracts the steel erection, because it does not have that expertise.

6. On October 10, 2017, Choate conducted a steel pre-erection meeting on the project. In attendance at that meeting were various representatives of Choate, two representatives from Eastern and Kirk Farmer, respondent’s project manager for this contract. Choate representatives conducted the meeting, reviewing their erection requirements and the delivery schedule for the steel products.

7. Steel erection for the project began on November 6, 2017 by employees of Eastern, under the supervision of Choate, as general contractor. Although the language of respondent’s contract with Choate required respondent to designate the project superintendent to oversee Eastern’s erection work, an amendment to the contract showed no superintendent designated for this project.

8. Mr. Farmer was the only employee of respondent to visit the project, which he did every week to check on the delivery of the steel products. He provided no supervisory or inspection functions with respect to the steel erection, and there was no evidence presented that he was expected to perform these functions by either Choate or Eastern, other than the written contract between Choate and respondent. He had no experience or training with reference to steel erection.

9. Several days after Eastern began erecting the steel, Choate’s superintendent on the project observed a lack of diagonal bridging while bundles of decking were hoisted on the steel. Because this was a safety issue, the job was shut down for steel erection. The superintendent met with representatives of Eastern to review the proper procedure for bridging.

10. Choate’s superintendent then discussed this issue with Mr. Farmer and asked him to discuss it with Eastern, which Mr. Farmer did. There is no evidence that out of those discussions, respondent was being asked by either Choate or Eastern to perform any supervisory or inspection functions with respect to the steel erection.

11. Eastern contacted Choate and requested that it be allowed to work on November 26, 2017, the Sunday after Thanksgiving, because Eastern was behind schedule on the steel erection. Choate gave permission for Eastern to work that day, and its employees were the only ones on the project that day. A representative of Eastern did contact Mr. Farmer to let him know they would be working. There is no evidence that Eastern expected Mr. Farmer to come to the project or to provide any supervisory or inspection functions with reference to Eastern's work that day.

12. During Eastern's work on that Sunday, a collapse of part of the steel being erected occurred, again because of the lack of diagonal bridging before bundles of decking were hoisted on the steel. As a result, one Eastern employee was killed and another was injured.

13. The complainant was immediately notified and CHSO Jermaine Dennis conducted an inspection of the project and an investigation of the accident. From the evidence, it appears that Choate, Eastern and the respondent all cooperated with Officer Dennis in this inspection and investigation. At the end of this process, citations were issued to Eastern and to the respondent. Choate was not cited.

14. The respondent was cited for a serious violation of 29 CFR 1926.20 (b)(2). That section provides: "Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers."

15. The complainant is relying exclusively upon OSHA's Multi-Employer Workplace Policy to support the citation item issued to respondent. The complainant contends that respondent's contract with Choate makes it a "controlling employer" under this Policy and that it had the responsibility for ensuring the safe erection of steel on this project.

16. Choate was the general contractor for this project and by contract respondent was responsible to Choate for provision of the steel products and erection. The respondent subcontracted the steel erection part of its contract to Eastern. This appeared to have been understood by everyone involved with this project. There is no indication from the evidence that respondent was expected by either Choate or Eastern to either supervise or inspect the steel erection function. It had no employees on the project for that purpose and had no employees trained to provide such supervision or inspection.

17. It is apparently recognized in the structural steel industry that fabricators like respondent do not provide erection services, although many general contractors bid the fabrication and erection as one contract.

18. This is not a situation in which an employer is attempting to contract away either its normal responsibilities for work site safety or its responsibility under the Act to protect its employees. The respondent had no employees working on the site of this project and no one on the site expected it to supervise or inspect the steel erection work.

19. It is understood that the source of an employer's responsibility under the Act is not based on a contractual relationship but is based on the language of the Act. In this situation, it appears that the complainant is basing the citation against respondent on the language in its contract with Choate concerning the steel erection part of the contract, even though it does not seem that Choate considered the fulfillment of its contract with the respondent to require any functions related to steel erection.

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

#### CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated 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 respondent did not violate the provisions of 29 CFR 1926.20 (b)(2) with reference to this incident.

4. The undersigned has read the post-hearing briefs submitted by counsel and also all of the case law submitted by respondent. The respondent advances several different theories as to why it did not violate the cited standard of the Act. None of the case cited are necessarily controlling in this situation. This set of circumstances appears to create a *sui generis* situation.

5. The undersigned does not believe that respondent was a "controlling employer" under OSHA's Multi-Employer Workplace Policy, because the only part of this situation which arguably would make respondent a "controlling employer" is the language of the contract with Choate. The respondent's duties under the Act do not arise strictly from the contract language, but rather from the circumstances on the project. Neither Choate, Eastern nor respondent seemed to consider respondent a "controlling

employer” with respect to the steel erection, because it was not expected to be on the project during the steel erection and it was understood by all such parties that it did not have the training and expertise to supervise or inspect the steel erection. The evidence suggests that Choate performed such activities with the respect to the steel erection. There is nothing respondent could have realistically done to prevent the accident to Eastern’s employees.

Based on the foregoing Findings of Fact and Conclusion of Law, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. This citation item is dismissed.
2. Each party shall bear its own costs and attorney’s fees.

This 25th day of May, 2021.

  
\_\_\_\_\_  
RICHARD M. KOCH  
HEARING EXAMINER

**CERTIFICATE OF SERVICE**

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

JOHN J. DOYLE JR.  
CONSTANGY BROOKS SMITH  
& PROPHETE, LLP  
100 N CHERRY ST STE 300  
WINSTON SALEM NC 27101

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

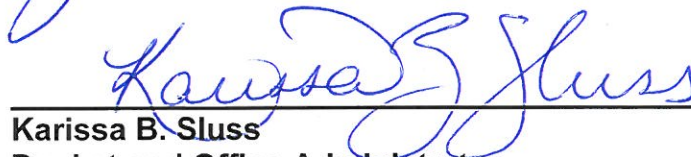
RORY AGAN  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
P O BOX 629  
RALEIGH, NC 27602-0629

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 3 DAY OF June 2021.



---

Karissa B. Sluss  
Docket and Office Administrator  
NC OSH Review Commission  
1101 Mail Service Center  
Raleigh, NC 27699-1101  
TEL.: (919) 733-3589  
FAX: (919) 733-3020