

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

**FILED**

AUG 8 2024

NC Occupational Safety & Health  
Review Commission

COMMISSIONER OF LABOR OF THE )  
STATE OF NORTH CAROLINA )  
 )  
COMPLAINANT, )  
 )  
v. )  
 )  
NORSTAN COMMUNICATIONS, INC. )  
DBA BLACK BOX NETWORKS )  
and its successors )  
 )  
RESPONDENT. )  
\_\_\_\_\_ )

**FINAL ORDER**

OSHANC NOS. 2022-6467

**THIS MATTER** was before the undersigned for hearing via the Lifesize video conference platform on June 26, 2024 beginning at 10:00 am.

The complainant is represented by Rory Agan, Special Deputy Attorney General; the respondent is represented by Greg C. Ahlum of Johnston Allison & Hord.

Based on the evidence, consisting of testimony and admitted documents, in the hearing on the merits on this citation item, and consideration of the post-hearing submittals of the parties, 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 Minnesota corporation which is authorized to do business in North Carolina.
3. Pursuant to N. C. Gen. Stat. § 95-135, the Review Commission has jurisdiction over the parties and subject matter to this action.
4. The respondent is an “employer” within the meaning of N. C. Gen. Stat. §95-127(10); all of respondent’s employees referred to in the hearing are “employees” within the meaning of N. C. Gen. Stat. § 95-127(9).
5. The complainant’s OSHA staff conducted a fatality inspection on September 27, 2021 of the Carolina Tractor & Equipment Company training facility located at 6605 W. T. Harris Boulevard, Charlotte, North Carolina.

6. The respondent had been hired by Carolina Tractor & Equipment Company (“Carolina Tractor”) to install IT cables for Carolina Tractor’s computer network in connection with an upfit of Suite F of its office complex.

7. Brent Boles and Doyle (“Gene”) Stepp were employees assigned by respondent to perform this work for Carolina Tractor. They had both performed previous work at the Carolina Tractor facility but in other areas. Mr. Boles was the project superintendent and lead technician for the respondent. He and Mr. Stepp had worked together on many jobs and were personal friends.

8. This work began at the Carolina Tractor facility on Monday, September 20, 2021. The work ended on Friday, September 24, 2021 when Mr. Stepp fell through a suspended ceiling in Suite K to the floor below. He died the next day from his injuries.

9. Because of this fatality, the complainant cited respondent for an alleged violation of fall protection standard 29 CFR 1910.28(b)(1)(i). That standard provides:

- (i) Except as provided elsewhere in this section, the employer must ensure that each employee on a walking-working surface with an unprotected side or edge that is 4 feet or more above a lower level is protected from falling by one or more of the following:
  - (a) Guardrail system;
  - (b) Safety net system; or
  - (c) Personal fall protection systems, such as personal fall arrest, travel restraint or positioning systems.

10. Because the events of each day of that work week from September 20 - September 24, 2021 have a bearing on what happen to Mr. Stepp on that Friday, the pertinent facts of each of those days will be recited here.

11. On Monday, September 20, 2021, Mr. Boles and Mr. Stepp participated in a safety walk-through of the relevant parts of the Carolina Tractor facility involved with the work to be done. Mr. Cory Maples and Mr. Kou Her of Carolina Tractor also participated in the walk-through, which was designed to review the proposed pathways for running the IT cables. During that walk-through, Messrs. Boles and Stepp were made aware of the mezzanine located in Suite K and were told to get in touch with a Carolina Tractor employee familiar with access. Neither Mr. Boles nor Mr. Stepp entered the mezzanine on that date.

12. On Tuesday, September 21, 2021, Messrs. Boles and Stepp began working on pulling cable between Suites K and F. This involved using a six-foot stepladder to remove the suspended ceiling tiles and insulation to access the area above the ceiling to the inside of the roof. At that point, J-hooks were shot into the underside of the ceiling with a Hilti-Gun. The cables would then lay in the J-hooks as they were strung between the suites. Neither Mr. Boles nor Mr. Stepp entered the mezzanine on this date, either.

13. On Wednesday, September 22, 2021, Mr. Her showed Mr. Boles and Mr. Stepp how to access the mezzanine from a hallway in Suite K. The access ceiling panel was located behind a door in the hallway. The six-foot stepladder was required to remove the ceiling panel, and then a 24 foot extension ladder had to be put in the opening to climb to the mezzanine. There were no signs



or other indicia to indicate the configuration of the mezzanine, although from the opening looking up it would appear that some sort of railing was present on that part of it.

14. On that Wednesday, Messrs. Boles and Stepp did not access the mezzanine for the purpose of doing any work in that area or to run cable. They were merely inspecting and assessing the mezzanine area to determine if it was a viable option from which to run the IT cables. When they entered the mezzanine, they saw equipment and building materials were being stored on the mezzanine, and during that time several Carolina Tractor employees entered the mezzanine to retrieve some of that equipment.

15. After being on the mezzanine, Mr. Boles determined that the mezzanine was not a suitable path for the cables. It turned out that there were not guardrails around the open sides of the mezzanine and that they would have to work from the unprotected mezzanine to reach the ceiling. The determination not to use the mezzanine was confirmed by Mr. Boles with Mr. Maples during a Face Time call while Messrs. Boles, Stepp and Her were standing on the mezzanine. This decision was based on several factors, including the difficulty of running the cables in that area, later issues with servicing the cables and the lack of fall protection on the mezzanine.

16. After the above-mentioned assessment of the mezzanine and the Face Time call with Mr. Maples, Messrs. Boles, Stepp and Her climbed down from the mezzanine and replaced the ceiling panel. From that point, it would seem to have been clear to Messrs. Boles and Stepp that no respondent employee needed to access the mezzanine again for this job, if for no other reason they knew it to be an unsafe working area.

17. On Thursday, Messrs. Boles and Stepp spent the day pulling cable from Suite F to Suite K, in the same manner as previously described for doing that work. They worked together on this task. At no time did they access the mezzanine on that date. In his statement to the complainant, Mr. Her recollected that the previously described events of Wednesday actually occurred on Thursday, but Mr. Joye acknowledged during the hearing that that recollection was incorrect.

18. On Friday, September 24, 2021, Messrs. Boles and Stepp reported to work at the Carolina Tractor facility at 8:00 am and continued to work at that point in Suite F. Approximately 10:15 am Mr. Shawn South, a Carolina Tractor employee, asked Mr. Boles to provide a status update on the progress of the job. Mr. Boles informed Mr. Stepp that he would be back shortly after the walk-through with Mr. South.

19. After performing a walk-through of Suite F, Messrs. Boles and South inspected Suite K. At approximately 10:41 am, while conducting the walk-through with Mr. South, Mr. Boles received a phone call from Ms. Simmons, his supervisor, requesting an update on the job. Mr. Boles told her that he was doing a walk-through with Mr. South and that he would call her back as soon as he was finished.

20. At this point, the facts seem to vary between the parties. The complainant's evidence seems to indicate that Mr. Boles became aware during his walk-through with Mr. South while in Suite K that Mr. Stepp was up in the mezzanine and did nothing about that situation, even though the sides of the mezzanine were not guarded. The respondent's evidence tended to show that when Mr. Boles and Mr. South heard a "ruckus" that seemed to emanate from the area of the

mezzanine, Mr. Boles called out to whoever was up there, and then Mr. Stepp identified himself. Mr. Boles then told Mr. Stepp to get down from there, and Mr. Stepp answered by saying he was getting down.

21. The witness statements do not indicate the exchange between Mr. Boles and Mr. Stepp, but I am not sure that these divergent facts make a difference, since it appears from the timeline that within several minutes, Mr. Stepp had fallen off the mezzanine through the suspended ceiling to the floor in the training room below. Given the configuration of the entrance to the mezzanine through an extension ladder through a ceiling panel, it does not appear that there was much Mr. Boles could do in this situation to protect Mr. Stepp from the fall.

22. Mr. Boles walked out of Suite K and initiated the return phone call to Ms. Simmons at 10:47 am. At approximately 10:53 am, the Carolina Tractor receptionist found Mr. Boles outside on the sidewalk and informed him that Mr. Stepp was on the floor unconscious in Suite K.

23. There is no evidence that Mr. Boles knew in advance that Mr. Stepp would go to the mezzanine on that Friday. Based on the evidence concerning how the cables were to be strung between the suites, with the mezzanine not being used, there would appear to be no reason for Mr. Stepp to be on the mezzanine, and no evidence was offered as to a reason for Mr. Stepp to be there. No pictures were taken by either party of the actual mezzanine. All I could surmise is that Mr. Stepp may have used the mezzanine to get an overall view of the finished job of stringing the cables between the suites, to make sure they were all in place. Presumably Mr. Stepp tripped over the 2x4s or equipment Carolina Tractor employees stored on the mezzanine. Several of the pictures showed a 2x4 caught in some cables in the hole created when Mr. Stepp fell through the ceiling. All the evidence indicated that Mr. Stepp was a good and safe employee of the respondent.

24. The respondent timely interposed the affirmative defense of isolated employee misconduct. There are four (4) essential elements to this defense, which must be proved by a preponderance of the evidence by respondent. These elements are:

- (a) The employer must have a viable safety program with work rules,
- (b) These rules must be communicated to its employees,
- (c) The employer's work rules need to be enforced through disciplinary procedures, and
- (d) The employer cannot have knowledge of the employee's violation of the safety standard.

25. Through the evidence offered by the respondent and the arguments of the complainant, the only one of these four elements at issue in this case is the fourth element, employer knowledge of the violation.

26. There are very few reported cases in North Carolina analyzing and applying this defense of isolated employee misconduct. In the Court of Appeals case of *O.S. Steel Erectors v. Brooks*, 84 N.C. App. 630, 353 S.E. 2d 869 (1987), the Court held that in order to show a safety violation was the result of isolated employee misconduct, the employer needs to show that it had taken all feasible steps to prevent the accident from occurring and that the employer had neither



actual or constructive knowledge of the violation. In that case, the employer failed to establish any of the four elements of the defense.

27. In *Commissioner of Labor v. Carolina Steel Corporation*, OSHANC 98-3677 (2000), the hearing examiner analyzed the isolated employee misconduct defense. She opined that a supervisor can rely to some extent on employees with good safety records and discussed knowledge on the part of employers of a safety violation of an employee in terms of foreseeability. If the employer has a good safety program on which it trains its employees and then enforces that safety program through employee discipline and vigilance, then if the violation was not foreseeable, there would have to be actual knowledge of the violation with an opportunity to prevent it or correct it. In this case, the hearing examiner found that the employer carried its burden of proof with respect to the affirmative defense of isolated employee misconduct.

28. Under the circumstances of this case as outlined above, I don't believe that Mr. Boles as respondent's supervisor on the Carolina Tractor job, had any constructive knowledge that Mr. Stepp would be on the mezzanine on that Friday. I also do not believe that there was much if anything he could have done to prevent or stop Mr. Stepp's actions on the mezzanine before his fall, once he became aware.

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. There is sufficient evidence to support a violation of the standard in Citation 1, Item 001.
4. There is also sufficient evidence to carry the burden of proof of the respondent in proving the affirmative defense of isolated employee misconduct.

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

1. Citation 1, Item 001, an alleged serious violation of 29 CFR 1910.28(b)(1)(i), is dismissed.
2. Each party shall bear its own costs and attorney's fees.

This 8<sup>th</sup> day of August, 2024.

  
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RICHARD M. KOCH  
HEARING EXAMINER

**CERTIFICATE OF SERVICE**

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

**GREG C. AHLUM  
JOHNSTON ALLISON HORD  
1065 EAST MOREHEAD ST.  
CHARLOTTE, NC 28204**

By depositing a copy of the same in the United States Mail, by certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

**RORY AGAN  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH NC 27602**

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

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

via email.

THIS THE 12 DAY OF August 2024.

**PAUL E. SMITH  
CHAIRMAN**

  
\_\_\_\_\_  
**Karissa B. Sluss  
Docket Administrator  
NC Occupational Safety &  
Health Review Commission  
1101 Mail Service Center  
Raleigh, NC 27699-1101  
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