

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

**FILED**

APR 14 2025

NC OSH Review Commission

**COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA**

**Complainant,**

**v.**

**MC GEE BROTHERS CO INC  
and its successor**

**Respondent.**

**DOCKET NO: 2024 - 6626**

**INSPECTION  
NO: 318275666**

**CSHO ID: A7605**

**DECISION AND ORDER**

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Hearing Examiner for the North Carolina Occupational Safety and Health Review Commission, on April 1, 2025, via LifeSize video platform pursuant to a Notice of Hearing.

Stacey A. Phipps, Special Deputy Attorney General, North Carolina Department of Justice, appeared on behalf of the Commissioner of Labor for the State of North Carolina ("Complainant"). Robert D. Fisher, Jr., Safety Manager of McGee Brothers Co., Inc., appeared on behalf of McGee Brothers Co Inc ("Respondent").

At the commencement of the Hearing the parties jointly agreed upon and consented to the admission into evidence the following exhibits:

Exhibit 1	Court Exhibit 1 Stipulations
Exhibit 2	Investigation Report – Unredacted PSIM File for Inspection 318275666 consisting of pages 1-147; provided by Complainant
Exhibit 3	Photographs taken by Inspector – total of 79; provided by Complainant

Exhibit 4	Exhibits provided by Respondent – total of 34 listed on Attachment 1
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At the Hearing the witnesses called by Complainant were Compliance Safety and Health Officer Mr. Chris Fombin (“CSHO Fombin”) and District Supervisor Mr. Kevin McGuire (“McGuire”). The witness called by Respondent was Mr. Robert D. Fisher, Jr., Safety Manager of Respondent.

During the Hearing Mr. Fisher wanted to testify regarding testing for airborne respirable crystalline silica conducted by Respondent after the time of the issuance of the Citation. Attorney Phipps objected to such testimony being presented. Due to the lateness of the afternoon and the fact that such silica testing data was included in Exhibit 4 which had already been entered into evidence by joint consent of the parties, and that accordingly such testimony would be duplicative of the existing evidence, the motion was sustained.

#### **Stipulations Concerning Conduct Of The Hearing**

The parties entered into the following stipulations regarding the conduct of the Hearing:

Number	Stipulation
1	The Hearing in this matter shall be conducted via the video conferencing platform known as “Lifesize”;
2	The presence of a court reporter during the Hearing is waived;
3	The Hearing’s audio and video will be recorded through Lifesize (the “Recording”);
4	The Recording will be the official record of the Hearing;
5	The Recording will be made available to all counsel/ representative of each party after the Hearing concludes (the Host will send a link to the Recording as soon as is practicable after the Hearing concludes);
6	The Administrative Law Judge shall control when the Hearing is on and off the record;
7	The Hearing will be deemed to have taken place in Raleigh, North Carolina;
8	Neither party objects to R. Joyce Garrett, Administrative Law Judge, conducting the Hearing

#### **The Citation**

Complainant issued to Respondent a 2-item grouped citation alleging a serious violation of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter the “Act”) as follows (herein referred to as the “Citation”):

“The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury or illness.

Citation 01 Item 001a    Type of Violation: Serious

29 CFR 1926.1153(c)(1): For each employee engaged in a task identified on Table 1, the employer did not fully and properly implement the engineering controls, work practices, and respiratory protection specified for the task on Table 1:

- a) jobsite – for an employee, dry-cutting brick with a stationary saw that generated respirable crystalline silica (RCS), and an integrated water delivery system was not provided/utilized to comply with Table 1.

Date By Which Violation Must Be Abated:	Corrected During Inspection
Proposed Penalty:	\$6,500.00

Citation 01 Item 001b    Type of Violation: Serious

29 CFR 1926.1153(d) (3)(i): The employer did not use engineering and work practice controls to reduce and maintain employee exposure to respirable crystalline silica to or below the PEL, and could not demonstrate that such controls were not feasible:

- a) jobsite – where an employee utilized a stationary saw to cut brick that generated respirable crystalline silica (RCS) without the aid of engineering and work practice controls to reduce and maintain exposure to RCS at or below the permissible exposure limit (PEL).

Date By Which Violation Must Be Abated:	Corrected During Inspection
Proposed Penalty:	\$ 0.00”

The referenced ‘Table 1’ is included in 29 CFR 1926.1153 and is captioned “Table 1 – Specified Exposure Control Methods When Working With Materials Containing Crystalline Silica”.

**Summary Background**

On October 23, 2023, CSHO Fombin, from his vehicle in a public right of way, observed what he considered to be a serious violation of respirable crystalline silica standard 29 CFR 1926.1153 at a residential construction site located in Kernersville, Forsyth County, North Carolina. CSHO Fombin observed a worker using a stationary brick saw to cut bricks, which work created a dense dust plume.

From the public right of way, CSHO Fombin took photographs of what he considered to be a serious hazard. Entry was made onto the construction site, and CSHO Fombin determined that McGee Brothers Co., Inc., a subcontractor, was the only employer at the construction site, and that its employees were engaged in masonry operations. One employee was cutting bricks using a stationary saw and one employee was carrying the bricks which had been cut to the mason who was installing the bricks on the house.

## FINAL DECISION

Based on careful consideration of the sworn testimony of the witnesses presented at the Hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact and Conclusions of Law.

In making the Findings of Fact, the Undersigned has (i) weighed all the evidence and assessed the credibility of the witnesses; (ii) taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have; and (iii) carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, and whether the testimony of the witness was reasonable and consistent with all other believable evidence in the case.

## FINDINGS OF FACT

1. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter the "Act"). The Review Commission has jurisdiction over the parties and the subject matter to this action.
2. Respondent is a North Carolina corporation, duly organized and existing under the laws of the State of North Carolina. It is active and current and maintains a place of business at 4608 Carriker Road in Monroe, in Union County, North Carolina.
3. Respondent is in the masonry business. Respondent is an "employer" as defined by N.C.G.S. Section 95-127(11). Respondent maintains employees as defined by N.C.G.S. Section 95-127(10).

4. On October 23, 2023, Compliance Safety and Health Officer (CSHO) Chris Fombin, employed by the North Carolina Department of Labor, inspected Respondent's worksite located at 1644 Lazy Fox Lane, Lot 18, Kernersville, Forsyth County, North Carolina (the "Worksite").
5. While driving on a public street CSHO Fombin observed a worker using a saw to cut brick, which activity created a dense dust plume. Since Forsyth County was subject to Operational Procedure Notice 123Y (Special Emphasis Program [SEP] for Construction Activities) CSHO Fombin took the necessary steps to initiate an inspection.
6. CSHO Fombin made his determination that the Worksite was a multi-employer worksite with Royal Homes of North Carolina, LLC being the top-tier general contractor who subcontracted with Respondent as the first tier subcontractor to provide masonry services. The only employer present at the Worksite at the time CSHO Fombin entered the Worksite and conducted the Inspection was Respondent.
7. CSHO Fombin presented credentials and initiated the inspection pursuant to Operational Procedure Notice 123Y (Special Emphasis Program [SEP] for Construction Activities). The inspection with respect to Respondent was conducted as a comprehensive inspection.
8. At the time CSHO Fombin observed the construction site from the public right of way employees of Respondent were working on installing bricks to the front of a single-family home which was under construction.
9. At the Worksite at the time of the Inspection one of Respondent's employees was assigned to making the specialty cut of the bricks, another employee was carrying the cut bricks from the cutter to the installer, and another employee, who was the foreman, was installing the cut bricks on the front of the house.
10. Cutting of bricks was not continuous but on an 'as needed' basis at the direction of the foreman. Respondent's workday began in the morning at approximately 8 o'clock. At approximately 11:15 a.m. when CSHO Fombin first observed the Worksite there had been 11 cuts of bricks. During CSHO Fombin's observation period of approximately 11:15 a.m. to approximately 11:37 a.m. there were 5 cuts of bricks.
11. The foreman was installing bricks under a porch overhang on the front of the house; the location of the foreman and the brick cutter was within sight of each other.
12. Although the foreman and brick cutter were within sight of each other, there was no evidence that the foreman was looking at the brick cutter when he was actually cutting bricks. The foreman was the mason actively installing bricks on the house.
13. The foreman who was at the Worksite when CSHO Fombin arrived, and Cliff McGee, Manager, and Chris Trogon, Supervisor, were Respondents representatives who accompanied CSHO Fombin during the walkaround portion of the inspection.

14. Prior to entering the Worksite, CSHO Fombin observed an employee of Respondent using a saw to dry cut silica-containing brick without wearing a N95 mask when he was cutting bricks.

15. CSHO Fombin conducted employee interviews during the Inspection, but such interviews were not included in the Investigation Report.

16. The brick cutter was not called to testify at the Hearing; however, Respondent entered into evidence a signed statement by the brick cutter (Exhibit 4-R13) that stated the following:

“... I was cutting the brick with a dust mask walking back and forth I was just getting finish with the cuts. Then I needed to to make a couple more. I got lost in the work a didn't realize and forgot to the dust mask on. As I was cutting the last couple brick. The osha inspector was a looking me from across the way taking photos of me. My foreman told me to throw the mask on. I didn't hear due do the noise of the saw and my ear plugs were also in. After a while the osha inspector came over and introduced himself to me and the crew and asked me where the water was on the saw and were my dust masks was and that point I pulled out of my hardhat and showed it to him I had a fresh dust mask that morning because it was our second day on the job. And our first day of making cuts. After I showed him my dust mask. He took a couple photos of it also took a couple photos of the table saw I was using. Then he asked me who the foreman was and wanted my information so I provided him with my information. The Formen provided his information and all of our safety information. Our safety talks that we have every week on the tablet and our big green safety book.”

17. The brick cutter received a verbal discipline from Respondent for his failure to wear the required N95 mask and was required to take additional training.

18. The saw was a stationary masonry table cut-off saw STOW TWAK; it was not equipped with an integrated water delivery system; the saw was used to ‘dry cut’ the bricks.

19. The stationary masonry table saw functioned such that the plume of dust created by the cut was released from the back of the saw and directed away from where the cutter was located.

20. Respondent was aware of the dry cutting of the bricks, and intended that the bricks be dry-cut.

21. Respondent wanted the bricks dry-cut so that they would not discolor after being installed.

22. The bricks contained silica and the cutting of the bricks results in the release of respirable crystalline silica.

23. 29 CFR 1926.1153 Table 1 applies to respirable crystalline silica.

24. In issuing the Citation, CSHO Fombin relied on the fact that the bricks contained silica which can be released in the form of respirable crystalline silica upon cutting of the brick with a

saw, and that the visible plume which was generated when the employee cut the brick contained respirable silica.

25. Neither Respondent nor CSHO Fombin conducted any air quality testing at the Worksite on the day of the Inspection.

26. Respondent had a written silica exposure control plan.

27. Regarding control of worker exposure to respirable crystalline silica, Respondent had implemented work practice/engineering controls including training, limiting a worker's time actually cutting to no more than 2 hours per work day, providing and requiring personal protective equipment, and cutting silica containing materials down-wind away from the masonry cutter and other workers.

28. The evidence through testimony of Mr. Fisher and Respondent's Exhibit 4-R23 shows that at the time of the Inspection the worker had made 16 cuts of bricks that day and that no additional bricks were cut that day. Respondent's Exhibit 4-R22 shows that a total of 28 cuts of bricks were required for the front of the house; Respondent's Exhibit 4-R31, captioned "Cut Duration 10-23-23 Stone Haven 18", shows that, based on 27 cuts, the average time it took to cut a brick was 80 seconds. In summary, the evidence shows that there were either 16 cuts of bricks or 27 to 28 cuts of bricks for the entire day of the Inspection.

29. Based on data from air sampling conducted by Respondent prior to the day of the Inspection, Respondent assessed the airborne concentration of respirable crystalline silica to be less than 50  $\mu\text{g}/\text{m}^3$  calculated as an 8-hour TWA on the day of the Inspection.

30. Subsequent to the Inspection, Respondent conducted additional testing to assess the airborne concentration of respirable crystalline silica under conditions which simulated the conditions at the time of the Inspection. The resulting data showed that the exposure was less than 50  $\mu\text{g}/\text{m}^3$  calculated as an 8-hour TWA.

31. The preponderance of evidence pertaining to the airborne concentration of respirable crystalline silica at the time of the Inspection shows that such concentration was not in excess of 50  $\mu\text{g}/\text{m}^3$  calculated as an 8-hour TWA.

## **DISCUSSION**

To establish a violation of a specific OSHA standard, Complainant must establish the following elements: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation. To establish that the violation was serious the Complainant must also establish that the hazard created the possibility of an accident and that the

substantially probable result of an accident could be death or serious bodily injury. See *Commissioner of Labor v Liggett Group, Inc.*, OSHANC 94-3175 (1996); *Commissioner of Labor v Yates Construction Company, Inc.*, OSHANC 93-2967 (1995); *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009); *Commissioner of Labor v. Young Construction Co.*, OSHANC 02-4130 (2004).

Complainant has the burden of establishing each element by a preponderance of the evidence. *Commission Rule .0514(a)*; See *Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). A preponderance of the evidence is “that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false.” *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982).

If Complainant fails to meet its burden of proof on any one of the required elements, then the violation cannot be sustained. The burden of proof of the alleged violation rests entirely on the Complainant. An employer who has been issued a citation can present evidence which negates or reduces the validity or strength of Complainant’s evidence regarding an element. Further, although the employer does not have the burden to prove that it is not liable for an alleged violation, the employer claiming an exemption from the application of a standard bears the burden of proof on the issue. *Stephenson Enterprises, Inc.*, 4 BNA OSHC 1702, 1976 CCH OSHD 1121,120 (No. 5873, 1976)

#### Applicability of the Cited Standard

The Complainant asserts a violation of 29 CFR 1926.1153(c)(1) and 29 CFR 1926.1153.(d)(3)(i). The standards at Part 1926 generally cover construction activities. Respondent was engaged in construction. Section 1926.1153 applies to occupational exposures to respirable crystalline silica in construction work. Respondent was cutting brick using a stationary masonry saw. It is not disputed that this activity results in the release of respirable crystalline silica. The cited standard applies.

#### Noncompliance With The Standard

The Complainant contends that Respondent violated 29 CFR 1926.1153(c)(1) because it was using a stationary masonry saw to dry cut silica-containing brick without using an integrated water delivery system that continuously feeds water to the blade, and 29 CFR 1926.1153.(d)(3)(i) because such cutting was occurring without the use of engineering and work practice controls to reduce and maintain exposure to respirable crystalline silica at or below the permissible exposure limit.



Respondent confirmed that the saw it was using was not equipped with an integrated water delivery system, and it affirmatively acknowledged that it was using, and that it intended to use, the saw to dry cut (i.e. cut without the use of water) the brick. Respondent further affirmatively asserted that it used engineering and work practice controls and respiratory protection to reduce and maintain employee exposure to respirable crystalline silica to or below the permissible exposure limit.

- Respondent asserts that it is not in violation of §1926.1153(c)(1) because that section is not applicable when “the employer assesses and limits the exposure of the employee to respirable crystalline silica in accordance with paragraph (d) of this section”. 29 CFR 1926.1153(c)(1)
- The introductory language in paragraph (d) of 29 CFR 1916.1153 pertains to alternative exposure control methods and states: “For tasks not listed in Table 1, or where the employer does not fully and properly implement the engineering controls, work practices, and respiratory protection described in Table 1:”
- Paragraph (d) provides in 29 CFR 1926.1153(d)(1) “Permissible exposure limit (PEL). The employer shall ensure that no employee is exposed to an airborne concentration of respirable crystalline silica in excess of 50 µg/m<sup>3</sup>, calculated as an 8-hour TWA.”
- 29 CFR 1926.1153(d)(2) provides that “the performance option in paragraph (d)(2)(ii)” is an acceptable method for exposure assessment.
- 29 CFR 1926.1153(d)(2)(ii) provides: “Performance option. The employer shall assess the 8-hour TWA exposure for each employee on the basis of any combination of air monitoring data or objective data sufficient to accurately characterize employee exposures to respirable crystalline silica.”
- 29 CFR 1926.1153(b) defines terms applicable to §1926.1153, and states that “**Objective data** means information, such as air monitoring data from industry-wide surveys or calculations based on the composition of a substance, demonstrating employee exposure to respirable crystalline silica associated with a particular product or material or a specific process, task, or activity. The data must reflect workplace conditions closely resembling or with a higher exposure potential than the processes, types of material, control methods, work practices, and the environmental conditions in the employer’s current operations.”
- Respondent asserts that it had performed air monitoring of respirable crystalline silica and that based on its calculations its employees at the Worksite on the day of the Inspection would not be exposed to respirable crystalline silica at concentrations greater than the PEL of 50 µg/m<sup>3</sup> calculated as an 8-hour TWA.
- Prior to the issuance of the Citation, Respondent provided Complainant with the results of one of its exposure assessments on 6/1/2017 (Exhibit 2, page 140-142). Mr.

Fisher testified that at that time Respondent had additional tests/assessment results but that such data was not requested by Complainant.

- Mr. Fisher testified that Respondent performed additional air monitoring tests on April 5, 2024 after the Inspection under similar conditions using the same brick and the same table saw used at the time of the Inspection; the testing results were included in Respondent's Exhibits. (Exhibit 4-R30)
- Complainant's Exhibit 2 (page 054) references the 6/1/2017 exposure assessment data it received from Respondent stating as follows:
  - "McGee Brothers Co. Inc. provided sampling data from their own exposure assessment. On 6/1/2017, McGee Brothers Co., Inc. sampled an employee performing dry-cutting operations on a stationary masonry saw. The sampling took place over the course of 174 sample minutes. The 3<sup>rd</sup> party lab (EMSL Analytical) returned a value of 0.50 mg/m<sup>3</sup> as the concentration. When calculating for the time weighed average (TWA), assuming zero exposure for the remaining 306 minutes, the TWA comes up to 0.18125 mg/m<sup>3</sup>, or 181.25  $\mu$ g/m<sup>3</sup> (approximately 3.5 times the PEL). (See TEST SAMPLE under Document)."

The formula used by Complainant showing the determination of the time weighed average (TWA) for an 8-hour work day is as follows:

TWA concentration = (Exposure concentration X Exposure minutes) ÷ Minutes in 8-hr work day

The following shows the application of the formula to the 6-1-2017 exposure assessment data (the "Original Data"):

$$\begin{array}{rclclcl}
 & \text{(Exposure concentration X Exposure minutes) } \div \text{ Minutes in 8-hr work day} & & & & \\
 0.50 \text{ mg/m}^3 & \times & 174 & \div & 480 & \\
 \text{same as } 500 \text{ } \mu\text{g/m}^3 & \times & 174 & = & 87,000 & \\
 & & 87,000 & \div & 480 & = 181.25 \text{ } \mu\text{g/m}^3
 \end{array}$$

The 181.25  $\mu$ g/m<sup>3</sup> exposure is greater than the permissible exposure limit (PEL) of 50  $\mu$ g/m<sup>3</sup> specified in 29 CFR 1926.1153(d)(1). The 181.25  $\mu$ g/m<sup>3</sup> exposure is calculated based on an exposure time of 174 minutes.

After the Inspection, on April 5, 2024 the Respondent collected additional exposure assessment data (the "April 2024 Data") by conducting an additional exposure assessment test on air sample collected from 28 cuts of bricks using identical bricks as was used on the day of the Inspection, with the table saw used on the day of the Inspection, and under similar conditions (including cutting not being continuous) as the day of the Inspection.

The following shows the application of the formula to the April 2024 Data:

$$\begin{array}{rclclcl}
 & \text{(Exposure concentration X Exposure minutes)} & \div & \text{Minutes in 8-hr work day} & & \\
 430 \mu\text{g}/\text{m}^3 & \times & 47 & \div & 480 & \\
 430 \mu\text{g}/\text{m}^3 & \times & 47 & = & 20,210 & \\
 & 20,210 & \div & 480 & = & \mathbf{42.10 \mu\text{g}/\text{m}^3}
 \end{array}$$

The 42.10  $\mu\text{g}/\text{m}^3$  exposure is less than the PEL of 50  $\mu\text{g}/\text{m}^3$  specified in 29 CFR 1926.1153(d)(1).

The Original Data shows that 174 minutes of exposure results in a concentration of respirable crystalline silica of 181.25  $\mu\text{g}/\text{m}^3$  calculated as an 8-hour TWA. If we use a simple ratio and proportion, we can use this information to estimate the concentration of respirable crystalline silica based on the length of exposure.

- If 174 minutes of exposure result in 181.25  $\mu\text{g}/\text{m}^3$ , then, 47 minutes of exposure would result in 48.95  $\mu\text{g}/\text{m}^3$  which is still slightly below the PEL value of 50  $\mu\text{g}/\text{m}^3$  (although it is higher than the 42.10  $\mu\text{g}/\text{m}^3$  actually calculated using the formula).
- On the day of the Inspection no air sampling was conducted; however, the evidence shows that the minutes of exposure based on 28 cuts being performed would be 37.3 minutes. If 174 minutes of exposure result in 181.25  $\mu\text{g}/\text{m}^3$ , then, 37.3 minutes of exposure would result in 38.9  $\mu\text{g}/\text{m}^3$  which is below the PEL value of 50  $\mu\text{g}/\text{m}^3$ .
- If only 16 cuts were made on the day of the Inspection then the minutes of exposure would be 21.3 minutes. If 174 minutes of exposure result in 181.25  $\mu\text{g}/\text{m}^3$ , then, 21.3 minutes of exposure would result in 22.2  $\mu\text{g}/\text{m}^3$  which is below the PEL value of 50  $\mu\text{g}/\text{m}^3$ .

Based on this analysis it appears that Respondent's position that the workers were not exposed to respirable crystalline silica in excess of 50  $\mu\text{g}/\text{m}^3$  was based on objective data as defined in 29 CFR 1926.1153(b). Respondent has carried its burden of proof that it assessed and limited the exposure of its employee to respirable crystalline silica in accordance with paragraph (d) of 29 CFR §1926.1153.

Further, without consideration of the PEL, the preponderance of credible evidence does not establish that the foreman had actual or constructive knowledge that the brick cutter was not wearing a mask at the time he was cutting some of the bricks. The brick cutter's statement was that he had been wearing a mask earlier when cutting bricks, and that he forgot to put the mask back on when he made some additional cuts. The preponderance of evidence shows that the brick cutter and foreman, although some distance apart, were in the line of sight of each other but

its does not establish that the foreman had knowledge that the cutter was not wearing a mask while cutting some bricks.

### **CONCLUSIONS OF LAW**

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. 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, at all times material to this proceeding, was engaged in a business affecting commerce within the meaning of the Occupational Safety and Health Act of North Carolina, N.C.G.S. 95-126 et seq (the "Act").

3. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Review Commission has jurisdiction of the parties and of the subject matter.

4. The burden of proof is on the Complainant to prove by a preponderance of the evidence that Respondent violated the terms of the standard cited in the Citation.

5. With respect to Citation 01 Item 001a and Citation 01 Item 001b, considering the evidence presented relative to the Respondent assessing and limiting the exposure to respirable crystalline silica, and considering the lack of evidence establishing employer knowledge of the failure of the brick cutter to wear a mask while cutting some of the bricks, Complainant did not establish by a preponderance of the evidence that the terms of the standard were violated.

6. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. Specific findings are not required on each piece of evidence presented.

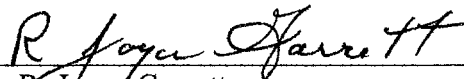
## ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED that:

Citation 01 Item 001a in violation of 29 CFR 1926.1153(c)(1) is VACATED, and

Citation 01 Item 001b in violation of 29 CFR 1926.1153(d)(3)(i) is VACATED.

This 14<sup>th</sup> day of April, 2025.

  
\_\_\_\_\_  
R. Joyce Garrett  
Hearing Examiner

**Attachment 1**

34 Items Introduced Into Evidence As Exhibit 4

4-R1	Silica Wet Cutting
4-R2	Crew Signatures
4-R3	Silica Program
4-R4	Crew Signatures
4-R5	Dry Cutting Criteria -before Citation
4-R6	Crew Signatures
4-R7	Wet Cutting – continuous training annually
4-R8	Crew Signatures
4-R9	Silica Table 1 – continuous training annually
4-R10	Crew Signatures
4-R11	Dry Cutting – continuous training annually
4-R12	Crew Signatures
4-R13	Employee Statement
4-R14	JSA – 2 hour limit
4-R15	Safety Discipline Policy
4-R16	Safety Meeting – retraining crew during observation of silica rule violation
4-R17	Associate Disciplinary Report – of silica rule violation
4-R18	Assoc. Disciplinary Report – follow though Mgmt. enforcement
4-R19	JSA – mason laborer
4-R20	JSA – mason
4-R21	Silica video training – actual employee observed
4-R22	House & specialty cuts to be made over 3 day period
4-R23	House & actual cuts to be made day of inspection
4-R24	Ordering & setup of testing
4-R25	Chain of Custody for testing
4-R26	Chain of Custody for testing
4-R27	Chain of Custody for testing

4-R28	Results for testing & notes to convert micrograms
4-R29	Results for testing & notes to convert micrograms
4-R30	Results for testing & notes to convert micrograms
4-R31	Actual cuts made for all specialty brick that day of Inspection.
4-R32	Actual brick work at time of Inspection
4-R33	Actual brick work at time of Inspection
4-R34	Actual brick work at time of Inspection

CERTIFICATE OF SERVICE

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

BOBBY FISHER  
MCGEE BROTHERS CO., INC.  
8224 TRIAD DR.  
GREENSBORO, NC 27409

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:

STACEY A. PHIPPS  
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 16 DAY OF April 2025.

PAUL E. SMITH  
CHAIRMAN



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Karissa B. Sluss  
Docket Administrator  
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