

BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA

FILED

FEB 25 2026

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

NC OSH Review Commission

COMPLAINANT - RESPONDENT,

DOCKET NO. OSHANC 2024-6626
OSHA INSPECTION NO. 318275666
CSHO ID: A7605

v.

McGEE BROTHERS CO INC.,
and its successors

ORDER OF THE COMMISSIONERS

RESPONDENT - PETITIONER.

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 11:00 A.M. on the 7th day of November 2025, in the OAK courtroom at 422 N Blount Street Raleigh, North Carolina, by Paul E. Smith, Chairman, William Rowe, and Terrence Dewberry, members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Stacey Phipps, Special Deputy Attorney General: North Carolina
Department of Justice, Raleigh, North Carolina

Respondent: Bobby Fisher, employee of McGee Brothers, Inc.

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission AFFIRMS the Order of Hearing Examiner R. Joyce Garrett.

ISSUES PRESENTED

WHETHER THE COMPLAINANT MET ITS BURDEN OF PROOF?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.1153(c)(1)

For each employee engaged in a task identified on Table 1, the employer shall fully and properly implement the engineering controls, work practices, and respiratory protection specified for the task on Table 1, unless 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(d)(3)(i)

Engineering and work practice controls. The employer shall use engineering and work practice controls to reduce and maintain employee exposure to respirable crystalline silica to or below the PEL, unless the employer can demonstrate that such controls are not feasible. Wherever such feasible engineering and work practice controls are not sufficient to reduce employee exposure to or below the PEL, the employer shall nonetheless use them to reduce employee exposure to the lowest feasible level and shall supplement them with the use of respiratory protection that complies with the requirements of paragraph (e) of this section.

FINDINGS OF FACT

1. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10) and is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
3. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
4. On April 1, 2025, a remote hearing was held before the Honorable R. Joyce Garrett.

5. On April 14, 2025 Hearing Examiner Garrett filed an Order finding that the provisions of 29 CFR 1926.1153(c)(1) and 29 CFR 1926.1153 (d)(3)(i) had not been violated and vacated the citations.
6. On May 1, 2025, Complainant timely petitioned the Review Board for a review of the decision of the Hearing Examiner, which was granted.
7. The oral arguments were heard by the full Commission on November 7, 2025.
8. The Review Commission adopts the Hearing Examiner's findings of facts.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

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 Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The Complainant did NOT meet its burden of proving by substantial evidence that the Respondent committed a violation of 29 CFR 1926.1153(c)(1) or 29 CFR 1926.1153 (d)(3)(i).

5. The Commission AFFIRMS the Order of Hearing Examiner Garrett.

DISCUSSION

To establish a violation of an OSHA standard, Complainant must establish that (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. *Commissioner of Labor v. Liggett Group, Inc. OSHANC 94-3175 (1996)*. Complainant has the burden of establishing each element by a preponderance of the evidence. *Commission Rule .0514(a) Hartford Roofing Co., 17 BNA OSCH 1361 (No.92-3855, 1995)*. The entire burden of proof lies on the Complainant. If the Complainant fails to meet its burden of proof of any one of the required elements, the violation cannot be sustained. *Stephenson Enterprises, Inc., 4 BNA OSHC 1702, 1976 CCH OSHD 1121, 120 (No. 5873, 1976)*. In reviewing the whole record, we must determine whether the Hearing Examiner's factual findings were supported by competent and substantial evidence in the record. Substantial evidence is relevant evidence that would lead a reasonable mind to support a conclusion. *Brooks v. Snow, 2 NCOSHD 377, 380 (RB 1983)*

CSHO Fombin, from the public right of way, observed a worker using a stationary brick saw to cut bricks at a residential construction site. The work created a dense dust plume, and that worker was not wearing a N95 mask. A statement from this worker was entered into evidence that stated "...I was cutting the brick with a dust mask walking back and forth I was just getting finish with the cuts. Then I need to to make a couple more. I got lost in the work a didn't realize and forgot to the dust mask on." A second worker was carrying the bricks which had been cut to a third worker (the mason) who was installing the bricks on a single family home under construction. The mason was also the foreman. The foreman was within sight of the brick cutter but there was no evidence that the foreman was looking at the brick cutter. The foreman was actively working to install the bricks on the house. No air quality testing was conducted at the worksite on the day of inspection. Respondent had conducted air sampling prior to the date of inspection and again after the inspection. Both tests resulted in data showing that the exposure was less than 50 ug/m³ calculated as an 8-hour TWA.

On appeal, Complainant initially contended, in part, that the Hearing Examiner committed mathematical errors when evaluating the concentration levels shown in Respondent's air sample tests. At oral argument, Complainant withdrew this argument, agreeing that the Hearing Examiner's mathematical calculations were accurate. We concur and find no error in the Hearing Examiner's analysis. We likewise find no merit to the Complainant's additional contentions on appeal.

The standards cited relate to occupational exposure to respirable crystalline silica in construction activities. The standards apply. The Hearing Examiner sets forth in great detail her analysis and findings that the workers were not exposed to respirable crystalline silica in excess of 50 ug/m³ and that the Respondent limited employee exposure as required. In addition, actual or constructive knowledge was not established.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's April 14, 2025, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. The citations have been **VACATED**.

This the 25th day of February 2026.

Signature: Paul E Smith
Paul E Smith (Feb 25, 2026 10:00:00 EST)

Email: psmith@pathlaw.com
PAUL E. SMITH, CHAIRMAN

Signature: [Signature]
Terrence Dewberry (Feb 25, 2026 15:38:07 EST)

Email: todewberry@aol.com
TERRENCE DEWBERRY, MEMBER

Signature: William Rowe
William Rowe (Feb 25, 2026 10:47:08 HST)

Email: billdrowe@gmail.com
WILLIAM D. ROWE, MEMBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER OF THE COMMISSIONERS Upon:

BOBBY FISHER
MCGEE BROTHERS CO INC
Bobby.fisher@Mcgeebrick.com

STACEY PHIPPS
NC DEPARTMEN OF JUSTICE
LABOR SECTION
mncetah@ncdoj.gov

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION

Via email.

THIS THE 26th DAY OF February 2026.

PAUL E. SMITH
CHAIRMAN

KB Sluss

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