own employees. *Bratton Corp. v. OSHRC*, 590 F.2d 273, 276-78 (8th Cir. 1979). Even if the Respondent did not create or control the hazardous condition, it must still take reasonable efforts to protect its employees. *Anning-Johnson Co.*, 1975-76 OSHD ¶20,690; *Grossman Steel and Aluminum Corp.*, 1975-76 OSHD ¶20,691. Respondent has not shown that it took reasonable efforts to protect its employees against such hazard.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the violations and proposed penalty are affirmed.

2. That Respondent immediately pay the proposed penalty of $420.

3. That the Respondent immediately abate all violations.

This the 29th day of January, 1985.

Thomas L. Barringer
Hearing Examiner

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA,	)	OSHANC NO. 83-1039
Complainant,	)	11-26-85
v.	)	
REBARCO, INC.,	)	
Respondent.	)	

APPEARANCES	Complainant:	David R. Minges Associate Attorney General
	Respondent:	Richard J. Vinegar Attorney at Law Raleigh, North Carolina
BEFORE	Review Board:	Kenneth K. Kiser, Chairman; Michael K. Curtis

Concrete; Defenses and Nondefenses; Electrical; Employees; Hazards; Injuries and Illnesses; Knowledge; Occupational Safety and Health Act; Safety Programs; Violations The lower order did not err by affirming the citation for violation of N. C. Gen. Stat §95-129(1), the "general duty clause." Allowing the employee to climb the inadequately anchored concrete form was a recognized hazard which led to a fatal accident. "Hazard recognition" was evidenced by the employer's ineffectual attempt to preclude the accident. An employee had been assigned to help steady the form. Hazard recognition was also evidenced by an American National Standards Institute standard derived from the employer's own industry. The standard proscribes releasing a vertical form from the crane line till adequate anchoring of the form is effected. The "reasonable prudent person test" is the critical criterion for hazard recognition in North Carolina. A reasonable and prudent employer would have foreseen the hazard presented by the inadequately secured form. Abatement was economically and technologically feasible. The added cost of securing each concrete form by use of the crane was negligible. Other abatement methods were also at hand. The violation was serious. The employer's own testimony that "broken limbs" would be the likely result of an accident confirmed the "serious" denomination of the citation. Isolated-employee-misconduct could not be established because the employer's safety rule was unenforceable. First, reguiring only "safe movements" on the concrete form could not foreclose accidents. Second, a certain amount of employee negligence or carelessness must be anticipated. Additionally, the lower order correctly affirmed a citation for violation of 29 CFR 1926.402(a)(4) for exposure of employees to an inadequate electrical extension cord. It was no defense that the cord was not owned by the employer. The respondent's employees were exposed, and alternative protection measures were not taken.

The hearing examiner order is at 2 NCOSHD 577.

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This matter came on to be heard and was heard before the Safety and Health Review Board of North Carolina on the 30th day of September, 1985 upon the appeal by Rebarco, Inc. from the order of Thomas L. Barringer, Hearing Examiner, dated January 29, 1985. Having heard the argument of counsel and received the transcript in this case the Review Board makes the following:

FINDINGS OF FACT

1. Complainant, Commissioner of Labor of North Carolina, is an officer of the State of North Carolina charged with inspection for compliance with and enforcement of the Occupational Safety and Health Act of North Carolina (hereinafter, "the Act").

2. Respondent, Rebarco, Inc. (hereinafter, "Rebarco") is a corporation organized and existing under the laws of the State of North Carolina with its principal office and place of business located in the Town of Garner, Wake County, North Carolina.

3. At the time of the incidents which are the subject of the contested citations in this case, Rebarco was engaged as a concrete and steel reinforcement subcontractor for the construction of a new wing at the Johnston County Hospital on US 301 North in Smithfield, North Carolina. Respondent employs approximately 200 employees and had approximately fifteen (15) employees on the job site at the time of the inspection. At all material times Rebarco's employees were engaged in performing concrete work.

4. At the time of the incidents, Rebarco's employees were engaged in performing concrete formwork. The concrete forms which were being set were 1'x1'x14' high and weighed approximately 400 lbs. The concrete forms were being set by a crane in place over a steel rebar.

5. At all material times Rebarco had a crane available at the job site. Rebarco's method of setting forms was to have the crane set the form in place on the steel rebar and wire mesh. Then a worker would then climb the form with a safety belt to a standing height of approximately seven feet. Once the worker had climbed the form and fastened his safety belt, he would unhook the crane so that the crane was available for use elsewhere on the job.

6. Then the worker would brace the sides of the fourteen foot column with three poles at a time.

7. The worker who climbed the forms had been instructed to move around the form cautiously.

8. One purpose of bracing was to keep the sides of the form perfectly perpendicular to the floor during the placement of concrete.

9. Rebarco held safety meetings and did not allow totally inexperienced employees to climb the form.

10. On July 15, 1983 an employee of Rebarco, Larry Daniel Stout, was fatally injured while Rebarco was engaged in concrete framework [sic - formwork] at the Johnston County Hospital job site.

11. A crane had placed a 1'x1'x14' form. The employee had climbed the form. His foreman was at the base of the form attempting to steady it. Another employee, Keith Long, was at the base of the form and handed 4"x4" braces to the employee on the form (Stout) so that Stout could nail them to the sides of the form.

12. Stout climbed the form and unhooked the crane from the form after hooking up his safety belt. He nailed one of the 4"x4" braces to the top of the form. Stout's waist would have been about ten feet high on the form, his feet perhaps a little more than seven feet high. (T.p. 15)

13. Mr. Stout had nailed on one of the braces but none had been secured to the concrete. At that point the crane was unhooked. After Mr. Stout had nailed the first brace, he shifted his weight and the column rocked and then tilted over. Mr. Stout was crushed by the fall.

14. As one employee witness described it, Stout "just swung around too quickly and shifted his weight to one side, and it went." (T.p. 19) Had the form been hooked to the crane, it would not have fallen. (T.p. 24-25) Mr. Stout weighed 185 to 200 lbs. and was 5'10" - 5'11" tall. (T.p. 37)

15. There was testimony at the hearing that the employee suddenly and unexpectedly swung out on the form. The employee giving that testimony had earlier given a statement to the OSHA inspector indicating simply that when the crane was unhooked "the column started swaying, and then fell." (T.p. 40)

16. In the situation in the present case, an injury to the employee is possible and, if an injury occurs, it is likely to cause death or serious bodily harm.

17. Leaving the crane hooked up to the form would have prevented the fatality which exists in the present case.

18. The witnesses were unable to say why Mr. Stout unexpectedly shifted his weight on the form. As one of the company's witnesses said in response to a question by the company's attorney, "whether he lost his footing or intentionally swung around that way, I don't know." (T.p. 91) There have been other incidents in which a form such as this had tipped over. (T.p. 92) One of the company's witnesses indicated that his experience had been that the consequences of a form falling over would be broken limbs. (T.p. 93)

19. The rent of the crane is approximately $60.00 per hour. At the longest it would have taken two additional minutes to secure all the braces before removing the crane. (T.p. 100)

20. If an employee swung on the form, contrary to instructions, or simply lost his footing, the form might tip over. It would, of course, be impossible to instruct an employee not to lose his balance. At the time Mr. Stout was killed, the form was not adequately braced in case he either swung or lost his footing.

21. Although the form may have been able to stand on its own weight, it was foreseeable that the additional weight of a grown man who had reached the height Mr. Stout had reached on the form, moving about at that height, nailing braces could cause the form with an only one square foot base to tip and fall. The taller the form and the smaller the base, the more likely it is the form could fall. It is reasonably foreseeable that a worker could move unexpectedly, shift his weight, or lose his footing and cause the form to tip. Such an accident is even more likely to occur without adequate training and instruction.

22. The company was aware that the form could fall while an employee climbed on it. Indeed the company had one employee stationed at the base of the form for the purpose of steadying it.

23. Even after the death occurred in the present case, the company continued to employ the same practice with reference to erecting the forms.

24. The evidence in the record indicates that the company recognized a possible hazard from the form tipping.

25. The hazard is also recognized by ANSI standard aid 10.9 - 1970.6.4.5 [sic - ANSI standard A 10.9 - 1970.6.4.5] which provides in pertinent part:

> Vertical forms being raised . . . shall not be released until adequately braced or secured.

26. A prudent employer engaged in concrete form work would realize the possibility that a form can fall without adequate bracing, and would particularly realize a greater danger of such a possibility where the form is high and the base is small and where an employee has climbed a substantial height on the form.

27. Although the employer had informal safety meetings, employees were not specifically warned of the hazards associated with form work.

28. Even if employees were warned not to make sudden movements without warning, such a safety rule could not be effective in light of the fact that an employee could simply lose his footing and fall. The danger to the employee would occur prior to the time the form was properly braced. No safety rule, which did not include effective bracing would be effective to protect the employee against the hazard.

29. A feasible and effective means of abating the hazard is to have the employee nail and secure the braces prior to releasing the form from the crane when the crane is available. Additional bracing in addition to effectively communicated and strictly enforced safety rules regarding employee movement would be sufficient to prevent the hazard which resulted in death in the present case.

30. During the course of the inspection of Rebarco on this occasion the safety officer also observed two heavy duty orange extension cords with cord covers pulled from the plugs so that they wouldn't endure rough use nor would strain be removed from the terminal plugs.

31. The cords were used by an employee, Keith Long, and were available for use by any employee. Respondent's employees were exposed to electric shock. As a result of this finding, Respondent was issued Citation Two, Item 1 for a nonserious violation of 29 CFR 1926.402(a)(4). No penalty was proposed.

CONCLUSIONS OF LAW

1. Complainant has proved each element of its case by the greater weight of the evidence in this case.

2. Respondent has failed to carry its burden of proof with respect to any affirmative defense.

3. Respondent failed to furnish its employees conditions of employment free from recognized hazards that are causing or likely to cause death or serious bodily harm to employees.

4. Whether or not a hazard exists is to be determined by the standard of a reasonable prudent person. Industry custom and practice are relevant and helpful but are not dispositive. If a reasonable and prudent person would recognize a hazard, the industry cannot eliminate it by closing its eyes. *Brooks v. Daniel Construction Co.*, OSHANC 79-594 (RB 1981); *Brooks v. Biggers Bros., Inc.*, OSHANC 78-315 (RB 1980); *Brooks v. Fruehauf Corp.*, OSHANC 79-541 (RB 1981).

5. The hazard in this case was recognized by Rebarco and the industry.

6. The hazard was likely to cause death or serious bodily harm.

7. A feasible means existed for abating the hazard.

8. As to the cord, the Commissioner of Labor has proved a nonserious violation of 29 CFR 1926.402(a)(4).

9. In the present case the defense of isolated employee misconduct has not been established. Some carelessness and negligence by employees must be anticipated and expected (*Brooks v. Budd Piper Roofing Co., Inc.*, OSHANC 80-639 (RB 1983)).

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the order of Hearing Examiner Barringer in this case is affirmed. Respondent shall promptly pay the assessed penalty.

DISCUSSION

The danger of the form tipping in this case was, we believe, obvious, recognized by industry in its ANSI standards, and recognized by the

Respondent. The proper test, as our North Carolina Court of Appeals has noted, is whether a prudent person familiar with the industry would have recognized a hazard. (*Daniel Construction Company v. Brooks*, No. 8310SC1220 (N.C. App. 1985))

A feasible method existed to eliminate the hazard in this case —the crane could be left attached to the form for another two minutes until the form is adequately braced. Defendant pled isolated employee misconduct. The idea behind this defense is that if the hazard is one that can be eliminated by safety rules and, if the rules are effectively conveyed to the employee, and, if an employee unforeseeably and idiosyncratically violates one of the rules, the employer may not be held responsible for the violation. The burden of proof is on the employer.

Our Board has recognized that a certain amount of employee negligence or carelessness must be expected. (*Brooks v. Bud Piper Roofing Co., Inc.*, OSHANC 80-639 (RB 1983).) Only when the employee's conduct and negligence is so extraordinary that it cannot be conceivably considered ordinary conduct on the job and must almost seem to be intentionally dangerous, can the defense succeed (*Nye v. Peden Steel Co.*, OSHANC 67 (RB 1976)). It is to be anticipated that an employee may slip or shift his weight too quickly. A "safety rule" which attempts to prevent such happenings is bound to be ineffective. The policy of the law is, where possible, to protect employees from expected and foreseeable mistakes.

This the 26th day of November, 1985.

Kenneth K. Kiser
Chairman

Michael K. Curtis
Member