The only evidence to the contrary is the testimony of one of the steel erection employees, L.G. Martin, that he noticed that the building had a little more movement than normal and that he commented on this to McBro, the general contractor. McBro responded that the building was erected in accordance with the designs, and this apparently satisfied Martin. Martin also testified that the movement of the building did not give him any concern that the building might fall down. In fact, Martin was on the roof at the time of the collapse.

The Commissioner suggests that Cox had a duty to inspect. Since Cox, a concrete subcontractor, has no expertise in structural engineering, what the Commissioner is suggesting is that Cox should have hired a separate structural engineer to give a second opinion about the adequacy of the building design. Logically, such a standard would require each subcontractor to do this. There is nothing in the record to suggest that a reasonably prudent person would not rely on a structural design prepared by a competent, licensed professional. To hold otherwise would cause chaos in the construction industry without materially improving safety.

I therefore conclude, based on the facts before me, that Cox did not have sufficient notice of irregularity prior to the collapse of the building that a reasonably prudent person would have made further inquiry as to whether or not the structure would safely support the pouring of concrete.

Based on these conclusions, It is ORDERED, that Citation Number One, date 12/16/83, against L.P. Cox Company, Inc. is dismissed.

This the *31* day of *January*, 1985.

Leslie J. Winner
Hearing Examiner

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, Complainant, v. L. P. COX CO., INC., Respondent.	)	OSHANC NO. 83-1063 9-11-85

APPEARANCES	Complainant:	David R. Minges Associate Attorney General
	Respondent:	Jeffrey T. Myles Attorney at Law Sanford, North Carolina
BEFORE	Review Board:	David W. Erdman and Dewey A. Houston

Burden of Proof; Citations; Concrete; Employers; Knowledge; Occupational Safety and Health Act; Standards; Violations The lower order did not err by dismissing the citation for the alleged "nonserious" violation of 29 CFR 1926.701(a)(1), for the failure to provide formwork to adequately support the concrete poured upon it. The terms of the standard, however, applied to the condition, notwithstanding the fact that the permanent components of the building served as formwork for the concrete. Concrete for the roof was poured prior to pouring concrete to form the floor. The building collapsed. However, the subcontractor was instructed by the general contractor as to the sequence of the concrete pouring. Ultimately, plans and specifications developed by licensed professionals were relied upon for assurances as to the integrity of the building. In the absence of palpable evidence dictating further inquiry about the strength of the building, a prudent person would rely upon the architect's and engineer's designs. "To hold otherwise would cause chaos in the construction industry without materially improving safety." The act seeks to "assure

employees safe workplaces 'so far as possible'"; and the Act itself requires that its terms be "liberally construed" in favor of employee safety. Therefore, the Act does not impose a strict liability standard upon employers with regard to employees' safety and health. The corollary derived by the Review Board was that to establish a violation of a "nonserious" nature, the Commissioner bears the burden of proving the existence of employer knowledge of the condition alleged as violative. Here, that burden was not successfully borne.

The hearing examiner order is at 2 NCOSHD 630.

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THIS CAUSE CAME ON TO BE HEARD on the 27th day of June, 1985, in Raleigh, North Carolina before David W. Erdman, Acting Chairperson and Dewey A. Houston, Member, Safety and Health Review Board of North Carolina.

APPEARANCES

David R. Minges, Associate Attorney General, N. C. Department of Justice, Raleigh, N. C., for the Department of Labor, Complainant.

Jeffrey T. Myles, Attorney and Vice President of Administration, for L. P. Cox.

STANDARDS CITED

29 CFR 1926.701(a)(1): (a) General provisions. (1) Formwork and shoring shall be designed, erected, supported, braced, and maintained so that it will safely support all vertical and lateral loads that may be imposed upon it during placement of concrete.

FINDINGS OF FACT

1. L. P. Cox Co., Inc. (hereinafter, "Cox") is in the business of concrete construction.

2. In November, 1983, Cox was a subcontractor working under the general contractor McBro in constructing the Charlotte Memorial Hospital. The subcontractor for steel erection was Florence Steel Company. The purpose of Cox as subcontractor was to pour concrete for the foundation, floors, and roof after the subcontractor Florence Steel had erected the structural steel.

3. The contractor McBro was working under a design of plans and specifications provided by a licensed architect and structural engineer. The Respondent made no independent inspection of the plans and specifications and hired no outside expert to review those plans before proceeding with its obligations under the contract.

4 On November 21, 1983, Cox was planning to pour cement on the one-story portion of the hospital adjacent to the main tower. The condition of the building at that point was as follows:

a. The steel erection for the one-story portion had been completed except for several minor adjustments.

b. The one-story reception building was formed of sheets of corrugated steel supported by I-beams welded onto concrete tiers. The corrugated steel was to support the concrete which was ultimately to serve as the roof.

c. The ground floor was also to be composed of concrete, but that concrete had not yet been poured.

5. McBro, the general contractor, ordered Cox, the subcontractor, to pour the roof before Cox poured the ground floor cement. The order of pouring of the concrete was not specified in the plans for the building.

6. After Cox had begun the pouring of the concrete on the roof, but before the pouring was complete, the building collapsed.

7. At the time of the collapse, the building had been erected in accordance with the plans and specifications of the licensed architect and structural engineer, and the inspector had released the area of the building in which Cox was pouring concrete as meeting the planned specifications.

8. There was no evidence presented to show that the minor adjustments yet to be made by the subcontractor, Florence Steel, in any way made the structure vulnerable to collapse.

9. We find that the Complainant presented insufficient evidence to show that the fact that the roof was poured before the ground floor cement was poured contributed to the collapse of the building. We find, therefore, that the sequence of the pour was not a cause of the collapse.

10. The greater weight of the evidence establishes that the building collapsed because of improper bracing of the structural steel to stand the load placed on it by pouring concrete. This improper bracing was the result of a defect in the designing of the building and not the result of improper erection of the building. It was feasible to have avoided the collapse of the building by using temporary cross-bracing during the construction of the building. The only warning that the building might have been improperly designed was the testimony indicating that, before the concrete was poured, the building had slightly more movement than buildings at that stage normally have. However, none of the workers who testified said that the extra movement was enough to make them think that a collapse of the building was possible. This finding of fact is supported by the presence of several of the workers on the roof at the time that the concrete was being poured.

11. The Respondent, subcontractor Cox, had no actual knowledge of the design defect prior to the collapse of the building.

CONCLUSIONS OF LAW

1. L. P. Cox Co., Inc., is an employer within the meaning of G.S. 95-127(10) and is covered by the provisions of the North Carolina Occupational Safety and Health Act. G.S. 95-128.

2. The citation issued involved a nonserious violation of 29 CFR 1926.701(a)(1). In this instance, corrugated steel and steel beams were the formwork and shoring of the building, provided to support the vertical and lateral loads imposed by the pouring of concrete. Therefore, the section of the act is applicable to the construction site in question.

3. There is no question but that there was a violation of 29 CFR 1926.701(a)(1).

a. The formwork and shoring of the building were not designed, erected, supported or braced to safely support the pouring of the concrete at this construction site.

b. However, we find all the evidence in the record supports the conclusion that neither the Respondent Cox nor any of its agents had actual knowledge of the unsafe condition.

4. Assuming that Cox had no actual knowledge, two questions are presented:

First, is the Commissioner required to prove actual or constructive knowledge on the part of the Respondent in order to prove a nonserious violation?

For the following reasons, we hold that, in order to establish a nonserious violation, the Commissioner has the burden of proving that an employer either knew, or through reasonable diligence, could have known, that a condition that violates the Act or the standards does exist.

Although a "serious violation" is defined in the Act, G.S. 95-127(18), a nonserious violation is not defined. The primary reference to a nonserious violation is in G.S. 95-138(a) providing: "If the violation is adjudged not to be of a serious nature, then the employer may be assessed a civil penalty of up to one-thousand dollars ($1,000) for each violation." The elements of such an adjudication are not specific by statute.

Further, not only does the Act not define a nonserious violation but neither the Courts of North Carolina nor the Occupational Safety and Health Review Board has considered directly the question of whether a showing of scienter is required to find a nonserious violation. In *Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 590 (1981), the Supreme Court of North Carolina held that proof of knowledge of the *standard*, not proof of the knowledge of the *condition*, was necessary to show a *repeated* violation. [Emphasis added.] In *McWhirter*, the Supreme Court of North Carolina held that there was insufficient comparability of the condition in question in that case, to a previous citation that had been issued to the Respondent, to establish the culpability necessary for a repeated violation, *and* insufficient evidence of the possibility of an accident to establish a serious violation. Therefore, the Supreme Court remanded the case for consideration of whether a penalty should be imposed for a nonserious violation. 303 N. C. 573, 591 (1981). However, in *McWhirter*, unlike *Cox*, the violation was for failure to shore a trench, a condition that was patent. In *McWhirter*, there was no question that the employer knew that a condition existed that contravened the standard cited. In the instant matter, the standard requires safe support, and it was not obvious to anyone that the support was not

adequate to safely support the load at hand. Thus, *McWhirter* does not answer the question of whether an employer must know or have constructive knowledge that the condition that contravenes the standard exists, in order to show that the employer has violated the standard.

Since neither statute nor *stare decisis* can solve what is the burden of proof rests [sic - resting?] upon the Complainant to establish scienter, it is appropriate to look at the purpose of the Act. Two provisions are relevant, G.S. 95-126(b) and 95-155. The first states that the purpose of the act is "to assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions. . . ." The second provides that the Act shall be liberally construed "to the end that safety and health of employees be effectuated and protected."

Therefore, we conclude that the Act should be interpreted to provide every incentive to employers to take all reasonable actions to prevent unsafe conditions from coming into existing [sic - existence?] or from continuing in existence, and to provide every incentive to employers to correct any unsafe condition of which they are aware, or through reasonable efforts might become aware.

We can see no way in which safety will be promoted by issuing a citation for a violation if reasonable diligence would not have exposed the unsafe condition. Such a citation neither encourages the establishment of safety programs nor the cooperation of employers. It approaches a strict liability standard which would hold an employer responsible whether it should or could have known of the unsafe condition. We do not believe that this was the intent of the General Assembly. See *Brennan v. OSHRC*, 511 F.2d 1139, 1145 (9th Cir. 1975) and *Mountain States Telephone and Telegraph Company*, 1973 OSHD ¶15,365, p.20,497 (OSHRC 1973).

The Commissioner states that it is necessary to be able to issue citations for every violation in order to assure that the violation will be abated and will not be repeated in the future. We noted previously that in this case there is certainly no such need, because the unsafe condition ceased to exist when the building collapsed, before the citation was issued.

The statutory interpretation must, however, take into account unsafe conditions that are not self-destructing. The issuance of a citation for a violation is not the Commissioner's only means to assure correction of latent unsafe conditions, once they are discovered. G.S. 95-133(b)(9) gives the Commissioner ample authority to issue whatever notice is necessary to inform the employer of the violation, without the issuance of a citation. Notice by the Commissioner to the employer can set an abatement date after which, if the condition is not abated, a citation can be issued. This procedure is in accord with the purpose of the Act as cited in *Arkansas-Best Freight*, 529 F.2d 649, 653 (1979) and with the remedies available to the Commissioner as stated in *Atlas Roofing Co.*, 430 U.S. 442, 446 (1976).

We, therefore, hold that to establish that an employer has violated the Act, the Commissioner must prove either that the employer knew of the offending condition or that the employer had sufficient notice of irregularity that a reasonably prudent person would have made further inquiry. On this issue, the Commissioner has the burden of proof. See Rule .0514 of the Rules of Procedure of the Safety and Health Review Board; *Brennan v. OSHRC*, 511 F.2d at 1143.

Second, applying these standards to this case, we conclude that the Commissioner did not prove by the greater weight of the evidence that Cox knew that the formwork and shoring were not adequately safe to support the pouring of concrete on the "roof" before it was poured on the ground floor, or that Cox had sufficient notice of irregularity that a reasonably prudent person would have made further inquiry to establish if the pouring of concrete on the roof before it was poured on the ground floor would be hazardous to the health and welfare of the employees.

The wing of the hospital was designed by an architect and a structural engineer. There is nothing in the record that either of these professional persons was not duly licensed, that either had a questionable reputation, or that either was for any reason known to be incompetent to design the structure in question.

Further, the building was constructed in accordance with the plans and specifications provided and the steel structure had been inspected prior to the pouring of the concrete. Cox reason-

ably relied on the determination of other professionals that the building was structurally sound and would safely support the pouring of concrete on the roof before the concrete was poured on the ground floor.

The only evidence to the contrary is the testimony of one of the steel erection employees, L. G. Martin, that he noticed that the building had a little more movement than normal and that he so commented to McBro, the general contractor. McBro responded that the building was erected in accordance with the approved design, and this apparently satisfied Martin to the extent that he was one of the employees on the roof at the time it collapsed.

The Commissioner suggested that Cox had a duty to inspect. Since Cox, a concrete subcontractor, has no expertise in structural engineering, what the Commissioner is suggesting is that Cox should have hired its own structural engineer to give a second opinion about the adequacy of the building design. Logically, such a standard would require each subcontractor to so comply. There is nothing in the record to suggest that a reasonably prudent person should not rely on a structural design prepared by competent, licensed professionals. To hold otherwise would cause chaos in the construction industry without materially improving safety.

We therefore, conclude that the Complainant did not meet its burden of proof in establishing that Cox had such notice of irregularity prior to the collapse of the building that a reasonably prudent person would have made further inquiry as to whether the structure would safely support the pouring of concrete on the "roof" prior to the pouring of concrete on the first floor.

IT IS THEREFORE ORDERED that the decision of the hearing examiner in this case is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Citation Number One, dated December 16, 1983 against the L. P. Cox Company, Inc., be dismissed.

This the 11th day of September, 1985.

David W. Erdman, Member

Dewey A. Houston, Member

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, Complainant, v. L. P. COX COMPANY, INC., Respondent.	OSHANC NO. 83-1063 7-14-87 85 CvS 9029

APPEARANCES
Complainant: Ralf F. Haskell, Special Deputy Attorney General
Respondent: Jeffrey T. Myles, Attorney at Law and Vice President of Administration, L. P. Cox Company, Inc.

BEFORE
Superior Court: Read, J. Milton, Jr.

Knowledge; Violations The lower order properly required the complainant to prove the existence of employer knowledge to establish a nonserious violation; employed the proper standard for testing for employer knowledge; and properly concluded that the existence of employer knowledge was not proven.