

BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

DOCKET NO. OSHANC 94-3057
OSHA INSPECTION NO. 111101259

SOUTHEASTERN PLUMBING &
HEATING,
INC. and its successors

ORDER

RESPONDENT.

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 2:00 P.M. on the 17th day of December, 1997 in the Utilities Commission Hearing Room # 2115, Dobbs building, 430 North Salisbury Street, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, and Henry Whitesides, Members of the North Carolina Safety and Health Review Board.

APPEARANCES

John C. Sullivan, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Ronnie Overcash, pro se, vice-president of Respondent.

ISSUES PRESENTED

1. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent committed a serious violation of 29 CFR 1926.28(a) by allowing its employee to work on the edge of a building 23 feet above the ground without personal protective equipment to prevent him from falling?
2. Is the Hearing Examiner's finding of fact that the employee who was working on the edge of the building was an employee of Respondent's supported by competent and substantial evidence?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ... unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation".
2. 29 CFR 1910.28(a). The standard reads as follows:

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The employer (Respondent) Southeastern Plumbing & Heating, Inc., is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
4. A hearing was scheduled and held on April 30, 1997 before the Honorable Richard M. Koch. Judge Koch's order, filed with the Review Board on May 9, 1997, affirmed Citation No. 1 as a serious violation of 29 CFR 1926.28(a) with a penalty of \$100.00.
5. The Review Board adopts all of the findings of fact found by the Hearing Examiner in its decision below.
6. The employee photographed at the edge of the building was an employee of Respondent's and he was exposed to the hazard of falling off of the roof of the building 23 feet to the ground below.
7. The Respondent timely filed an appeal with the Review Board on May 16, 1997.
8. The Respondent filed a brief with the Review Board on August 26, 1997 and the Complainant filed its brief with the Review Board on September 25, 1997.
9. On December 17, 1997, the issues on appeal were heard by the full Review Board.

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 Commissioner has proved by the greater weight of the evidence that Respondent committed a serious violation of 29 CFR 1926.28(a) by allowing its employees to work on the edge of a building 23 feet above the ground without personal protective equipment to prevent him from falling.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schoss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976). When there is conflicting testimony and the Hearing Examiner adopts findings of fact that are based on one party's version of the facts, the Board follows the rule that "The hearing examiner is in a far better position to

determine credibility of witnesses than we are when an appeal is based solely upon contradictions in testimony, as it is here, the decision of the hearing examiner must be affirmed." Nye v. Jay's Electric Company, 2 NCOSHD 56, at 58 (RB 1977).

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the Rules of Procedure of the Safety & Health Review Board of North Carolina, revised February 3, 1992, amended effective April 1, 1993. OSHA enforcement proceedings are civil in nature, rather than penal, and the applicable burden of proof is the ordinary burden of proof for civil actions, the preponderance of the evidence. Brooks v. Daniel Construction Company, 2 NCOSHD 299 (RB 1981); Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

In interpreting the personal protection provision for the construction industry, 29 CFR 1926.28(a), the Review Board stated: "The main purpose of OSHA is to ensure employees a safe work place. A serious violation of OSHA can be established only if a preponderance of the evidence shows that employees are exposed to a hazardous condition requiring the use of personal protective equipment that would eliminate the hazard." Brooks v. Daniel Construction Company, 2 OSHANC 299, at 303 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984). Pursuant to Brooks v. McWhirter in order to prove a serious violation it must also be shown by substantial evidence "that the violation created a possibility of an accident a substantially probable result of which was death or serious physical injury." Brooks v. McWhirter Grading Co., INC., 2 OSHANC 115, 303 N.C. 573 (Supreme Court 1981). In addition, G.S. 95-127(18) which gives the definition of a serious violation requires an element of employer knowledge: " A 'serious ' violation shall be deemed to exist in a place of employment . . . unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation."

Following the principals of these precedents, the following elements must be proven in order to show a serious violation of 29 CFR 1926.28(a), the personal protective provision for the construction industry:

1. A hazard existed;
2. employees were exposed;
3. the use of the personal protective equipment would have eliminated the hazard;
4. the hazard created the possibility of an accident;
5. the substantial probability of an accident would be death or serious physical injury and
6. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniels, supra) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered six above. See, Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

The Commissioner is required to prove each and every element of a violation by a preponderance of the evidence. If the commissioner fails to meet its burden of proof on any one of the above elements then the violation cannot be sustained. The only element at issue in this appeal is element numbered 2, whether any of the Respondent's employees were exposed to the hazard of falling off of the edge of the building. There was conflicting testimony by the compliance officer and by the Respondent's employee on direct and cross-examination. The Hearing Examiner was in the best position to make the credibility determination based on the

witnesses demeanor while testifying. The Hearing Examiner gave more credibility to the testimony of the compliance officer in finding that the Respondent violated 29 CFR 1926.28(a) and the record on a whole supports his findings of fact and conclusions of law in that regard. Based on the Board's precedent set out above, the Board is not inclined to disturb the findings of the Hearing Examiner based on credibility determinations. There is substantial and competent evidence in the record to support the Hearing Examiner's findings that the Respondent violated 29 CFR 1926.28(a).

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's May 2, 1997 Order in this cause be, and hereby is, **AFFIRMED**, and the Respondent is ordered to pay the \$100.00 in penalties.

This the 27th day of March, 1998.

ROBIN E. HUDSON, CHAIR

HENRY WHITESIDES, MEMBER

I dissent.

KENNETH K. KISER, MEMBER