BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

Metric Constructors

RESPONDENT.

DOCKET NO. OSHANC 96-3407
OSHA INSPECTION NO. 12526302
CSHO ID NO. J9294

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 12:00 P.M. on the 24th day of June, 1998 in Room 700 on the seventh floor of the Wake County Courthouse located at 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser and Henry M. Whitesides Members of the North Carolina Safety and Health Review Board.

APPEARANCES

Ms. Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Mr. J. Larry Stine OF WIMBERLY & LAWSON PC, Atlanta, Georgia and Mr. Richard L. Rainey of WOMBLE, CARLYLE SANDRIDGE & RICE, Charlotte, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did Complainant meets its burden of proving by a preponderance of the evidence and by substantial and competent evidence that respondent committed a serious violation of N.C.G.S. § 95-129(1), the general duty clause, by allowing its employees to use an elevator emergency key to open elevator doors without knowing whether the elevator car was in the shaft behind the door?

2. Was the Hearing Examiner's dismissal of the sign violation supported by substantial and competent evidence in the record?

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. N.C.G.S. § 95-129(1), the general duty clause, which states:

> Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees[.]

3. 29 CFR 1926.200

(b)(1) Danger signs shall be used only where an immediate hazard exists.

(c)(1) Caution signs shall be used only to warn against potential hazards or to caution against unsafe practices.

(h)(1) Accident prevention tags shall be used as a temporary means of warning employees of an existing hazard, such as defective tools, equipment, etc. They shall not be used in place of, or as a substitute for, accident prevention signs.

Having reviewed and considered the record and the briefs of the parties and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby affirms the decision of the hearing examiner upholding the Respondent's violation of the general duty clause, N.C.G.S. § 95-129(1) and vacates and reverses the decision of the hearing examiner dismissing the citation for the alleged violation of the sign regulation, 29 CFR 1926.200(h)(1), (b)(1) and (c)(1) and 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 Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).

4. The employer (Respondent), Metric Constructors is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On December 1, 1997, the honorable Richard M. Koch issued an order affirming the citation for a serious violations of N.C.G.S. § 95-129(1), the general duty clause together with the penalty of $7,000.00, and dismissing the citation for an alleged serious violation of 29 CFR 1926.200 for the failure to post a danger or caution sign or accident prevention tag on an elevator door for an elevator that was out of order.

6. The Board adopts the Hearing Examiner's findings of fact numbered 1 through 20.

7. The failure to place a danger or warning sign or accident prevention tag on the elevator door on the first floor indicating that the elevator was out of order and not behind the door, created the hazard that the operator would open the door and fall down the elevator shaft because she would not know that the elevator was not behind the door.

8. This hazard created the possibility of an accident that the operator would open the closed door with the emergency key and fall down the 25 foot elevator shaft to the concrete floor of the elevator pit.

9. The substantially probable result of such an accident would be death or serious physical injury as is evidenced in this case when the operator, Angela Murphy fell 25 feet down the elevator shaft to her death.

10. The employer knew or reasonably should have known that the failure to place a danger or caution sign or accident prevention tag on an out of order elevator created a hazardous condition as is evidenced by the employer's practice prior to the accident of placing "out of order" signs on the elevator doors from the basement through the sixth floor of the elevator that was stuck on another floor.

11. After taking into account the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations the Board finds that the $7,000.00 penalty assessed by the commissioner is appropriate for the grouped serious violations of the general duty clause, N.C.G.S. § 95-129(1) and the violation of 29 CFR 1926.200(b)(1), (c)(1) or (h)(1) which were cited in the alternative.

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 Board has jurisdiction of this cause and the parties are properly before the Board.

3. The Complainant has proven by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of N.C.G.S. § 95-129(1), the general duty clause as alleged in Citation No. 1, item 1b by failing to furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees in that his employees were exposed to a fall down an open elevator shaft because the employees were instructed to open the closed elevator doors with an elevator key to access the elevator without knowing whether the elevator car was in the shaft behind the elevator door.

4. The Hearing Examiner's dismissal of Citation 1, Item 1a, the sign violation was not supported by competent and substantial evidence in the record and the Complainant has proven by a preponderance of the evidence and by substantial evidence that the Complainant committed a serious violation of 29 CFR 1926.200(h)(1) or in the alternative (b)(1) or (c)(1) as alleged in Citation No. 1, item 1a by failing to place accident prevention tags, danger signs or caution signs on the doors of the elevator on the first floor to warn employees of the hazard of an open shaft due to the elevator being stuck on the sixth floor.

5. The $7,000.00 penalty assessed by the commissioner is appropriate for the grouped serious violations of the general duty clause, N.C.G.S. § 95-129(1) and the violation of 29 CFR 1926.200(b)(1), (c)(1) or (h)(1) which were cited in the alternative and was calculated after taking into account the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations and is fair and reasonable in amount.

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. Schloss 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).

"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).

The Violation of the General Duty Clause

In order to establish a violation of the general duty clause the Commissioner has the burden of proving by a preponderance of the evidence the following:

1. The employer failed to keep its workplace free of a hazard;

2. the hazard was recognized;

3. the hazard was causing or likely to cause death or serious physical harm; and

4. there were feasible measures that can be taken to reduce materially the likelihood of death or serious physical harm resulting to employees.

5. employees were exposed; and

6. the hazard created the possibility of an accident;

Brooks v. Rebarco, Inc., 3 NCOSHD 1, 91 N.C. App. 459 (1988); 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." If the state proves that the hazard was recognized, then the scienter requirement of N.C.G.S.95-127(18) is satisfied.

Proof that a hazard was recognized can be accomplished by showing actual employer knowledge of the hazard or by use of the reasonable man standard. "[w]hether 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. Rebarco, Inc., 3 NCOSHD 1, 6, 91 N.C. App. 459 (1988). (quoting the Review Board decision in Rebarco, below). "[a]s applied by the First and Third Circuits, the practice in the industry is but one circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard. These courts have noted, quite properly we think, that equating the practice of an industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry" Id. at 7 (quoting Daniel Construction Co. v. Brooks , 2 NCOSHD 311, 316, 73 N.C. App. 426, 430-431 (1985)).

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. 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.

With respect to the alleged general duty clause violation, the Respondent sought review of the Hearing Examiner's findings of fact numbered 15, 17, and 18 in which the Hearing Examiner found that the facts of this case showed a recognized hazard, a feasible means of abatement and a possibility of an accident, three of the essential elements of a general duty clause violation. The Respondent does not seek review of the other three essential elements and the Board will consider only those findings of fact that have been challenged. The Respondent also seeks review of the hearing examiner's conclusions of law numbered 4 which held that the Complainant had proven by a preponderance of the evidence that Respondent committed a serious violation of the general duty clause.

The Board has adopted the Hearing Examiner's findings of fact numbered 1 through 20, which includes the challenged findings of fact numbered 15, 17 and 18. A review of the record reveals that the Complainant presented competent and substantial evidence to prove by a preponderance of the evidence each of the challenged findings of fact. The opinion of the safety officer was that "there's a potential hazard . . . of falling into the hoistway if the car is not there." (T, pp 100-101). He further testified that the setup of the doors with the procedure of reaching 6 feet 6 inches over ones head to insert a key into the elevator lock and then having to push the doors open with one's hands and peer into an unlighted shaft was the reason that there was a hazard of

falling into the hoistway. The opinion evidence of a compliance officer is sufficient to prove that there is a hazard. See, McWhirter v. Commissioner, 2 NCOSHD 115, 129, 303 N.C. 573, 586 (1981) (data or opinion evidence sufficient to prove possibility of an accident).

The testimony of Fred Allmond, Respondent's superintendent, was that if you opened the hoistway doors and there were no elevator behind the door there would be a hazard and that it was recognized in the construction industry that there would be a safety problem if an elevator door were opened and there was no elevator behind the door. This is evidence that the hazard associated with the Respondent's procedure of opening the elevator doors with the elevator key was recognized in the industry and this actual knowledge is imputed to the Respondent. Respondent argues that they trained the operators to always look for the elevator car before they stepped into the elevator shaft and that the operator failed to look before she stepped and that was the cause of the accident. However, the OSH Act anticipates that employees will make mistakes and requires employers to use safety procedures that provide for employee mistakes.

> Our Board has recognized that a certain amount of employee negligence or carelessness must be expected. (citations omitted). . . 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 our law is, where possible, to protect employees from expected and foreseeable mistakes.

Brooks v. Rebarco, Inc., 2 NCOSHD 584 (RB 1985), affirmed, 3 NCOSHD 1, 91 N.C. App.459 (1988).

Similarly, a "safety rule" that requires a 5 feet 3 inch employee to stand on tiptoe or on a box to insert a key into a lock to open a closed elevator door with instructions to leave the key in so the door would only open half way, to physically open the door with the hands the rest of the way and to peer into the elevator shaft to make sure the elevator car was there before stepping into the car is likely to be ineffective. It is to be anticipated that an employee might trip on the box or might lose their balance while standing on tiptoe or might lose their balance while opening the door. The very fact that Ms. Murphy fell down the elevator shaft to her death is at least some evidence that the procedure that she was trained to follow was ineffective.

In a digest of a 1974 administrative law decision which was later affirmed by the Review Commission without comment and which had a fact situation almost identical to this case, it was stated:

> Failure to properly warn an employee of the danger involved in gaining access to a maintenance elevator by means of emergency release device (key) was a serious violation of the general duty clause, even though the employer did not know that this practice was hazardous. The employee, upon opening the elevator by use of the emergency release device, fell 23 feet. The judge held that the employer completely failed in his duty to properly educate his employees concerning the dangers of opening hoistway doors by use of the emergency release device, and that the practice was a "recognized hazard" in the industry, even though the employer did not have actual knowledge that the practice was hazardous.

National Cleaning Contractors, Inc., 1973-1974 OSHD 22,073-22074 (1974) (digest of administrative law judge's decision), affirmed without comment, 1974-1975 OSHD 22,834 (RC 1974).

Complainant had three witnesses who were experienced with elevators and with the construction industry who testified that it was a recognized hazard in the elevator and/or construction industry to open elevator doors with an emergency key without knowing whether the elevator car was behind the door. Those witnesses were: Harold Wagner, a qualified Elevator Inspector for the Department of Labor who had worked in the elevator construction industry; Dean Schleicher, a twenty-five year employee of Otis Elevator Company; Archie Smith, an employee of Otis Elevator Company. The evidence is overwhelming that Respondent's procedure of opening the elevator doors with the emergency key exposing employees to a fall down an elevator shaft was a recognized hazard within the construction industry.

The Complainant has also met its burden of proof with respect to the feasibility of abatement. The safety officer, Robert Jones, testified that temporary external material and personnel hoists were used in the construction industry and that is a feasible method of abatement of the hazard presented by the Respondent's procedure of using the permanent elevators to move material and personnel between floors. The safety officer also testified that a feasible means of abatement would be to park the elevators on the lowest floor with the doors locked open with lights on in the elevator and to limit access to the elevator keys to qualified maintenance personnel. Archie Smith, the construction foreman for Otis Elevator on Respondent's worksite and Harold Wagner both testified that it was possible to operate the elevator with the hall call buttons installed which would be a feasible alternative to Respondent's procedure for opening the elevator doors.

The Complainant has also proven that the Respondent's procedure for opening the elevator doors created the possibility of an accident. The record is replete with testimony that it was possible to fall down the elevator shaft when opening the door with the elevator key and the fact that Angela Murphy did in fact fall down the elevator shaft to her death while opening the elevator door with the key is some evidence of the possibility of an accident. The hearing examiner's finding of the possibility of an accident is supported by competent and substantial evidence.

The hearing examiner's conclusion of law that the Complainant had proven that the Respondent committed a serious violation of the General Duty Clause of the Act (N.C. Gen. Stat. 95-129(1)) by the use of its procedure for operation of the elevators during construction is supported by the findings of fact and those findings of fact are supported by competent and substantial evidence in the record.

The violation of the sign standard.

In order to prove that the Respondent committed a serious violation of a specific standard the Commissioner of Labor must prove by a preponderance of the evidence the following elements:

1. A hazard existed;

2. employees were exposed;

3. the hazard created the possibility of an accident;

4. the substantially probable result of an accident could be death or serious physical injury; and

5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel, supra) of the condition or conduct that created the hazard.

Again, if there were actual knowledge of the hazardous condition by the employer or a supervisor, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above.

As was stated above, the Board follows the policy that ordinarily facts found by a hearing examiner will be affirmed when such facts are supported by substantial evidence. The hearing examiner made findings of fact that on the day of the accident no signs were placed on the door of the first floor elevator to advise of any problems with elevator one and a finding of fact that prior to the accident the Respondent's practice was to place "out of order" signs on the doors of the elevator when the elevator was not working. In his discussion the hearing examiner wonders whether a sign on the door of the first floor elevator would have prevented Angela Murphy's death but then states that it did not appear that the "sign standard", 26 CFR 1926.200, applied to elevators. The question of whether a standard applies to a particular fact situation is a question of statutory construction and the Board applies a de novo standard of review.

Respondent argues that 29 CFR 1926.200 does not apply to elevators and only applies to traffic signs. To support his argument the Respondent states that all of the cases involving 29 CFR 1926.200 that are reported in CCH's Employment Safety and Health Guide involve traffic signs and that none of them involve elevator signs.

However, a look at an identical provision for caution signs in the General Industry Standard 29 CFR 1910.145(c)(2)(i) shows that there is a recent Review Commission decision by Chairman Foulke, Commissioners Wiseman and Montoya, that found a violation of the sign standard in an area other than traffic signs. In Pride Oil Well Service, 1991-1993 OSHD 40,578 (RC 1992), the full Review Commission held that the employer violated 29 CFR 1910.145(c)(2)(i) by failing to place caution signs on or around the top of a "frac tank" to warn against the potential hazard of nitrogen gas. An employee was overcome by oxygen deficient air while monitoring the returns on the top of a tank and fell into the tank and drowned.

Respondent also makes the argument that the standard 29 CFR 1926.200 is unconstitutionally vague as applied and it cites a Fifth Circuit case which states that industry custom and practice determines the standard of conduct and that it was not the industry standard to place signs on elevator doors when there was no car behind the door. However, the Fifth Circuit is the only circuit that uses that test and it reserves that test for generally worded standards. The test that is used by all of the other circuits is set out in the quotation from the case below:

> Bratton argues that section 1926.28(a) is vague as applied and that to cure this vagueness the Secretary must prove that industry custom or practice required the use of safety belts under the circumstances cited in this case. However, no federal circuit court other than the Fifth Circuit has found evidence of industry custom to be dispositive. Rather, the vast majority of the circuit courts have concluded that the same test applied by the Commission in the decisions cited above--what a reasonable person familiar with the circumstances surrounding the cited condition and with industry practice would have done--is sufficient to meet the requirements of due process. (citations omitted).

Bratton Corp., 1987-1990 OSHD 38,989, at 38,993 (RC 1990). Complainant has set forth competent and substantial evidence that a reasonably prudent employer would have placed signs warning of the hazard of a fall down an elevator shaft due to the elevator being stuck on the sixth floor. In fact, the Respondent's own practice was to place signs on the first floor elevator doors indicating that the elevator was out of service when it became stuck on a floor.

There is precedent for finding a violation of the caution sign standard in areas other than traffic signs and the Board finds that the Respondent violated 29 CFR 1926.200, by failing to place danger or caution signs or warning tags to warn of the hazards of an open elevator shaft when the elevator was out of order. The hearing examiner in his opinion stated the Board's view succinctly:

> . . .One can only wonder whether Angela Murphy would be alive if a sign advising that the elevator was out of service had been posted on the hoistway doors on the first floor when she came into work on that fateful day.

The compliance officer and other witnesses testified that there were no warning signs or tags on the elevator warning that it was out of order and that created the hazard of falling down the elevator shaft, that employees were exposed, that there was a possibility of an accident, that the substantial probable result of such a fall would be death or serious injury and that the Respondent knew or should have known of the condition that created the hazard. The evidence, the findings of fact found by the hearing examiner and the discussion of the hearing examiner all support a finding of a violation of 29 CFR 1926.200(h)(1), (b)(1) or (c)(1) in the alternative.

As is required by N.C.G.S. 95-138, after giving due consideration to the statutory criteria of size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations, the Board finds that the penalty of $7,000.00 assessed by the Commissioner for the grouped violations of the general duty clause, N.C. Gen. Stat. 95-129(1), and the sign violation, 29 CFR 1926.200(h)(1), (b)(1) or (c)(1) is appropriate.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's December 1, 1997 Order in this cause be, and hereby is, **AFFIRMED**, with respect to the violation of the general duty clause and

the Respondent is found to be in serious violation of N.C. Gen. Stat. 95-129(1), the general duty clause as was cited in Citation 1, Item 1b.

The Review Board further **ORDERS** that the Hearing Examiner's holding dismissing the sign violation is **REVERSED** and Respondent is found to be in violation of 29 CFR 1926.200(h)(1), (b)(1) or (c)(1) in the alternative as was cited in Citation 1, Item 1a and Respondent is ordered to pay the $7,000.00 penalty for the grouped violations within 30 days of the date of this order.

This the 30th day of July, 1999.

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ROBIN E. HUDSON, CHAIR

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HENRY M. WHITESIDES, MEMBER

J. B. KELLY, Member, did not participate.