BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

ROMEO GUEST ASSOCIATES, INC.
and its successors,

RESPONDENT.

DOCKET NO. OSHANC 96-3513
OSHA INSPECTION NO. 300260270
CSHO ID NO. W3441

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 27th day of March, 1998 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, Member and Henry Whitesides, Member of the North Carolina Safety and Health Review Board.

APPEARANCES

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

Jay M. Wilkerson, of Bugg & Wolf, P.A. for Respondent.

ISSUES PRESENTED

1. Did Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that Respondent committed a serious violation of 29 CFR 1926.416(a)(3) for failure to ascertain whether any dangerous energized power lines were located in such a manner so that a person may come into contact with them?

2. Did Complainant meets its burden of proving by a preponderance of the evidence that the Respondent could reasonably have known by reason of its supervisory capacity that the energized power lines presented a hazard to the employees of the subcontractor who were installing the fascia on the walkway?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1926.416(a)(3) which provides:

> Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

2. N.C.G.S. § 95-127(18) which provides:

> A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such 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.

Having reviewed and considered the record, the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby reverses the decision of the Hearing Examiner 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) Romeo Guest Associates, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. An inspection was made of Respondent's work site located at South Elementary School in Roxboro, North Carolina on or about October 24, 1996 by Safety Compliance Officer Ron Wells of the Occupational Safety and Health Division of the North Carolina Department of Labor.

6. The inspection was conducted as a result of the report of an accident in which an employee of a subcontractor was electrocuted when a piece of fascia that he was installing came into contact with a power line.

7. Respondent was the general contractor on the site.

8. A serious citation was issued against Respondent for violation of 29 CFR 1926.416(a)(3) for failure to ascertain whether any dangerous energized power lines were located in such a manner so that a person may come into contact with them.

9. On March 24, 1997 a hearing was held before the honorable Carroll D. Tuttle.

10. On September 1, 1997, Judge Tuttle filed an Order affirming Citation 1, Item 1 as a serious violation of 29 CFR 1926.416(a)(3) with a penalty of $2,100.00.

11. On October 3, 1997, Respondent timely petitioned the Review Board for a review of the decision of the hearing examiner holding that the Respondent committed a serious violation of 29 CFR 1926.416(a)(3).

12. An Order granting review was filed on October 8, 1997.

13. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

14. The issues on appeal were heard by the full Board on March 27, 1998.

15. The Board adopts the Hearing Examiner's findings of facts numbered 6 through 14.

16. Respondent's contract with Aluminum Design Concepts forbid the subcontracting of the installation of the canopy without the permission of Respondent.

17. Aluminum Design Concepts subcontracted the installation of the canopy over the walkway to Aluminators at Large without the permission and knowledge of Respondent.

18. The employee hired by Aluminators at Large to assist the employee who became electrocuted was hired off of a street corner and did not have a permanent address at which he could be found. (Respondent's exhibit # 2, p 14-15).

19. Respondent had an exemplary safety program. As part of its safety program and general policy, it sent a copy of its safety pamphlet to all of its subcontractors and required the subcontractors to abide by its safety policies.

20. The safety pamphlet was 33 pages and contained extensive information on housekeeping, use of proper tools, personal protection, machine guarding, ladder safety, scaffolding, life line, safety belt, falls from equipment, electrical hazards, lock-out/tag-out procedures, compressed gas cylinders, welding/burning, fire protection and prevention, motor vehicle and power equipment, excavations and trenches, hazardous chemical safety, explosives, power activated tools, floor openings, reinforcing steel and general safety rules.

21. In the electrical hazards section item 3 states:

High voltage electrical equipment and transmission lines are to be approached and handled only by personnel authorized and qualified to do so, and only after complete precautions have been taken for the safety of themselves and others.

(Respondent's exhibit #3, at p. 15).

22. Since Aluminators at Large was an unauthorized subcontractor, Respondent was unable to confirm that they were properly insured or to provide them with safety information and one of their safety pamphlets.

23. The material for the construction of the canopy was delivered in a covered tractor trailer truck.

24. The fascia for the canopy were of varying length and the superintendent did not see the employees installing a 24 feet long piece of fascia prior to the accident.

25. The superintendent observed the employees installing the fascia horizontally from ladders and never observed them installing the fascia from the top of the canopy.

26. Installing the fascia from the top of the canopy would have constituted a fall hazard under OSH regulations and the superintendent would have stopped the employees from installing fascia from the canopy.

27. The power line crossed over the canopy covering the walkway in only one place in over 400 feet of length.

28. Respondent in its supervisory capacity had no reasonable basis for anticipating or detecting and preventing or abating the hazard of an employee contacting an energized power line with a 24 feet long piece of aluminum fascia while installing it on the canopy.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board 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 Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Commissioner has failed to prove by the greater weight of the evidence and by substantial evidence that the Respondent in its supervisory capacity could reasonably have detected and prevented or abated the hazard of

an employee of an unauthorized subcontractor contacting an energized power line with a 24 feet long piece of aluminum fascia while installing it on the canopy.

4. The Commissioner has failed to prove by the greater weight of the evidence and by substantial evidence that Respondent committed a serious violation of 29 CFR 1926.416(a)(3) for failure to ascertain whether any dangerous energized power lines were located in such a manner so that a person, tool or machine may come into contact with them.

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).

After reviewing the federal and state law with respect to the liability of a general contractor for violations of Occupational Safety and Health regulations to which employees of a subcontractor are exposed, we find it persuasive and now apply it to the facts of this case. The Respondent argues that it is not an employer of the employees that were exposed to the hazards and cites N.C.G.S. §95-129(1), the general duty clause, which requires employers to furnish to each of its employees safe working conditions. However, Respondent was not charged with a violation of the general duty clause but was charged under N.C.G.S. §95-129(2) for failure to comply with occupational safety and health standards, specifically for failure to comply with 29 CFR 1926.416(a)(3). The Review Commission in Anning-Johnson Co. supra, determined that a general contractor can be held liable under section 5(a)(2) of the federal act (which is almost identical to N.C.G.S. §95-129(2)) for hazards to which employees of subcontractors were exposed and stated that it relied on the reasoning of the Second Circuit Court of Appeals in Underhill Construction Co., 1974-1975 OSHD ¶ 19,401, 512 F.2d 1032 (2nd Cir. 1975).

In Underhill, the Court noted that a general contractor's, "duty to comply with the secretary's standards is in no way limited to situations where a violation of a standard is linked to exposure of his employees to the hazard. It is a duty over and above the general duty to his own employees under § 654(a)(1)." Underhill Construction Co., 1974-1975 OSHD ¶ 19,401, at p. 23,164-23,165, 512 F.2d 1032 (2nd Cir. 1975).

We find this reasoning persuasive and consistent with the purpose of the North Carolina OSH Act to "assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions". Therefore, a general contractor's duty under N.C.G.S. §95-129(2) to comply with "occupational safety and health standards or regulations" runs to employees of subcontractors on the jobsite.

However, that duty is a reasonable duty and although the general contractor is responsible for assuring that the contractors fulfill their obligations for employee safety that affect the whole construction site, the general contractor is only liable for those "violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity." Grossman Steel, supra, at 24,791. In addition, the general contractor cannot "anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations created by others." Id. It is only responsible for those hazards that it could reasonable have detected because of its supervisory capacity. The general contractor is required to make reasonable efforts to anticipate hazards to subcontractor's employees and reasonable efforts to inspect the jobsite to detect violations that its subcontractors may create.

In the case sub judice the Respondent did make such reasonable efforts. It observed that the power line crossed the proposed canopy over the walkway in only one place in almost 400 feet of walkway. Respondent through its project manager and superintendent estimated that the power lines were approximately 26 feet above the ground. The superintendent observed the subcontractor's employees installing the fascia from ladders and not from the top of the canopy which method of installation did not put them into risk of contacting the power lines that were 26 feet above the ground and 16 feet above the canopy.

Neither the project manager nor the superintendent knew that 24 foot long aluminum fascia pieces were being installed on the canopy. It is not reasonable to expect the general contractor to know the length of every board, piece of sheathing, fascia, or other materials on the job site nor to expect him to determine if each and every piece of material poses a risk of contact with a 26 foot high power line. The hearing examiner's findings of fact to that effect are actually mixed findings of fact and conclusions of law, and are not supported by substantial evidence.

The burden of proof is on the Commissioner to prove each and every essential element of a citation. One of the elements that the Commissioner is required to prove in the multi-employer construction context involving a general contractor's liability is whether the general contractor could reasonably have been able to detect and prevent or abate the violative conditions by reason of its supervisory capacity over the jobsite. The only evidence presented by the Commissioner on this point is the testimony of the compliance officer that the general contractor had the plans submitted by the subs and that they should have known that the 24 foot long fascia posed a hazard when installed underneath a 26 feet high power line. However, upon cross examination and a review of the plans the compliance officer testified that nothing in the plans showed that the fascia pieces would be 24 feet long.

The hearing examiner made findings that the superintendent with reasonable diligence could have known that some of the fascia pieces were 24 feet long and posed a contact hazard with the overhead power lines because the superintendent was on the job daily and was present when the fascia were delivered and they were stored outside the building where he had his telephone. However, it is an unreasonable burden to place on a general contractor to know the length of every piece of construction material delivered to the jobsite. In addition, the compliance officer testified and common sense dictates that it was obvious to anyone on the site that there were energized power lines overhead.

The testimony by the superintendent is that he did a site assessment and determined that the steel erector, brick mason and the dump truck driver for the grading company posed a risk of getting too close to the power line and he discussed the power line with those subcontractors. He did not discuss the power line with the employees of Aluminators at Large because he determined that they were carrying on their work in a reasonable manner and that their work would not bring them into contact with the power line.

In a case decided by a federal administrative law judge, the contractor had been charged with the same violation as the Respondent and the judge determined that the contractor had reasonably concluded that the manner in which they decided to do the job would not bring any person, tool, or machine into contact with an overhead power line. National Engineering and Contracting Co., 13 OSHC 1817, 1987-1990 OSHD ¶28,250 (1988). In National, the employer determined that the workers could pour concrete with a boom truck without coming into contact with a power line by positioning the power lines to the back of the truck and deciding to operate the

boom only from the front of the truck. When instructed to fold the boom, contrary to instructions, the operator folded and swung the boom at the same time and came into contact with the power line. The judge held:

> Based on these facts, National could not have anticipated that Perry would unnecessarily move the boom so as to come in contact with the lines. The decision not to deenergize the sleeve was reasonable under the known circumstances, and National was not required to post warning signs, take protective measures, or advise employees of the location of, or hazards involved with the energized lines.
>
> It is concluded that hazardous conduct cannot be prevented when it is so idiosyncratic and incompatible with industry practices that conscientious experts would not consider it a safety hazard.

Id, 13 OSHC 1817, 1818 (Digest of Judge's Report)

Similarly, Respondent Romeo Guest could not have anticipated that Aluminators at Large's employees would change their manner of installing the fascia and would attempt to install a 24 foot long piece of aluminum fascia at the only location in 400 feet where the power line crossed the walkway and that one employee would vertically pass the fascia to an employee standing on top of the canopy underneath the power lines instead of horizontally installing the fascia from ladders as they had done in the past.

The undisputed testimony is that Respondent had an exemplary safety program. As part of its safety program and general policy, it sent a copy of its safety pamphlet to all of its subcontractors and required the subcontractors to abide by its safety policies. It had a clause in the contract with Aluminum Design Concepts that forbid the subcontracting of the installation of the canopy without the permission of Respondent. The safety pamphlet was 33 pages and contained extensive information on various specific danger areas, and general safety rules. In the electrical hazards section provides that "high voltage electrical equipment and transmission lines are to be approached and handled only by personnel authorized and qualified to do so, and only after complete precautions have been taken for the safety of themselves and others." Respondent's exhibit #3, at p. 15.

Aluminum Design Concepts subcontracted the installation of the canopy to Aluminators at Large in violation of its contract with Respondent. As a result the safety pamphlet with the warning about precautions to be taken around transmission lines was not given to the subcontractor. The unauthorized subcontracting prevented the Respondent from knowing whether qualified safety informed people were installing the canopy and is relevant to the issue of whether Respondent in its supervisory capacity could have detected the hazardous condition.

The preponderance of the evidence indicates that the Respondent in its supervisory capacity could not reasonably have been expected to detect or prevent the hazard of an employee of an unauthorized subcontractor being electrocuted by a 24 feet long piece of fascia at the only place in 400 feet where the power line crossed the walkway. The Complainant has failed to carry its burden of proving that the general contractor is only liable for those "violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity." Grossman Steel & Aluminum Corp., 1975-1976 OSHD ¶20,691, at p. 24,790-24,791 (RC 1976).

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's September 1, 1997 Order in this cause be, and hereby is, **REVERSED** and Citation One, Item 1 is **DISMISSED**.

This the 8th day of December, 1998.

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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HENRY M. WHITESIDES, MEMBER