BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

CAROLINA STEEL CORPORATION
successor by merger to
CAROLINA STEEL FABRICATION,
INC.,

RESPONDENT.

DOCKET NO. OSHANC 98-3677
OSHA INSPECTION NO. 125255646
CSHO ID NO. J1002

ORDER

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Hearing Examiner for the Safety and Health Review Board of North Carolina, on January 13, 1999 in the Grand Jury Room, Guilford County Courthouse, Greensboro, North Carolina.

The Complainant was represented by John Sullivan, Assistant Attorney General, North Carolina Department of Justice.

The Respondent was represented by Daniel Fouts, Attorney At Law.

At the time of the Hearing Complainant moved to withdraw Citation 1 Item 1a, and there being no objection such Motion is GRANTED.

The only item remaining to be heard pertains to an alleged serious violation of NCGS §95-129(1), commonly referred to as the 'General Duty Clause'. The burden of proof is on the Complainant to establish by a preponderance of evidence that Respondent violated the standard cited. In order to establish a serious violation of the General Duty Clause the Complainant must show that the employer failed to render its workplace free of a hazard which is "recognized" and causing or likely to cause death or serious physical harm. *National Rlty. & C. Co., Inc. v Occupational S. & H.R. Com'r, 489 F.2d 1257 (D.C. Cir. 1973); Brooks v Rebarco, Inc., 91 N.C. App. 459, 372 S.E.2d 342*. A 'recognized hazard' is a hazard about which the employer knew or a hazard known about within the industry. The definition of a recognized hazard has been conditioned on a realization that not all hazardous conditions can be prevented and that the General Duty Clause does not impose strict liability on employers. Accordingly, a hazard is recognized only when it is demonstrated that feasible

measures can be taken to reduce materially the likelihood of death or serious physical harm resulting to employees. See *Brooks v Rebarco, Inc., OSHANC 83-1039 (RB 1985)*. Further, when the elimination of recognized hazard requires employees to follow safe procedures, an employer is not in violation of the general duty clause if it has established work rules designed to prevent hazards from occurring, has adequately communicated work rules to employees, has taken steps to discover non-compliance with rules, and has effectively enforced rules in event of non-compliance. *Secretary of Labor v Connecticut Light & Power Co. (OSHRC, 4/26/89) 13 OSHC 2214*. It is not unreasonable for an employer who has communicated work rules to its employee, in light of the employee's experience and training, to expect the employee to carry out instructions and comply with the work rules. *United States Steel Corp. [RevComm No. 76-5007 (1981) 9 OSHC 1641]*.

Respondent asserted the affirmative defense of "isolated employee misconduct". In asserting such defense the burden of proof is on the Respondent to establish that (1) all feasible steps were taken by the employer to avoid the occurrence of the hazard; (2) the actions of the employee were a departure from a uniformly and effectively communicated work rule; and (3) that the employer had

neither actual nor constructive knowledge of the violation. *H.B. Zachary Co. v OSHRC, 638 F.2d 812,818(5th Cir. 1981); Daniel International Corp. v OSHRC, 683 F.2d 361(11th Cir. 1981); O.S. Steel Erectors v Brooks, 84 N.C. App 630, 635, 2NCOSHD 529 (1987)*. Thus, the Respondent must establish that (1) the Respondent had work rules designed to prevent the violation; (2) the Respondent had adequately communicated the rules to the employees; (3) the Respondent had taken steps to discover violations of work rules; and (4) the Respondent effectively enforced the rules when violations had been discovered. Some degree of employee negligence or carelessness must be expected. *Brooks v Budd 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 be considered intentionally dangerously can the defense succeed. *Brooks v Rebarco, Inc., OSHANC 83-1039 (RB 1985)*. A supervisor is justified in placing a great deal of reliance on the judgment of employees with good safety records. *Cerro Metal Products, 12 BNA OSHC 1821m 1986-87 CCH OSHD 27,579 (No. 78-5159, 1986).*

Foreseeability is a primary factor to be considered with respect to an employee's conduct and has been evaluated by many courts to be related to the employer's safety program. Where the employer has a consistently enforced safety program, adequately trains its supervisors in safety matters, and takes reasonable steps to discover safety violations, the employer has been found to not have sufficient knowledge to sustain a serious violation. See Pennsylvania Power & Light v Occupational S. & H.R. Com'n, 737 F.2d 350 (1984) and cases cited therein.

FINDINGS OF FACT

Based upon the stipulations at the time of the Hearing, the record and the evidence presented at the Hearing, the Undersigned makes the following Findings of Fact:

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection

for compliance and with enforcement of the Occupational Safety and Health Act of North Carolina (the "Act"). Complainant brings this action pursuant to North Carolina General Statute 95-133.

2. Respondent is an entity duly organized and existing under the laws of the State of North Carolina and maintained a place of business in Colfax, North Carolina. Respondent is engaged in the steel bridge girder fabrication business.

3. Respondent is an "employer" within the meaning of NCGS §95-127(10) . Respondent's employees relative to the Citation are "employees" within the meaning of NCGS §95-127(9).

4. All parties are properly named in the Citation as amended.

5. This Court has jurisdiction over the parties and the subject matter of this Hearing.

6. All notices required by the Act and by any applicable procedural and substantive rules have been given.

7. Neither party has any procedural objection to this Hearing.

8. On or about March 5, 1998 Officer Bruce Jaworoski (herein referred to as "Safety Officer"), a Safety Compliance Officer employed by the North Carolina Department of Labor, inspected Respondent's worksite located at 9035 U.S. Hwy 421 West in Colfax, North Carolina (the "Site").

9. The Safety Officer properly entered onto the Site and conducted an inspection ("Inspection") pursuant to a referral. The incident that gave rise to the inspection took place January 12, 1998.

10. At the time of the Inspection, Respondent was engaged in the fabrication of structural steel bridge beams 50+ feet in length, and Respondent employed approximately 90 employees at the Site and employed overall about 275 employees.

11. An opening conference was held, and Michael Evans, Respondent's Plant Manager, and John Hizer, Respondent's Safety Manager, consented to the inspection by the Safety Officer.

12. On April 28, 1998, as a result of the Inspection, Complainant issued a citation; the only item remaining at the time of the Hearing was Citation One, Item 1b which alleged a serious violation of NCGS §95-129(1), bearing a penalty of $2,275.

13. The proposed penalty was calculated in accordance with Complainant's North Carolina Operations Manuel and standards applied generally applied to North Carolina employers, applying the following adjustment factors to the gravity based penalty: 10% credit for cooperation (no credit was given for size, safety and health programs or history). Respondent stipulated that if a violation is found to exist then the penalty as calculated is proper and not contested by Respondent.

14. Respondent submitted a timely Notice of Contest.

15. Citation Number One, Item 1b, asserted a serious violation of NCGS §95-129(1) alleging that Respondent did not furnish each of its employees conditions of employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that on January 12, 1998 an employee was standing between girders 101A7 and A1 while girder 103B1 was being moved by overhead crane and that as a result of that action an employee was pinned between girders 101A7 and A1.

16. The relevant evidence with respect to Citation Number One, Item 1b is as follows:

a. William Elder ("Elder"), a supervisor for Respondent who had been employed by Respondent for approximately 10 years, observed that there were some I-beams positioned improperly in a storage area. There were numerous beams in the area. Elder was supervising the work of Regan Vaughn ("Vaughn") at the time. Elder instructed Vaughn to assist him in correcting the positioning of one of the stored I-beams. Vaughn had been working with Respondent approximately seven weeks at that time and his age was in the mid to late 30's.

b. In general the I-beams are about 78 feet long and weigh approximately 7 tons, and are about 48 inches high; the beams are supposed to be stored on cribbing made of railroad ties which is approximately 54 inches high off the floor; the floor is concrete or earthen floor;

c. One of the improperly stored I-beams was Girder 103B1; after lifting hooks from a crane were placed near the midpoint of Girder 103B1 Elder instructed Vaughn to stay

out of the area where the beam was and to go to the end of the beam so Vaughn could tell Elder when Elder had lifted the beam clear; Vaughn went to the end of the beam; Elder then operated the crane and lifted Girder 103B1; Elder was in the process of moving the beam and Elder, in order to observe that the beam was properly positioned, turned his full attention to the beam and lost sight of Vaughn; in the process Elder observed that another beam began to fall over; Elder then noted that Vaughn had moved from the end of the beam where he had been told to stay and was in the area where the other beam was falling; when the other beam fell Vaughn was caught between the falling beam and a stationary beam, neither of which was Girder 103B1. Vaughn was injured when he was pinned between the two beams, sustaining broken legs.

d. There are standards which provide safety rules/guidelines for moving steel and employee exposure in areas of danger; Respondent also had safety rules, and in part those rules provided that "Before moving a load, the operator shall ensure no one is in a position to be injured and that no equipment or material will be damaged by the lift." (Crane Rules #5) and "During a lift, ALWAYS stand at the end of the girder (or load) or in a position with an immediate escape. NEVER stand where there is not an immediate way out of danger." (Crane Rules #7).

e. Respondent's safety program was very good.

f. The hazard is that if an individual is in the danger zone with the beam being moved there could be serious injury the result of which could be death.

g. The Safety Officer testified that in his opinion Elder had the responsibility to be sure that Vaughn was out of the zone of danger and that Elder should have had positive eye contact with Vaughn during the move at all times.

h. The crane used by Elder was not found to be in non-compliance with standards. The load which Elder lifted did not swing and did not slip. Elder did not feel his load (i.e. Girder 103B1) hit another beam.

i. Before Elder began the move of 103B1 its flange was overlapping another beam, but it was not touching the other beam (i.e. Girder 103B1 was not actually sitting on top of another beam).

j. The Safety Officer said he speculated that the load (i.e. Girder 103B1) hit something which caused the other beam to fall.

k. Elder told Vaughn twice to keep out of the zone of danger and to stand at the end of the beam.

l. Elder could not keep direct eye contact with Vaughn and at the same time look to be sure Girder 103B1 was being lowered to the proper place in the proper position.

m. Vaughn left his position at the end of the beam and moved between two other beams while Elder was in the process of lowering Girder 103B1.

n. If the violative condition did in fact exist, abatement could be achieved by not permitting employees to enter into the danger zone.

o. Respondent's safety rules were communicated to Vaughn. Elder had worked with Vaughn before and testified that Vaughn was a good employee and did what Elder had told him to do. Vaughn had assisted previously in moves of beams with a crane. To Elder's knowledge on no occasion prior to the time of the incident had Vaughn disobeyed a directive of Elder.

p. The incident occurred at approximately 4 p.m. Elder told Vaughn to stand at the right hand end of the girder and to give hand signals to Elder who operated the crane. Elder testified that the first signal by Vaughn was to straighten up the crane; he pointed and gave signal to go to the right, then gave signal to go up, then gave the signal to stop going up, then signaled to move to the left, and then signaled to stop (during all this time Elder was looking at Vaughn); after stopping Elder turned his head to the left to make sure the girder was not any

closer than anticipated; the girder was suspended; at the time Elder turned his head to observe the position of the left end of the girder he took his eyes off Vaughn who was standing at the right end of the girder; as Elder started turning his head back to the right he saw that Girder 101A7 began to move/shake; Elder hollowed for Vaughn to 'look out' and turning his head back to the right Elder did not see Vaughn at the right end of Girder 103B1 where he was supposed to be; Girder 101A7 fell over onto Vaughn; Vaughn had moved to a position between girders which was up about 10 to 15 feet from the end of the girders; Girder 103B1 did not swing or sway and did not come into contact with anything; Elder got assistance for Vaughn and got another employee to help him put down Girder 103B1 and then to lift the other girder off Vaughn.

q. Before beginning the move of Girder 103B1 both Vaughn and Elder were in safe positions out of the zone of danger.

r. While Elder was a supervisor he had on occasion seen an employee violate a safety rule, and upon such occasions he would talk to the employee and give a verbal warning; if the employee was observed committing a violation again the employee

would be given a written warning. Elder had given no written warnings for safety violations with respect to cranes and moving of beams.

s. Vaughn violated Respondent's safety rule by failing to observe safety regulations. Elder did not know why Vaughn left his safe position at the right end of the beams and moved up 10 to 15 feet between other beams while the beam they were moving was still suspended. Walking between girders was permitted only if the girders were secured or 'dogged down'. Elder had never seen any employee walk between beams that were not dogged down (except when hooking up a girder to move). Elder had heard of an employee who did walk between beams that were not dogged down and that employee received a verbal warning. Respondent had terminated an employee for disobeying safety rules. Respondent has a progressive disciplinary procedure: verbal warning; written warning; 3 day suspension; and termination.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Undersigned concludes as a matter of law the following:

1. This Court has jurisdiction of this cause and the parties are properly before the Court.
2. With respect to the alleged violations of NCGS §95-129(1) in this matter, Complainant did not carry its burden of proof that Respondent failed to render its workplace free of a hazard which is "recognized" and causing or likely to cause death or serious physical harm in that Respondent did in fact recognize the hazard and in so doing developed a good safety program which was communicated to its employees and there was no history of having employees violate the safety program regarding moving of beams with cranes.
3. Assuming that there was a violation of NCGS §95-129(1), Respondent carried its burden of proof with respect to the affirmative defense of isolated employee misconduct in that Respondent had work rules designed to prevent the violation, which rules were adequately communicated to employees, and Respondent had taken steps to discover violations of work rules and effectively enforced the rules when violations had been discovered.

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED as follows:

Citation 1 Item b for violation of NCGS §95-129(1) be and the same is hereby **DISMISSED.**

This the 1st day of September 2000

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R. Joyce Garrett, Hearing Examiner