

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

BOB DEGABRIELLE & ASSOCIATES,
INC.,

RESPONDENT.

DOCKET NO. OSHANC 98-3728
OSHA INSPECTION NO. 301969499
CSHO ID NO. W4297

ORDER

THIS CAUSE coming on for hearing and being heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety & Health Review Board of North Carolina, on the 14TH day of May, 1999, at the Old YWCA Building, Raleigh, North Carolina.

The Complainant is present and represented by Mr. John Sullivan, Associate Attorney General, North Carolina Department of Justice. The Respondent is present and represented by Mr. E. Andrew Keeney, Attorney from Kitty Hawk, North Carolina.

Respondent filed Motions to Dismiss in its Answer as follows:

1. Motion to Dismiss for failure to state a claim upon which relief may be granted presumably based upon Rule 12(b)(6) of the Rules of Civil Procedure. Upon consideration by the court of Complainant's Complaint and Citations, Respondent's Motion is denied.
2. Respondent's Second Motion to Dismiss for failure to specify the correct and proper inspection site, after consideration by the Court, is denied.
3. Respondent's Third Motion to Dismiss for failure to follow proper procedures, after consideration by the Court, is denied.

4. Respondent's Fourth Motion to Dismiss on the grounds of Collateral Estoppel is denied for the reason that the new citation and Notice of Penalty were issued within six months of the inspection.

5. Respondent's Fifth Motion to Dismiss on the grounds of Res Judicata based upon the second citations issued within six months of the inspection date is denied.

After assessing all evidence presented by all parties and following closing arguments, the Court makes the following:

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed a citation issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC).

2. The Commissioner of Labor is responsible for enforcing OSHANC.

3. Respondent exercised its right to contest the Complainant's enforcement actions.

4. Respondent is a North Carolina corporation engaged as a building contractor in eastern North Carolina. At the time of the inspection, Respondent had fifty-five employees. This particular job was a residential construction site in the Buck Island Subdivision, Corolla, North Carolina. No employees of Respondent were on the site at the time of the inspection although Respondent's site superintendent arrived during the inspection.

5. Respondent was the general contractor and project developer for the residential construction project at Lot No. 61 in the Buck Island Subdivision. Respondent had contracted with TOP Roofing Construction as the roofing subcontractor for the job. Respondent was not aware that TOP had evidently subcontracted the roofing work to another subcontractor, Jose Caberallo, whose employees were on the site performing the work at the time of the inspection.

6. Safety Compliance Officer Rodderick R. Willis conducted an inspection of the work site on February 26, 1998, after observing workers on the roof of the building from the public street. Officer Willis observed workers working on the roof without any guardrail system, harnesses, rope grabs or any system in place to prevent falls from the roof. During the course of the inspection, Officer Willis interviewed employees, took photographs and took measurements as part of a walk around inspection.

7. Officer Willis first talked with the roofing subcontractor, explained why he was there and asked about the general contractor. After learning who the general contractor was, he contacted Respondent by telephone and requested that a representative come to the site.

8. An opening conference was held with the subcontractor and then held with Mr. Andrew Keeney, Mr. Mike Willis and Mr. William Lucas for Respondent. Permission was given for the inspection.

Citation No. 1, Item No. 1a

9. Citation No. 1, Item 1a, alleges a serious violation of 29 CFR 1926.501(b)(11) alleging that each employee was not protected from falling by a fall arrest system.

10. Officer Willis observed and took photographs of workers working on the roof of the structure without a fall protection system. The roof was 26 feet and 34 feet above ground level. The work was conducted under the supervision of Respondent's site superintendent.

11. Respondent offered evidence and the Court finds that the workers were not those of the subcontractor which Respondent actually contracted with to do the work. Respondent did not contest the basic facts regarding the conditions that existed on the day of the inspection. Mr. William Lucas, Respondent's site superintendent, testified that he had been there in the morning, but workers were not on the roof at that time. When he returned in the afternoon to find Officer Willis at the site, he observed the workers on the roof.

12. Respondent's argument in this case appears to be that an unauthorized subcontractor was performing the work. Respondent had no opportunity to educate this subcontractor as to what they required as far as safety. Implicit in their argument is that if TOP Construction had been on the job as Respondent had arranged, the violations would not have occurred. TOP Construction had, without Respondent's knowledge or consent, re-subcontracted the work to Hose Caberallo. The Court accepts that Respondent did not contract with Hose Caberallo. Mr. Lucas testified that he believed the workers were with TOP Construction and he did not learn until during the inspection that they were with Hose Caberallo. The Court finds however, that this construction site was the responsibility of Respondent as the general contractor and the fact that the workers were with a different subcontractor than the one Respondent contracted with, is essentially irrelevant to Respondent's duty. The Court finds from the evidence that these workers were there on the job doing the work that was contracted for and Respondent believed they were with TOP Construction.

13. The Court finds there was the possibility of an accident and that a substantial probable result of such an accident would be death or serious physical harm. One or more of the subcontractor's employees who were subject to the supervision of Respondent were exposed to the hazard.

14. Respondent was aware or with reasonable diligence could have been aware of these hazardous conditions at the site.

15. The proposed penalties were properly calculated according to the provisions of the Field Operations Manual. Citation No. 1, Item No. 1a, was grouped with Citation No. 1, Item 1b.

Citation No. 1, Item 1b

16. Citation No. 1, Item 1b, charges a serious violation of 29 CFR 1926.503(a)(1), alleging that Respondent did not provide a training program for employees who might be exposed to fall hazards.

17. This alleged violation is based upon Officer Willis finding workers working on the roof at heights of 26 feet and 34 feet without any fall protection system. These workers had not been adequately trained to take appropriate action to eliminate such hazards combined with Respondent's supervision of the construction site.

18. The Court has previously found that Respondent was not aware that TOP Construction had re-subcontracted the work to Hose Caberallo. The Court has also found that when Respondent's site superintendent was at the site the morning of the inspection, no workers were on the roof. It is unclear from the evidence whether the workers were present at the site. When he returned to the site in the afternoon, Officer Willis was at the site and the workers were on the roof. Respondent had not contracted with Hose Caberallo to perform the work and did not know they would be on the job. Based upon this evidence, the Court cannot find that Respondent had knowledge or opportunity to conduct training of these workers.

19. Respondent offered evidence through William Lucas that training was conducted for Respondent's employees including Mr. Lucas himself. The workers not trained were those of Hose Caberallo. The issue then becomes, does the supervisory responsibility of Respondent require investigation of such training prior to them beginning the work despite the fact that these were not the workers contracted for? There was no direct evidence regarding whether there was knowledge by Respondent about the training of TOP Construction's employees. Assuming that Respondent knew that TOP Construction's workers were trained, Respondent would not have needed to

conduct such investigation reasonably believing that TOP Construction's workers would be on the job.

20. From this evidence, the Court cannot find by the greater weight of the evidence from these facts that Respondent knew or should have known that Jose Caberallo's workers were not trained.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The Court has jurisdiction of this cause and the parties are properly before the Court.
3. Respondent is an employer within the meaning of N.C.G.S. 95-127(9).
4. Respondent violated 29 CFR 1926.501(b)(11) by allowing workers, under his supervision, to work at heights of 26 feet and 34 feet without a fall protection system.
5. The Court cannot find by the greater weight of the evidence that Respondent violated 29 CFR 1926.503(a)(1).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED as follows:

1. Citation No. 1, Item 1a, charging a serious violation of 29 CFR 1926.501(b)(11) is hereby AFFIRMED together with a penalty of \$700.00.
2. Citation No. 1, Item 1b, charging a serious violation of 29 CFR 1926.503(a)(1) be and the same is hereby dismissed.

Entered this 14th day of April, 2000.

Carroll D. Tuttle
Administrative Law Judge Presiding

