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

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

WEEKLEY HOMES,LP dba DAVID WEEKLEY HOMES and its successors

RESPONDENT.

DOCKET NO. OSHANC 99-3806
OSHA INSPECTION NO. 302649405
CSHO ID NO. P2687

**ORDER**

*Affirmed by Superior Court*
*Affirmed by Court of Appeals*
*Petition for Certiorari denied and appeal dismissed*

## DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the10th day of September, 2002 in Room 124, First Floor, old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by Oscar A. Keller, Jr,. Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the North Carolina Safety and Health Review Board.

## APPEARANCES

Jane Gilchrist, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Robert E. Rader, Jr. of Rader & Campbell, Dallas, Texas and Michael C. Lord of Maupin, Taylor & Ellis, P.A., Raleigh, North Carolina for the Respondent.

## ISSUES PRESENTED

1. Did the Complainant meet its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR § 1926.20(b)(2) as alleged in Citation One, Item 1 in that frequent and regular inspections of the jobsite, materials, and equipment were not made by a competent person designated by the employer as part of its accident prevention program?

2. Is the General Contractor responsible for inspecting a job site to see if its subcontractors are complying with the Occupational Safety and Health laws?

## SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 C.F.R. §1926.20 provides, in pertinent part, as follows:

> (b)(1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.
>
> (b)(2) Such programs shall provide for frequent and regular inspections of the job sites, materials and equipment to be made by competent persons designated by the employers..

2. § 5(a)(2) of the federal OSH Act provides:

> Each employer shall comply with occupational safety and health standards promulgated under this Act.

3. N.C. Gen. Stat. §95-129(2) provides, in pertinent part, as follows:

Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article.

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Having reviewed and considered the record, the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby affirms 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) Weekley Homes LP dba David Weekley Homes. 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 17232 Bridgeton Lane, Huntersville, North Carolina on or about from March 30, 1999 through April 28, 1999 by Safety Compliance Officer, Lee Peacock as a result of observations of fall protection violations made from a public highway.

6. Respondent was the general contractor on the site.

7. On May 21, 1999, a serious citation was issued against Respondent for violation of 29 CFR § 1926.20(b)(2) in that frequent and regular inspections of the jobsite, materials, and equipment were not made by a competent person designated by the employer as part of its accident prevention program.

8. On April 25, 2000, a hearing was held in Winston-Salem, North Carolina before the honorable Ellen R. Gelbin.

9. On November 20, 2000, Judge Gelbin issued an Order affirming Citation 1, Item 1 as a serious violation of 29 C.F.R. §1926.20(b)(2) with a penalty of $875.00.

10. On January 2, 2001, 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 C.F.R. §1926.20(b)(2).

11. An Order granting review was filed on January 4, 2001.

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

13. An order staying all proceedings until further notice from the Review Board was issued by Chairman Kelly on April 2nd, 2001.

14. The issues on appeal were heard by the full Board on September 10, 2002.

15. The Board adopts the Hearing Examiner's findings of facts numbered 1 through 14, 19 through 20, 24 through 28, 30 through 34, and 36 through 37.

16. Respondent has two project managers on site, Scott Kirby and Gary Bryant, and two superintendents or "builders. The project managers are in charge of hiring and overseeing the builders, warranty representatives and sales people on the site. The builders are responsible for hiring and scheduling the contractors involved in

building each house, ordering and coordinating delivery of materials, scheduling the city building inspectors, and meeting with home buyers as the construction of each house progresses.

17. Respondent's employees on the job site spend part of their time in their construction trailer on the management activities described above and part of their time inspecting the sites to ensure compliance with construction standards before authorizing payment, assisting the city building inspectors and escorting home buyers on their inspections of the construction progress.

18. Respondent does not perform regular and frequent inspections of the job site with the purpose of ensuring compliance with the Safety and Health Act..

19. The hazard existed that the employees could fall from a roof that was greater than 6 feet off of the ground.

**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 Complainant met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR § 1926.20(b)(2) as alleged in Citation One, Item 1 in that frequent and regular inspections of the jobsite, materials, and equipment were not made by a competent person designated by the employer as part of its accident prevention program.

4. The General Contractor is responsible for inspecting a job site to see if its subcontractors are complying with the Occupational Safety and Health laws.

**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 Respondent makes four legal challenges to the Hearing Examiner's decision. They are that the Occupational Safety and Health Act does not imposes a legal duty on general contractors to police for subcontractors' violations and to compel subcontractors' to comply with OSHA; that the employer's duty to comply with specific standards under section 5(a)(2) is limited to his own employees; that OSHA's Multi-Employer Work Site Policy does not have the force of law because it has not been promulgated as a rule and that the Review Commission has already ruled under identical circumstances that Weekley may not be cited and that ruling is *res judicata*. These are questions of law and the Board will apply the *de novo* standard mentioned above.

The first two objections were visited in the Board's decision in Commissioner of Labor v. Romeo Guest Associates, Inc., OSHANC 96-3513, Slip Op., (RB 1998). In Romeo Guest, the Review Board reviewed 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 and stated:

> 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 [sic-reasonably] 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.

Commissioner of Labor v. Romeo Guest Associates, Inc., OSHANC 96-3513, Slip Op at 6-7, (RB 1998). Romeo Guest clearly states that the duty of a general contractor to comply with the occupational safety and health standards runs to employees of subcontractors on the jobsite.

The Respondent asserts that OSHA's Multi-Employer Work Site Policy does not have the force of law because it has not been promulgated as a rule. Both the federal and state courts have upheld OSHA's Multi-Employer Work Site Policy as an interpretation of existing law. E.g. Marshall v. Knutson Construction Co., 1977-1978 OSHD ¶22,333, p 26,907, 566 F.2d 596 (8th Cir 1977); Commissioner of Labor v. Romeo Guest Associates, Inc., OSHANC 96-3513, Slip Op., (RB 1998); Morrison-Knudsen, Inc., 2 NCOSHD 1072 (1986); McDevitt & Street Company, 1 NCOSHD 1209 (1985). See, e.g., Underhill Construction Co., 1974-1975 OSHD ¶ 19,401, p. 23,161, 512 F.2d 1032 (2nd Cir. 1975); Anning-Johnson Co. , 1975-1976 OSHD ¶20,690, p 24,779 (RC 1976); Grossman Steel & Aluminum Corp., 1975-1976 OSHD ¶20,691, p 24,788 (RC 1976). The multi-employer worksite doctrine when applied to a general contractor holds that the general contractor has a duty to provide for the safety of the employees of subcontractors. That duty include assuring that the subcontractors comply with occupational safety and health standards that affect the subcontractor's employees. This duty is based on the courts' interpretation of section 5(a)(2) of the federal act and N.C.G.S. §95-129(2) of the state act when read in conjunction with the stated purpose of the federal and state acts to provide safe and healthful working conditions for working men and women. Section 5(a)(2) of the federal act and N.C.G.S. §95-129(2) of the state act require that the employers comply with the standards promulgated under the act and does not limit that duty to its own employees. Holding the general contractor responsible for the safety of the subcontractor's employees interprets N.C.G.S. §95-129(2) in a manner that effectuates the purpose of the OSH act. The multi-employer worksite doctrine is a result of accepted methods of statutory interpretation and is not a rule subject to rulemaking. This doctrine has been a part of the federal OSH law for over 25 years and is well established as accepted law.

The fourth legal challenge that the Respondent makes is that the federal Occupational Safety and Health Review Commission has already ruled in David Weekley Homes, 2000 OSHD ¶ 32,203, p. 48,772 (RB 2000) under identical circumstances that Weekley may not be cited and that ruling is *res judicata*. Respondent does not correctly state the holding of the federal case and misapplies the doctrine of *res judicata*. In the federal case the Review Commission found that the Secretary had failed to address how Weekley's actual efforts were deficient. Based upon the record the Court found that the Secretary had failed to meet her burden of proving the alleged violations and the citations were vacated. The doctrine of *res judicata* means that a final judgment between the parties by a court of competent jurisdiction is final as to all points and matters determined in the suit. However, the doctrine of *res judicata* "requires identity in thing sued for as well as identity of cause of action, of persons and parties to action, . . ." Black's Law Dictionary, 4th edition (1968). The cause of action is not identical and neither are the parties. The federal case involved the Secretary of Labor as the Complainant and the present state case involves the Commissioner of Labor of North Carolina. *Res judicata* has no application to this case.

The last objection that the Respondent makes is a factual challenge. 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 order to prove a serious violation of an OSH standard the Complainant must prove the following:

1. A hazard existed;

2. employees were exposed;

3. the hazard created the possibility of an accident;

4. the substantial probability of an accident would 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 Construction Co., 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984)) of the condition or conduct that created the hazard.

The only factual challenge that the Respondent makes is that the Hearing Examiner was wrong when she held that Weekley should have known of the subcontractor's violations. (Element numbered 5 listed above). Respondent asserts that as part of its normal supervisory role, it did not inspect the jobsite. It only had four employees on the jobsite and they spent the majority of their time in the trailer and traveling between the job sites arranging for subcontractors to perform the work on the houses. The crux of Respondent's argument is that it did not have the time to perform the inspections and was not required to change its manner of operation and hire any additional employees to inspect the jobsite. Respondent, arguably, does have a smaller presence on its job sites than other general contractors. However, the lack of time to perform the job safely is not a legal defense to the violation of any OSH law. The question has come up as to exactly how often is Respondent required to inspect the job site to be in compliance with 29 CFR 1926.20(b)(2). The compliance officer asserted that once a day would have been sufficient. Since the Respondent stipulated that it did not inspect the job site at all, the Complainant does not have to indicate how often the Respondent must inspect to comply with the standard. The admission by the Respondent that it did not inspect at all is all the proof that Complainant needs to prove that the Respondent violated the standard. In addition, knowledge of the standard and an intentional decision to not comply with it, although not at issue here, could be grounds for a willful violation.

The issue for the Board to decide is whether there is substantial evidence in the record to support the Hearing Examiner's findings. In Conclusion of law # 9 the Hearing Examiner found:

> Respondent by reasonable diligence in carrying out its normal supervisory responsibilities over a two day period, should have seen Paige's employees working on a steep pitched roof over six feet off the ground, without fall protection or personal protective equipment.

Hearing examiner order, page 8. There is certainly substantial evidence in the record to support this finding by the Hearing Examiner. The inspector saw the employees working without fall protection both times when he came to the site and anyone driving by the Respondent's job sites would have seen them because they were in plain view. As the Hearing Examiner found, Respondent in carrying out its normal supervisory duties should have seen the violations and taken steps to have the subcontractor correct them.

In its argument before the Board, the Respondent cited the case of Hooper v. Pizzagalli, 112 N.C. App. 400, 436 S.E. 2d. 145 (1993) for the proposition that a general contractor's authority over the subcontractor to require him to build the project according to the plans and specifications did not mean that the general contractor has sufficient control over the subcontractor to make the general contractor liable for whatever the subcontractor does. Pizzagalli involved the issue of whether the general contractor in that case was liable in tort for the wrongful death of an employee of a subcontractor on the job site. The Court of Appeals in Pizzagalli reviewed the tort case law involving the liability of a general contractor for injuries to the employees of a subcontractor. The court stated the general rule that the "general contractor is not liable for injuries sustained by a

subcontractor's employees" and then reviewed the three exceptions to the general rule. The three exceptions are: (1) retention of control over the subcontractor's work by the general contractor, (2) inherently dangerous activities, and (3) negligent hiring and retention. Pizzagalli, supra, at 403. The court held that the record in that case established that the general contractor did not retain the right to control the manner in which the subcontractor and its employees performed their jobs.

The case before the Board does not involve tort liability but involves compliance with the Occupational Safety and Health Act of North Carolina, OSHANC, (N.C.G.S. § 95-126 et seq.) and is not predicated on whether the general contractor retained sufficient control over the subcontractor but on whether the general contractor by reason of its supervisory capacity could reasonably have been expected to prevent or abate safety and health violations committed by the subcontractor. This duty is not based on tort concepts of foreseeability, premise liability, agency or respondeat superior but on the interpretation of North Carolina's safety and health laws and on the public policy of the OSHANC to "assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions". N.C.G.S. §95-126(b)(2). Nationwide, in the year 2000, the construction industry had the highest number of fatalities of any industry, 1,154 (20%) out of a total of 5, 915 fatalities. Falls accounted for 734 deaths (12%) of the total 5,915 total nationwide deaths for the year 2000. "National Census of Fatal Occupational Injuries in 2000", [2001 Transfer Binder] Employment Safety and Health Guide (CCH) ¶ 14,343. Also, in the year 2000, the construction industry had approximately 194,400 injuries and illnesses that resulted in lost work time. "Lost-worktime Injuries and Illnesses: Characteristics and Resulting Time Away from Work", 4 Employment Safety and Health Guide (CCH) ¶ 14,473. In North Carolina in the year 1999 the construction industry accounted for 47 of the 222 (21.2%) total fatalities with falls accounting for 25 (11.3%) of the 222 total deaths. RESEARCH AND POLICY DIVISION, NORTH CAROLINA DEPARTMENT OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES IN NORTH CAROLINA 1999 (2000). Also, in North Carolina in 1999, the construction industry accounted for approximately 11, 400 (6.2%) of the approximate 184,000 injuries and illnesses. RESEARCH AND POLICY DIVISION, NORTH CAROLINA DEPARTMENT OF LABOR, 1999 OCCUPATIONAL INJURIES AND ILLNESSES IN NORTH CAROLINA (2002). It is this high rate of fatalities and injuries and illnesses in the construction industry that has led the courts to interpret the OSH Act to hold the general contractor responsible for assuring that the subcontractors comply with the OSH Act regulations.

> Typically, a construction job will find a number of contractors and subcontractors on the worksite, whose employees mingle throughout the site while work is in progress. In this situation, a hazard created by an employer can foreseeably affect the safety of employees of other employers on the site. . . .
>
> Additionally, the general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected.

Grossman Steel, supra, at 24,790 to 24,791.

A violation of an occupational safety and health regulation by an employer does not directly correlate with a finding of negligence on the part of the employer. Some states hold that a violation of an OSH regulation is not any evidence of negligence Sumrall v. Mississippi Power Co., 693 So.2d 359 (1997) while some states hold that an OSH violation is negligence per se. Other states, of which North Carolina is one, hold that an OSH violation is some evidence of negligence. Cowan v. Laughridge Construction Co., 57 N.C. App. 321, 291 S.E.2d 287 (1982). See generally, Annot., 79 A.L.R.3d 962 (1977) (violation of OSHA regulation as affecting tort liability); Annot., 35 A.L.R. Fed. 461 (1977) (third party-OSHA violation by employer or third party as providing cause of action for employee). The Board's holding that the General Contractor is responsible for inspecting a job site to see if its subcontractors are complying with the Occupational Safety and Health laws does not necessarily expand the situations in which a general contractor is liable in tort for injuries to the employees of a subcontractor. This holding is based on the supervisory role of the general contractor in the context of providing

a safe workplace. The North Carolina Court of Appeals has already held that the general supervisory role of the general contractor is insufficient to find the general contractor liable in tort for injuries to a subcontractor's employee. Pizzagalli, supra, at 405. A general contractor may by reason of its supervisory role be in violation of an OSHA regulation but not be liable in tort for injuries to a subcontractor's employees just because of that supervisory capacity.

**ORDER**

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's November 20, 2000 Order in this cause be, and hereby is, **AFFIRMED** and Respondent is found to have committed a serious violation of 29 CFR § 1926.20(b)(2) as alleged in Citation One, Item 1 and Respondent is **ORDERED** to pay the penalty of $875.00 within 30 days of the date to this order.

This the 19th day of November, 2002

_____
OSCAR A. KELLER, CHAIRMAN

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RICHARD G. PEARSON, MEMBER

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JANICE SMITH GERALD, MEMBER