

BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

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

COMPLAINANT,

ORDER

v.

WEEKELY HOMES LP d/b/a
DAVID WEEKLEY HOMES

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

RESPONDENT.

THIS MATTER was heard by the undersigned on April 25, 2000, in Winston-Salem, North Carolina. Complainant was represented by Jane Gilchrist, Assistant Attorney General and Linda Kimbell, Assistant Attorney General. Respondent was represented by Michael C. Lord, Esq., of the law firm Maupin Taylor & Ellis, P.A., of Raleigh, North Carolina and Robert E. Rader, Jr., of the law firm, Rader, Campbell, Fisher & Pyke of Dallas, Texas 75207.

Also present for the hearing were Robert Jones, District Supervisor for the North Carolina Department of Labor, Division of Occupational Safety and Health; Michael Lee Peacock, Safety Compliance Officer (SCO); Gary Bryant, Project Manager for David Weekley Homes.

The parties requested that they be allowed to file briefs. The undersigned granted the parties 30 days from the delivery of the hearing transcript within which to file their respective briefs. Upon further joint motion of the parties, the parties were granted through and including November 3, 2000 within which to submit briefs. The parties submitted their briefs in a timely manner.

ISSUE PRESENTED

Did complainant meet its burden of proving by a preponderance of the evidence that respondent was a controlling employer which failed to designate and train a competent person to conduct regular and frequent inspections and to recognize and

eliminate hazards associated with fall protection hazards and personal protective equipment?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 C.F.R. §1926.10 provides, in pertinent part, as follows:

This subpart contains the general rules... for construction, alteration, and/or repair, including painting and decorating...[which requires]... that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of contract work in surroundings or under working conditions which are ...hazardous, or dangerous to his health or safety... .

2. 29 C.F.R. §1926.16 provides, in pertinent part, as follows:

(a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a job site basis rather than individually. ... In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

(b) By contracting for full performance of a contract...the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.

(c) Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.

(d) Where joint responsibility exists, both the prime contractor and his subcontractor...regardless of tier, shall be considered subject to the enforcement provisions of the Act.

3. 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.

4. 29 C.F.R. §1926.32(j) provides, in pertinent part, as follows:

"Employee" means every laborer...under the Act regardless of the contractual relationship which may be alleged to exist between the laborer...and the contractor or subcontractor who engaged him.

5. 29 C.F.R. §1926.32(k) provides as follows:

"Employer" means contractor or subcontractor within the meaning of the Act and of this part.

6. N.C.G.S. §95-127(18) provides as follows:

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.

7. 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.

After reviewing the record file, hearing the evidence and arguments of counsel, and after considering the parties' briefs and the applicable legal authorities, the undersigned makes the following:

FINDINGS OF FACT

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et. seq., the Occupational and Safety and Health Act of North Carolina (the Act).
2. Respondent is a corporation engaged in the construction business which conducts business in, and under the laws, of the State of North Carolina
3. On March 17, 1999, from Public Highway 73 in Huntersville, North Carolina, Michael Lee Peacock, a Safety Compliance Officer for the North Carolina Department of Labor (the SCO), observed individuals in a construction development installing roofing on a steep pitched roof, over six feet off the ground, without fall protection or personal protective equipment. The residential housing construction project was located at 17232 Bridgeton Lane, (hereafter, "the project" or "the job site").
4. On March 18, 1999, the SCO obtained approval from his supervisor to conduct an inspection of the project. The SCO and associate SCO, Dawn Jarmen, traveled to the project. From the public way they observed and photographed individuals working on

at least two steep pitched roofs, over six feet without fall protection or personal protective equipment.

5. Respondent was the general contractor for the houses photographed by the SCO.

6. By agreement between the parties, the SCO inspected the job site on March 30, 1999. The SCO held an opening conference. Present for the conference were Pat Harkins, Safety Coordinator for David Weekley Homes; Gary Bryant, Project Manager for David Weekley Homes; Scott Kirby, also a project manager for David Weekley Homes; and Sonny Paige, from Paige & Son Construction (Paige). The SCO informed them of his purpose and presented his credentials.

7. On April 28, 1999, the SCO interviewed respondent's employees, Gary Bryant, Doug Turner, and Bruce Little. Respondent's counsel, Robert Rader, was also present.

8. Respondent regularly had four employees on the job site and 250 employees overall;

9. Respondent provided its written safety and health program to the SCO;

10. The individuals who the SCOs observed installing shingles on the roofs of the job site were Paige employees.

11. The roofs on which Paige employees were working varied in height from 21 feet at the edge of the roof to 28 feet at the ridge of the roof.

12. On two consecutive days and in plain view of the highway and one of the primary roads in the development, the SCO observed Paige employees more than 6 feet above the ground without proper guards, fall protection or personal protective equipment.

13. Roofers working without fall protection or personal protective equipment is a frequent hazard on residential construction sites.

14. Paige was cited for violations of the Act pertaining to having employees working more than 6 feet above the ground without proper guards, fall protection or personal protective equipment.

15. Respondent did not create the hazard which is the subject of the citation in this case.

16. The SCO did not observe respondent's employees being exposed to any hazards on the job site.

17. Respondent's employees do not do any construction work on the job site.
18. Respondent does not direct the daily means, method, procedures or techniques of its subcontractors' work
19. Respondent was subject to a contract with Paige in which respondent reserves the following rights, among others:
 - (a) the right to inspect Paige's work from time to time and to reject portions of the work if not done in a satisfactory manner, with satisfactory materials or in a timely fashion in accordance with the respondent's standards;
 - (b) the right to schedule Paige's work and the work of other contractors;
 - (c) the right to prevent Paige from impeding the progress of the work by other contractors;
 - (d) the right to compel Paige to keep the job site clean of debris at all times and to clean the job site upon completion of each stage of the project;
 - (e) the right to compel Paige to comply with all safety, health and other laws, ordinances, rules and regulations applicable to the project; and
 - (f) the right to withhold payment or terminate the contract if Paige does not comply with its terms and conditions, including failure to comply with OSHA requirements after respondent tells them that they are in violation.
20. Respondent is required to provide safety data sheets for hazardous materials used on the job site to contractors.
21. 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 100 or more 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 progressed.
22. Respondent's employees on the job site are each responsible for 6 to 10 houses. Sometimes the houses are located in more than one development.

23. Typically, respondent's employees on the job site spend 70% to 80% of their time in their construction trailer on the management activities described above. The remaining time is spent inspecting the sites to ensure compliance with construction standards before authorizing payment, to assist the city building inspectors and to escort home buyers on their inspections of the construction progress.

24. Respondent's corporate safety coordinator, Mr. Harkins, reviews safety training for the subcontractors and their employees.

25. The builders have monthly safety meetings where specific topics are discussed.

26. At times, more than one contractor's employees are working on the job site and at individual buildings at the same time.

27. Respondent trains its employees to inspect subcontractor's work in progress and to recognize and avoid hazards on the job sites.

28. Respondent's policy if they see a hazard is to notify the appropriate subcontractor and request that he remedy the unsafe condition.

29. Because respondent does not consider itself a controlling employer, it does not perform regular and frequent inspections of the job site with the purpose of ensuring compliance with the Safety and Health Act.

30. The SCO held a closing conference on April 28, 1999. Present for the closing conference were Gary Bryant and respondent's legal counsel, Robert Rader.

31. Based upon his observations, his photographs and the information received from respondent and Sonny Paige at the opening and closing conferences, and in order to enforce the Act, the SCO issued a citation on May 21, 1999, alleging the following serious violation:

29 C.F.R. §1926.20(b)(2): Frequent or regular inspections of the job site, materials, and equipment were not made by competent person designated by employer, as part of an accident prevention program.

(a) job site, employer did not designate and train a competent person to conduct inspection to recognize and eliminate hazards associated with fall protection hazards and personal protective equipment.

32. The violation cited in Citation 1, Item 1 was serious in that there existed a possibility of an accident, to wit: Paige workers falling off of the roof.

33. The substantial probable result of such an accident would be fractures, internal injuries, lacerations, abrasions, contusions, in some cases, death.

34. At least four employees of Paige were exposed to the hazard.

35. None of respondent's employees were exposed to the hazard.

36. The \$875.00 penalty imposed for the violation cited in Citation 1, Item 1 was properly calculated in accordance with the North Carolina Operations Manual by respondent as follows:

(a) the severity of the violations was determined to be medium;

(b) the probability assessment was properly deemed to be low;

(c) the gravity based penalty was properly calculated to be \$1,250;

(d) the adjustment factor for size was properly calculated to be 0%;

(e) the adjustment factor of 10% for respondent's cooperation with the inspection was properly applied;

(f) the adjustment factor of 10% for no history of prior violations was properly applied;

(g) the adjustment factor of 10% for safety and health programs was properly applied; and

(h) the total reduction of 30% to the \$1,250.00 gravity based penalty to reduce the penalty to \$875.00 was properly applied.

37. The date by which the violated was to be abated was May 27, 1999.

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. Respondent is subject to the provisions and jurisdiction of the Act.

3. Respondent was a general contractor on the job site.

4. The work that respondent's employees did in (1) hiring, scheduling and coordinating up to 100 contractors per home, (2) ordering the construction supplies necessary for the completion of the work, (3) inspecting the work sites for compliance with construction standards, and (4) reviewing contractor's safety programs, among other things, was directly and vitally related to the construction project. Romeo Guest Associates, Inc., OSHANC 96-3513 (1998); Grossman Steel & Aluminum Corp., ¶ 20,791 (RC 1976); Bechtel Pwr. Corp., 4 BNA OSHC 1005, 1975-1976 CCH OSHD P 20,503 (No. 5064, 1976) *aff'd per curiam* 548 F.2d 248 (8th Cir. 1977)

5. Respondent was a controlling employer with supervisory capacity over the job site.

Romeo Guest Associates, Inc., OSHANC 96-3513 (1998); Grossman Steel & Aluminum Corp., ¶ 20,791 (RC 1976); Anning-Johnson Co. v. wU.S. Occupational Safety and Health Review Comm'n, 516 F.2d 1081 (7th Cir. 1975)

6. Respondent was required, within its regular supervisory capacity, to make reasonable efforts to anticipate hazards to Paige's employees and to make reasonable efforts to inspect the job site to detect violations that Paige's employees may have created. Romeo Guest Associates, Inc., OSHANC 96-3513 (1988); Secretary of Labor v. David Weekely Homes, OSHRC Docket No. 96-0898, ___ BNAOSHC ___ (Rev. Comm. 2000)

7. Respondent should have known that roofers working without fall protection or personal protective equipment is a frequent hazard on residential construction sites.

8. On two consecutive days, Paige's employees were working on respondent's houses without fall protection or personal protective equipment and in plain view of the highway and in plain view of a primary road in the construction development.

9. 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. Romeo Guest Associates, Inc., OSHANC 96-3513 (1988); Secretary of Labor v. David Weekely Homes, OSHRC Docket No. 96-0898, ___ BNAOSHC ___ (Rev. Comm. 2000)

10. The Complainant proved by a preponderance of the evidence that respondent violated the section of the Act as set forth in the Findings of Fact above, that the violation was serious as designated in the Citation and that the proposed penalty assessed for Citation 1, Item 1 was figured appropriately.

11. The method of abatement would be for respondent to do the following: (a) make reasonable efforts within its normal supervisory capacity to anticipate hazards to subcontractor's employees and identify any such hazards; (b) make reasonable efforts within its given supervisory

capacity to detect violations that its subcontractors may create or to detect hazards that are long standing and in plain view; and (c) to correct any hazards it discovers or to have the subcontractor correct the hazards it identifies during the course of its supervisory responsibilities.

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED** as follows:

1. Citation 1, Item 1 is hereby affirmed and the penalty is hereby imposed in the amount of \$875.00;
2. The penalty shall be paid within ten (10) days of the filing date of this Order; and
3. Respondent shall do the following: (a) make reasonable efforts within its normal supervisory capacity to anticipate hazards to subcontractor's employees and identify any such hazards; (b) make reasonable efforts within its given supervisory capacity to detect violations that its subcontractors may create or to detect hazards that are long standing and in plain view; and (c) to correct any hazards it discovers or to have the subcontractor correct the hazards it identifies during the course of its supervisory responsibilities.

This the 20th day of November, 2000.

Ellen R. Gelbin
Administrative Law Judge