

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

COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

POPE MASONRY CONTRACTORS, INC.,

RESPONDENT.

DOCKET NO. OSHANC 99-3821  
OSHA INSPECTION NO. 302634878  
CSHO ID NO. W43297

**ORDER**

**APPEARANCES:**

**Complainant:**

**Daniel S. Johnson  
Associate Deputy Attorney General  
North Carolina Department of Justice**

**Respondent:**

**Charles Crutchfield  
General Superintendent  
Pope Masonry Contractors, Inc**

**BEFORE:**

**Hearing Examiner: Carroll D. Tuttle**

**THIS CAUSE** came on for hearing and was heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on December 10, 1999, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Mr. Daniel S. Johnson, Associate Deputy Attorney General. The Respondent was represented by its General Superintendent, Mr. Charles Crutchfield.

Based upon the evidence presented at the hearing, and with due consideration of the arguments and contentions of all parties, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

### **FINDINGS OF FACT**

1. This case was initiated by a Notice of Contest received by the Complainant, North Carolina Department of Labor, on or about July 16, 1999 contesting a citations issued March 26, 1999 to Respondent, Pope Masonry Contractors, Inc., to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).
2. 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 with, and enforcement of the provisions of the Act (N.C.G.S. § 95-133).
3. Respondent is a North Carolina corporation performing masonry construction work and maintains an office in Cary, North Carolina. Respondent had twenty-two employees at the construction site.
4. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
5. Officer Rod Wilce, a Compliance Safety Officer (CSO) with the Occupational Safety and Health Division, North Carolina Department of Labor, conducted an occupational safety and health (OSH) inspection of multi-employer construction site located at 350 Asheville Avenue, Cary, North Carolina ("the site"). The inspection was a referral inspection. The construction site was the construction of a hotel which was in its final stages.
6. On February 3, 1999, prior to beginning his inspection, Office Wilce conducted an opening conference with Mr. Stuart Gordon and Mr. Robert Case, representatives for

the General Contractor. Officer Wilce then conducted an opening conference with Mr. Charles Crutchfield, the site Superintendent for Respondent. During the opening conference Office Wilce presented his credentials and explained the scope and purpose of the inspection. Approval for the inspection was granted by Mr. Crutchfield after calling his home office by telephone.

7. During the inspection Officer Wilce conducted a walk-a-round of the site, took photographs, interviewed witnesses, and obtained written statements. Citations were issued on March 26, 1999.

Citation Number One, Item 1a

8. Citation No. 1, Item 1a, charges a serious violation of 29 CFR 1926.501(b)(1) alleging that employees working more than 6 feet or more above a lower level were not protected from falling by a fall arrest system.

9. At the hotel construction site where Respondent was the masonry contractor, Officer Wilce observed three of Respondent's employees working on the roof which was fifty-six (56) feet above the ground level. These employees were receiving scaffolding sections by a crane in order to erect scaffold. They were working at the edge of the roof to receive the scaffold without fall protection. The edge of the roof had a twelve (12) inch parapet or low wall. This condition is illustrated by Complainant's Exhibit 2 which shows employees standing at the edge of the roof.

10. This condition described above presented the possibility of an accident. The hazard associated with these conditions is falling from the roof to the ground level, a distance of fifty-six (56) feet. The most probable injury from such an accident would be death. Respondent's three employees working on the roof were exposed to this hazard.

11. Respondent's site Superintendent was working on site on the ground level and either observed the conditions or with reasonable diligence could have observed the conditions.

12. Respondent had previously entered into a settlement agreement at an informal conference for the same or similar violation based upon a citation issued on May 31, 1996, which was within three years of this citation. That citation was a violation at a construction site located at 1500 Buck Jones Road, Raleigh, North Carolina, for employees working on a roof located 27 feet 3 inches from the ground level without fall protection. Complainant's Exhibit No. 5 is the Informal Settlement Agreement from the prior citation.

13. The penalty calculation for this violation pursuant to the Field Operations Manual gave a high severity and a medium probability resulting in a gravity based penalty of \$3,500.00. Reductions for size of 50% and cooperation of 10% resulted in an adjusted penalty of \$1,400.00 which was doubled to \$2,800.00 because of the prior citation within three years. All these calculations and evaluations made by Officer Wilce were performed in accordance with the guidelines set forth in the Field Operations Manual and were properly made.

Citation No. 1, Item 1b

14. Citation No. 1, Item 1b, charges a serious violation of 29 CFR 1926.502(a)(2) alleging that Respondent failed to install a fall arrest system for its employees before employees began the work which required fall protection.

15. At the site, Respondent was engaged in the construction of a hotel as the masonry contractor. Its employees were working on the roof of the structure which was 56 feet above ground level without fall protection. There was a 12 inch parapet around the edge of the roof. Respondent had instructed its employees to stay 6 to 8 feet away from the edge. However, employees were regularly working near the edge as shown in several of Complainant's photographic exhibits.

16. Respondent's failure to install some fall protection system prior to beginning work created the possibility of an accident in which the hazard created was falling. The most probable result of such an accident at that height was death. Respondent's job site Superintendent was on site and observed or could have observed its employees working near the edge of the roof just as Officer Wilce did.

17. The same guidelines for calculations apply as in Citation No. 1, Item 1a, for penalty calculations according to the Field Operations Manual. This was also a repeat serious violation because of the prior citation within three years as shown in Complainant's Exhibit s 4 and 5. This violation was grouped with Citation No. 1, Item 1a.

Citation No. 2, Item No. 1

18. Citation No. 2, Item 1, charges a serious violation of 29 CFR 1926.503(c)(3), alleging that Respondent failed to adequately train or failed to re-train its employees in the recognition of fall hazards.

19. Complainant's evidence indicated that Respondent's employees had been trained but because of the conditions found at this job site, Complainant contends that the

lack of fall protection means that the training was inadequate. The training conducted was mandated by the prior citations cited in this Order.

20. 29 CFR 1926.503(c) states:

**STRONG>Retraining.** When the employer has reason to believe that any affected employee who has already been trained does not have the understanding and skill required by paragraph (a) of this section, the employer shall retrain each such employee. Circumstances where retraining is required include, but are not limited to, situations where:

(3) Inadequacies in an affected employee's knowledge of use of fall protection systems or equipment indicate that the employee has not retained the requisite understanding or skill.

21. There was no evidence that these particular employees were trained or not or that these particular employees were the employees in the prior citation or whether Respondent has had prior indications that these affected employees need retraining. The circumstances of this job site conditions do indicate that these affected employees need retraining, however, the Employer must be given the opportunity to actually conduct such retraining before they can be cited for failing to do so.

22. The penalty calculations in this citation are the same as in the previous citations and were properly conducted pursuant to the Field Operations Manual.

#### Citation No. 2, Item No. 2

23. Citation No. 2, Item No. 2, charges a serious violation of 29 CFR 1926.451(g)(1) alleging that Employees on scaffolds more than 10 feet above a lower level were not protected from falling to that lower level.

24. Respondent's employees were in the process of dismantling the scaffolding system. Officer Wilce observed the employees climbing below the working surface wearing fall protection harnesses without actually being tied off. Complainant's Exhibit 6 contains photographs taken by Officer Wilce which, although vague because of fog, illustrate and support his testimony. Although Officer Wilce could not specifically see the tie offs from the distance, it was clear to him and from his testimony that these employees could not have been tied off because of their movements across the scaffold framing.

25. These conditions created the possibility of an accident, the most probable result of which would be falling and death. Three of Respondent's employees were exposed to

this hazard. The penalty calculations and evaluations were made according to the guidelines set out in the Field Operations Manual and were properly done. The penalty calculations are the same as in the prior citations.

Based upon the foregoing Findings of Fact, the undersigned Hearing Examiner concludes as a matter of law the following:

### CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. This Court has jurisdiction of this cause and the parties are properly before the Court.
3. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
4. Respondent violated 29 CFR 1926.501(b) (1) by failing to provide fall protection for employees working on the roof at its construction site at 350 Asheville Avenue, Cary, North Carolina.
5. Respondent violated 29 CFR 1926.502(a)(2) by failing to provide and install fall protection systems for its employees prior to beginning the work that required fall protection.
6. The Court cannot find by a greater weight of the evidence that Respondent violated 29 CFR 1926 503(c)(3).
7. Respondent violated 29 CFR 1926.451(g)(1) by failing to assure that employees working more than 10 feet above a lower level were protected by fall protection.
8. The proposed penalties for the above citations were calculated in accordance with the North Carolina Operations Manual and are appropriate.

### **ORDER**

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

1. Citation No. 1, Item 1, alleging a serious violation of 29 CFR 1926.501(b)(1) and 29 CFR 1926.502(a)(2), as grouped, are hereby affirmed together with the proposed penalty of \$2,800.00.

2. Citation No. 2, Item No. 1, alleging a serious violation of 29 CFR 1926.503(c)(3), is hereby dismissed.

3. Citation No. 2, Item No. 2, alleging a serious violation of 29 CFR 1926.451(g)(1), is hereby affirmed together with the proposed penalty of \$1,050.00.

4. All penalties shall be paid within ten (10) day of service of this Order.

This the 22nd day of September, 2000.

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Carroll D. Tuttle  
Administrative Law Judge Presiding