

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

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 99-3853  
OSHA INSPECTION NO. 302869466  
CSHO ID NO. W0633

v.

MILLER BUILDING CORP.

**ORDER**

RESPONDENT.

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**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 April 19, 2000, continued and June 28, 2000, each session held at the Old YWCA Building, Room 124 - 1st Floor, 217 West Jones Street, Raleigh, NC.

The Complainant was represented by Ann G. Kirby, Assistant Attorney General, North Carolina Department of Justice.

The Respondent was represented by Charles D. Meier, Attorney at Law with the firm of Marshall, Williams & Gorham, LLP, Wilmington, North Carolina.

This case involves a general contractor on a multi employer work site. The specific issues for determination are whether Respondent is liable for the following alleged violations:

**Citation 1 Item 1a:** Serious violation of **29 CFR 1926.20(b)(2)**: "The employer's health and safety program did not provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons: (a) site - on a jobsite controlled by the general contractor, the competent person did not identify and correct hazards where employees of Miller Building Corporation and of Marapese Masonry, Inc. were exposed while working from tubular welded scaffolding and in the vicinity of the masonry wall, including but not limited to . . . "; such violation, together with those designated in Citation 1 Items b and c, bearing a penalty of \$1,050.00.

**Citation 1 Item 1b:** Serious violation of **29 CFR 1926.21(b)(2)**: "The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards

or other exposure to illness or injury: (a) site - the general contractor's on site representative had not been trained by the employer in the recognition of improperly setup scaffolding, the basic requirements for fall protection, proper use of ladders, or any other training in the recognition of hazards normally found on a construction site."; such violation, together with those designated in Citation 1 Items a and c, bearing a penalty of \$1,050.00.

**Citation 1 Item 1c:** Serious violation of **29 CFR 1926.451(g)(1)(vii)**: "For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vii) of this section, employees were not protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section: (a) interior of west wall . . . (b) interior of east wall . . . (c) interior of east wall southeast corner . . . ; such violation, together with those designated in Citation 1 Items a and b, bearing a penalty of \$1,050.00.

**Citation 1 Item 2a:** Serious violation of **29 CFR 1926.706(a)**: "a limited access zone shall be established whenever a masonry wall is being constructed: (a) site, exterior masonry wall - no limited access zone established for east, west, and south walls varying in height from 15-28 feet 8 inches." such violation, together with that designated in Citation 1 Items b, bearing a penalty of \$1,050.00.

**Citation 1 Item 2b:** Serious violation of **29 CFR 1926.706(b)**: "all masonry walls more than eight feet in height were not adequately braced to prevent overturnings and to prevent collapse: (a) south wall, southeast corner - wall, approximately 15 feet in high X 16 feet long was not braced." such violation, together with that designated in Citation 1 Item a, bearing a penalty of \$1,050.00.

On work sites which involve multi employers, each employer is obligated to make reasonable efforts to detect and abate any violation of safety standards of which it is aware if its employees are exposed, this obligation being imposed even if the employer did not create the violative condition. See *Brooks v BCF Piping*, 109 NC App 26 (1993). This obligation is consistent with the general rule earlier stated by the Review Board of North Carolina in *Brooks v Kane* (3 NCOSHD 307 (1989)): "... the general rule that an employer is responsible for work place safety of all employees whose activities it controls in a common undertaking." On the multi employers' worksite the general contractor can be held liable for hazards created by a subcontractor and to which the general contractor's employees are not exposed if the general contractor can reasonably be expected to prevent or abate those hazards by reason of its supervisory capacity. See *Commissioner of Labor v Romeo Guest*, OSHANC 96-3513. In *Romeo Guest* the Review Board acknowledged that the general contractor's duty is to make reasonable efforts to anticipate hazards to subcontractors' employees and reasonable efforts to inspect the jobsite to detect violations that its

subcontractors may create. The ruling by the North Carolina Review Board is consistent with that of the Federal Review Commission position that "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 . . . Thus, we will hold the general contractors responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity," Grossman Steel & Aluminum Corp., 4 BNA OSHC 1185 (No. 1275, 1976)

In adopting this position with respect to a general contractor's obligations there is a presumption that a general contractor has sufficient control over its subcontractors to require the subcontractors to comply with safety standards. It is based on this presumption that the general contractor is held liable for violations it should reasonably have detected and abated, even when the general contractor's own workers are not exposed to the violative conditions. 'Sufficient control' has been interpreted to be control over a subcontractor (1) established by a specific contract with the subcontractor; (2) established by a combination of other contract rights; or (3) established without explicit contractual authority.

In order to establish a serious violation, the Complainant has the burden of showing by preponderance of evidence that (1) the cited standard applies; (2) the terms of the standard were not met; (3) employees were exposed to or had access to the violative conditions; (4) the Respondent knew or could have known of the violative conditions with the exercise of reasonable diligence; and (5) there was a possibility of an accident the probable result of which would be death or serious physical injury.

### **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"). The 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 Wilmington, North Carolina. Respondent is engaged in the construction business.
3. Respondent is an "employer" within the meaning of NCGS §95-127(10).

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. Russell Wingate, a compliance officer with the Department of Labor, OSHA Division, conducted an inspection of Respondent's worksite on July 21, 1999. The worksite was located at Cleveland Crossings Road, near state Highway 40 and Highway 42. Respondent was the general contractor responsible for the construction of a Lowe's Home Improvement Center. Officer Wingate was accompanied on the inspection by Officer Tracy Townsend. Officer Wingate focused his inspection on the Respondent and Officer Townsend focused her inspection on a subcontractor.
9. The inspection was a self-referral inspection; the inspection was referred within the agency, based on observations made by Officer Wingate and Officer Townsend from the public right of way on July 20, 1999, with respect to workers working on scaffolding at elevations without fall protection. The inspection was a partial inspection.
10. Upon arriving at the work site Officer Wingate went to the office trailer and spoke with Arthur Boone who was the site superintendent for Respondent. Mr. Boone called Randall Thomas by phone and Officer Wingate spoke to Mr. Thomas to explain the nature of the inspection. Permission was given to conduct the inspection. Officer Wingate continued his opening conference with Mr. Boone and went to the site to conduct the walk-around inspection. After the walk-around was completed, a closing conference was held with Mr. Boone.
11. When Officer Wingate arrived at the site, he observed hazards similar to those observed from the public right of way the day before: employees working at various levels of the tubular welded scaffold without proper guardrails and a lack of guardrails, and workers climbing from one level to the other level improperly, climbing the cross braces, climbing the end frames. The employees of a subcontractor, Marapese, were working on the scaffolds; they had been working that day on the scaffolds for several hours.
12. The work at the site had begun on approximately June 1, 1999; Mr. Boone had been the site superintendent for Respondent on the site from the beginning of the project. However, Mr. Boone was to be replaced by another superintendent, Mr. Bob

Becker. Mr. Boone's duties included daily management of the site for safety and the construction process. These duties included conducting safety inspections on the job site. Mr. Boone was at the job site daily. Mr. Boone had been out on the site approximately three hours on the day of the inspection and for most of the day on July 20. Mr. Becker was also on the job site on July 20 and 21.

13. Respondent had approximately seven employees on the job site on the day of the inspection and had approximately 400 employees in total.

14. Mr. Boone conducted inspections as part of his daily activities and had the authority to stop the work activity of the subcontractor as evidenced by the fact that when Officer Wingate pointed out the problems Mr. Boone was able to have the workers stop work on the scaffolds. That Officer Wingate was 'led to believe' that the hazards or condition of the scaffold would be corrected before the workers would go back on the scaffolds to continue work.

15. At the Closing conference Officer Wingate explained to Mr. Boone in general terms that there would be citations dealing with adequate inspections of the site and proper setup of scaffolding, and reviewed with Mr. Boone the OSHA 59.

16. Officer Wingate did not mention anything about the masonry wall at the closing conference. The masonry wall issue was pointed out to Officer Wingate at a later time based on pictures taken during the inspection.

17. All penalties were calculated in accordance with the Field Operations Manual in a manner consistent with the calculations of penalties for other employers in North Carolina, except an error in favor of Respondent was made in determining the amount of credit to be given for size (Respondent was mistakenly given more credit for size than it should have been given).

18. There were ladders (some welded to scaffolding, some not welded) available for accessing scaffolds.

19. Randall Thomas, the safety director for Respondent, testified that it was his understanding that Respondent could be held liable for violations of its subcontractors, and that Respondent recognizes the responsibility to provide safety guidance to its subcontractors.

20. It is Respondent's policy to conduct regular inspections of the work site, including subcontractors, to ensure compliance with safety standards.

21. In 1992 Respondent provided a Saturday training session on trenching and scaffolding, and that session was attended by Mr. Boone. Respondent produced no other written documentation evidencing training of Mr. Boone. However, Mr. Thomas testified that within last two years Respondent's superintendents, including Mr. Boone, received training on scaffolds as part of a program by insurance risk control management team. Mr. Thomas further testified that Respondent had lost a lot of walls in the past and that a written instruction letter had been sent out to superintendents, including Mr. Boone; the letter was based on both economic concerns and on safety concerns. Mr. Thomas also testified that Mr. Boone was required to attend safety training meetings which were put on by a safety services group approximately quarterly.

22. Mr. Thomas testified that safety with respect to masonry walls would be a joint effort between Respondent and the subcontractor, and that typically it would be left to the expertise of the subcontractor. The masonry subcontractor was a relatively large company with expertise in the area, had been a subcontractor for Respondent on numerous previous occasions and, to the knowledge of Mr. Thomas, had a safety program.

23. The contract between Respondent and the masonry subcontractor required the subcontractor to comply with Respondent's safety policy.

24. On the day of the inspection Mr. Boone knew that there were some toeboard and guardrails missing from the scaffolds. Mr. Boone relied on the subcontractor to be sure there was compliance with required safety standards. The conditions alleged to be violations were open and obvious during a walk-around of the site and Mr. Boone was, or should have been, aware of the conditions.

25. Mr. Boone testified that his principle instructions on scaffolds and associated restricted areas were in 1992, and that he was not aware that the OSHA standard had been rewritten in 1995. Mr. Boone also testified that he received instructions during various seminars and verbal instructions, but he did not give specifics.

26. With respect to **Citation 1 Item** 1a: Serious violation of **29 CFR 1926.20(b)(2):a)**

a. Respondent had a written safety program and conducted some training; Randall Thomas is the safety director. Mr. Boone was Respondent's designated person responsible for conducting safety inspections on the job site and, according to Mr. Boone, he had the authority to tell a subcontractor not to proceed if its workers were violating safety standards. Officer Wingate testified that the issue was not whether Respondent had frequent and regular inspections but whether the person conducting the inspections was competent.

b. Employees of a subcontractor were working on tubular welded scaffolds without proper fall protection, the scaffolds did not have toeboards or any kind of netting to protect employees that may be working at lower levels; the area around the base of the scaffolds was not barricaded to prevent the entrance of other employees, and workers were observed accessing the various levels of the scaffold by climbing the end frames and the cross braces; there was no limited access zone established around the masonry wall to clearly identify the area as hazardous.

c. Mr. Boone had not received, during the past few years, adequate training specific to the recognition of unsafe conditions on the job site that were routine to the type of work nor had he received adequate training in the proper set up when fall protection is required. Mr. Boone had been in the construction business approximately 14 years.

d. Mr. Boone thought that the scaffolds were set up adequately and that bracing was not needed for the wall until it reached a higher level.

e. Officer Wingate did not believe Mr. Boone to be a competent person for purposes of conducting required inspections; such conclusion was based in part on Mr. Boone not having any specific training with respect to activities he was responsible for inspecting.

f. Mr. Boone was not able to recognize scaffolding hazards pertaining to fall protection and limited access zones.

g. Types of accidents likely to occur because of Respondent's failure to have inspections by a person able to recognize hazards, at this work site, included the possibility of a worker falling to lower levels from heights of up to 28 feet or being hit by falling objects, the probable injury being serious physical harm.

h. Employees of a subcontractor were exposed to the fall hazards from scaffolds and were exposed to overhead hazard of something falling from a scaffold and hitting them.

i. Respondent was aware of employees of subcontractors working on scaffolds without fall protection and hazards of objects falling from scaffolds and was also aware that it had not given training to Mr. Boone in the specific recognition and abatement of such hazards.

j. The violation was given a severity of high and a probability of medium, with a penalty of \$3,500 being proposed; the proposed penalty was adjusted 50% for size, 10% for good faith, 10% for cooperation; the proposed adjusted penalty was \$1,050.00. This proposed adjusted penalty was grouped for all items set forth in Item

1. However, the penalty for this Item would have been the same without the grouping for penalty purposes.

k. This violation could have been abated by Respondent providing training to the person designated as being responsible for conducting required inspections.

27. With respect to **Citation 1 Item 1b**: Serious violation of **29 CFR 1926.21(b)(2)**:

a. Employees of a subcontractor were working on tubular welded scaffolds without proper fall protection, the scaffolds did not have toeboards or any kind of netting to protect employees that may be working at lower levels; the area around the base of the scaffolds were not barricaded to prevent the entrance of other employees, and workers accessed the various levels of the scaffold by climbing the end frames and the cross braces; there was no limited access zone established around the masonry wall to clearly identify the area as hazardous.

b. Respondent had not properly instructed Mr. Boone in recognizing scaffolding hazards pertaining to fall protection and limited access zones.

c. Types of accidents likely to occur because of Respondent's failure to properly instruct Mr. Boone to recognize hazards, at this work site, was the likelihood of a worker falling to lower levels from heights of up to 28 feet or a worker being hit by a falling object, the probable injury being serious physical harm.

d. Employees of a subcontractor were exposed to the fall hazards from scaffolds and were exposed to overhead hazard of something falling from a scaffold and hitting them.

e. Respondent was aware of employees of subcontractors working on scaffolds without fall protection and was also aware that it had not given training to Mr. Boone in the specific recognition and abatement of such hazards.

f. The violation was given a severity of high and a probability of medium, with a penalty of \$3,500 being proposed; the proposed penalty was adjusted 50% for size, 10% for good faith, 10% for cooperation; the proposed adjusted penalty was \$1,050.00. This proposed adjusted penalty was grouped for all items set forth in Item 1. However, the penalty for this Item would have been the same without the grouping for penalty purposes.

g. This violation could have been abated by Respondent providing training to Mr. Boone who was the person designated as responsible for conducting required inspections.



28. With respect to **Citation 1 Item 1c**: Serious violation of **29 CFR 1926.451(g)(1)(vii)**:

- a. Tubular welded scaffolds were being used for erecting the concrete block wall.
- b. Employees of a subcontractor were working at heights above 10 feet from the ground on scaffolds which did not have a guardrail system or which did not have all the components of a guardrail system (some of the guardrail systems in use did not have both a top rail and mid rail), and such workers did not use a personal fall arrest system.
- c. Respondent failed to ensure that employees of a subcontractor used fall protection (either fall arrests or guardrails); such failure created the possibility of a worker falling from heights greater than 10 feet, the probable result of which would be serious physical injury.
- d. Respondent was aware of employees of subcontractors working on scaffolds without fall protection and was also aware that it had not given training to Mr. Boone in the specific recognition and abatement of such hazards.
- e. The violation was given a severity of high and a probability of medium, with a penalty of \$3,500 being proposed; the proposed penalty was adjusted 50% for size, 10% for good faith, 10% for cooperation; the proposed adjusted penalty was \$1,050.00. This proposed adjusted penalty was grouped for all items set forth in Item 1. However, the penalty for this Item would have been the same without the grouping for penalty purposes.
- f. This violation could have been abated by Respondent providing training to Mr. Boone who was the person designated as responsible for conducting required inspections.

29. With respect to **Citation 1 Item 2a**: Serious violation of **29 CFR 1926.706(a)**:

- a. There was no limited access zone marked for the east, west or south walls, which walls varied in height at the time of the inspection from 15 to 29 feet.
- b. Employees of Respondent and of a subcontractor were present in the area which would have been included in the limited access zone.
- c. There was a possibility a wall could fall and hit a worker in the limited access zone area, the probable result of which would be serious physical injury.

d. Respondent knew that the limited access zone had not been designated.

e. The violation was given a severity of high and a probability of medium, with a penalty of \$3,500 being proposed; the proposed penalty was adjusted 50% for size, 10% for good faith, 10% for cooperation; the proposed adjusted penalty was \$1,050.00. This proposed adjusted penalty was grouped for all items set forth in Item 2. However, the penalty for this Item would have been the same without the grouping for penalty purposes.

f. This violation could have been abated by Respondent having a limited access zone designated.

30. With respect to **Citation 1 Item 2b**: Serious violation of **29 CFR 1926.706(b)**:

a. The south wall, at the southeast corner, which was approximately 15 feet high and 16 feet long was not braced at the time of the inspection. Other walls being erected were braced.

b. Mr. Boone stated to Officer Wingate that he does not worry about the support brace until the wall reaches the control joint which is approximately 30 feet from the corner; Mr. Boone believed that the corner supports the wall initially.

c. Mr. Thomas testified that in his opinion the south wall was adequately supported because it was tied in at a corner with a 90-degree angle and had continuous steel bar reinforcement, but each bar was in a 4-foot segment. In experience with Respondent such walls have not fallen; only walls that have fallen were interior walls without steel bar reinforcement. Mr. Boone testified that he believed the south wall was adequately supported without the necessity of braces.

d. If the south wall was not adequately supported the failure to brace the southeast corner of the south wall created the possibility of an accident if the wall collapsed and hit workers, the probable result being serious physical injury.

e. If the south wall was not adequately supported and not braced then Respondent's employees and employees of subcontractors were exposed to the hazard.

f. Respondent was aware that the wall was not braced, and did not believe that the south wall needed to be braced.

g. The violation was given a severity of high and a probability of medium, with a penalty of \$3,500 being proposed; the proposed penalty was adjusted 50% for size, 10% for good faith, 10% for cooperation; the proposed adjusted penalty was

\$1,050.00. This proposed adjusted penalty was grouped for all items set forth in Item 2. However, the penalty for this Item would have been the same without the grouping for penalty purposes.

h. This south wall could have been braced.

i. There was no evidence that wind was not calm at the work site or that workers were working in windy conditions such that the wall would be blown over, or that there was any other reason that would cause the fall of the south wall.

j. The Complainant called as a witness Jane McLaurin, an area supervisor for Complainant, who testified that permanent supporting structures for purposes of securing a wall are items placed atop the masonry wall such as a roof, etc. to tie the walls together so they will not overturn or collapse; she did not inspect, or see, the south wall which is the subject of this case and testified that her primary knowledge of the case is from being present during the Hearing. Officer Wingate did not identify the necessity for bracing the south wall at the time of the inspection.

### **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. Respondent is responsible for a serious violation of **29 CFR 1926.20(b)(2)** the evidence at the Hearing being sufficient to support Complainant's burden of proof to establish a serious violation of the standard.
3. A proper penalty for a serious violation of **29 CFR 1926.20(b)(2)**, if a stand alone violation, is \$1,050.00.
4. Respondent is responsible for a serious violation of **29 CFR 1926.21(b)(2)** the evidence at the Hearing being sufficient to support Complainant's burden of proof to establish a serious violation of the standard.
5. A proper penalty for a serious violation of **29 CFR 1926.21(b)(2)**, if a stand alone violation, is \$1,050.00.
6. Respondent is responsible for a serious violation of **29 CFR 1926.451(g)(1)(vii)** the evidence at the Hearing being sufficient to support Complainant's burden of proof to establish a serious violation of the standard.
7. A proper penalty for a serious violation of **29 CFR 1926.451(g)(1)(vii)**, if a stand alone violation, is \$1,050.00.
8. A proper penalty for a serious violation of **29 CFR 1926.20(b)(2)**, **29 CFR 1926.21(b)(2)**, and **29 CFR 1926.451(g)(1)(vii)**, when grouped, is \$1,050.00.

9. Respondent is responsible for a serious violation of **29 CFR 1926.706(a)**, the evidence at the Hearing being sufficient to support Complainant's burden of proof to establish a serious violation of the standard.
10. A proper penalty for a serious violation of **29 CFR 1926.706(a)**, if a stand alone violation, is \$1,050.00.
11. With respect to the alleged serious violation of **29 CFR 1926.706(b)** in this matter, Complainant did not carry its burden of proof in establishing that the south wall was not adequately supported so that it would not overturn or collapse even though braces were not being used, and therefore did not carry its burden of proof to establish a violation of the cited standard

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

Citation 1 Item 1a, 1b and 1c for violation of **29 CFR 1926.20(b)(2)**, **29 CFR 1926.21(b)(2)**, and **29 CFR 1926.451(g)(1)(vii)** bearing the grouped penalty of \$1,050.00 be and the same is hereby **AFFIRMED**.

Citation 1 Item 2a for violation of **29 CFR 1926.706(a)** bearing the penalty of \$1,050.00 be and the same is hereby **AFFIRMED**.

Citation 1 Item 2b for violation of **29 CFR 1926.706(b)** be and the same is hereby **DISMISSED**.

This day the **30th** day of **September 2001**.

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R. Joyce Garrett, Hearing Examiner