



*systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.*

2. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.451(e)(1) by allowing subcontractor employees to work on a 10 buck scaffold system 30 feet above the ground without a safe means of access? (Citation 1, Item 1b)

**29 CFR 1926.451(e)(1)** provides in pertinent part that:

*When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.*

3. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.451(e)(8) by allowing subcontractor employees to access scaffold platforms from other scaffold platforms that were separated by 42 inches horizontally and 40 inches vertically? (Citation 1, Item 1c)

**29 CFR 1926.451(e)(8)** provides in pertinent part that:

*Direct access to or from another surface shall be used only when the scaffold is not more than 14 inches (36 cm) horizontally and not more than 24 inches (61 cm) vertically from the other surface.*

4. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.451(f)(14) by allowing a subcontractor employee to increase his working height with a one gallon can while working on a 10 buck scaffold system 30 feet above the ground? (Citation 1, Item 1d)

**29 CFR 1926.451(f)(14)** provides in pertinent part that:

*Makeshift devices, such as but not limited to boxes and barrels, shall not be used on top of scaffold platforms to increase the working level height of employees.*

5. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.501(b)(1) by allowing subcontractor employees working on a platform 9 feet above the ground to work without fall protection of any kind? (Citation 1, Item 1e)

**29 CFR 1926.501(b)(1)** provides in pertinent part that:

*"Unprotected sides and edges." Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.*

6. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.20(b)(2) by failing to provide for frequent and regular inspections of the job sites, materials, and equipment by a competent person? (Citation 1, Item 1f)

**29 CFR 1926.20(b)(2)** provides in pertinent part that:

*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.*

7. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.452(h)(2)(i) by failing to provide a 10 buck scaffold system with toe boards on each of the working platforms or barricades to keep employees and subcontractor employees out of the danger area? (Citation 1, Item 2)

**29 CFR 1926.452(h)(2)(i)** provides in pertinent part that:

*The area below the scaffold to which objects can fall shall be barricaded, and employees shall not be permitted to enter the hazard area;*

8. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.405(g)(2)(iv) by allowing a flexible power cord to be used that did not have strain relief at the female end? (Citation 2, Item 1)

**29 CFR 1926.405(g)(2)(iv)** provides in pertinent part that:

*Strain relief. Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.*

\*\*\*\*\*

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

**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) Helm Builders, LLC, is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. The Respondent, Helm Builders, LLC, is a North Carolina construction company.
6. On September 16, 2008, Howard Laurie, a safety compliance officer with the North Carolina Department of Labor, conducted an inspection of Respondent's work site in New Bern, North Carolina.
7. During the hearing the parties stipulated that the standards cited in the citations applied to the workplace and to the scaffolding that was erected on the work site. (T. p. 72)
8. Respondent filed its Notice of Contest to the Citation and Notification of Penalty, dated October 28, 2008.
9. On September 16, 2008, the date of Complainant's inspection of Respondent's work site, Respondent was engaged in the construction of a hotel building at the work site. Respondent was the general contractor for the hotel construction project. Respondent had subcontracted the exterior stucco work for the building to Mud Slingers, Inc. The actual exterior stucco work was being performed by Jose Pena Rodriguez, a sole proprietor, and his employees, pursuant to a subcontract between Mud Slingers, Inc. and Mr. Rodriguez. ( T. p. 31; Parties' Stipulations of Fact, No. 11)

**Findings Related to Citation 1, Item 1a**

10. With regard to Citation 1, Item 1a, Complainant and Respondent entered into the following written stipulations (the numbers and letters correspond to the paragraphs and subparagraphs of the parties' written stipulations):

“1. On September 16, 2008, during the inspection of the Respondent's work site at 300 Hotel Drive, New Bern, NC, conducted by Safety and Health Compliance Officer Howard Laurie for the North Carolina Department of Labor pursuant to the Occupational Safety and Health Act of North Carolina, the following conditions existed and the following activities occurred:

- a. There were three towers of scaffolds at the front of the building under construction;
- b. The tops of the scaffolds were approximately 55 feet above the ground;
- c. There were ten platform levels on each scaffold tower;
- d. There were spaces of approximately 42 inches between the two outer scaffold towers and the inner scaffold tower;
- e. There were no guardrails at the inner edges of the platforms of the left and right scaffold towers;
- f. There were no guardrails at either end of the platforms of the inner scaffold tower;
- g. Employees of Jose Pena Rodriguez were working on the scaffold platforms, more than 10 feet above the ground, and they were moving between the scaffold towers through the unguarded openings at ends of the scaffold platforms;
- h. The employees referred to in Paragraph 1(g) were not wearing personal fall protection equipment, and they were not protected by any other fall protection devices or equipment.”

11. Due to lack of guardrails and the employees not using fall protection equipment, employees were exposed to the hazard of falling to the ground from the unguarded ends of the scaffold platforms.

12. At the time of Mr. Laurie's inspection, the scaffolds were not tagged or roped off to keep employees from using them. (T. pp. 244-245)

13. The unguarded openings at the ends of the platforms, and the employees not using fall protection equipment while working on those platforms, created the possibility of an accident, which would be a fall from the scaffold platforms to the ground. The substantially probable result of such falls was that the employees could suffer permanent disability or death. (T. p. 68) This violation is properly classified as a serious violation.

14. The proposed adjusted penalty for this Citation 1, Item 1a is \$700.00. The penalty was correctly calculated by Complainant in accordance with the criteria in Complainant's Field Operations Manual. The penalty is appropriate and correct for this violation. This citation subitem is grouped with the other citation subitems in Citation 1, Item 1, and the total penalty for all the subitems within Citation 1, Item 1 is \$700.00.

Findings related to Citation 1, Item 1b

15. With regard to Citation 1, Item 1b, the parties stipulated as noted in Paragraph 10, above. In addition, the parties entered into the following stipulations (the numbers and letters correspond to the paragraphs and subparagraphs of the parties' written stipulations):

- "2. With reference to the scaffolding referenced in paragraph 1 above:
- a. There was a ladder extending vertically the full length of the left edge of the left scaffold tower;
  - b. There was no ladder on the inner (right) edge of the left scaffold tower; there were no ladders on or at any of the other two scaffold towers;
  - c. Employees of Jose Pena Rodriguez were climbing at the ends of the scaffold towers where there were no ladders, and these employees were using the scaffold cross bracing to access different levels of the scaffolds;
  - d. The employees referred to in Paragraphs 2(c) were not wearing personal fall protection equipment, and they were not protected by any other fall protection devices or equipment."

16. The vertical distance from one scaffold platform to the next platform, within each scaffold tower, was about six feet. (T. p. 74)

17. Due to lack of ladders at the ends of the scaffold platforms, the employees were using scaffold cross bracing to climb up and down from one scaffold level to another. This resulted in employees being exposed to the hazard of falling from the scaffolds to the ground.

18. The lack of ladders and the employees' use of the cross bracing for climbing the scaffolds created the possibility of an accident, which would be a fall from the scaffolds to the ground. The substantially probable result of such falls was that the employees could suffer permanent disability or death. (T. p. 78) This violation is properly classified as a serious violation.

19. The proposed adjusted penalty for Citation 1, Item 1b is \$700.00. The penalty was correctly calculated by Complainant in accordance with the criteria in Complainant's Field Operations Manual. The penalty is appropriate and correct for this violation. This citation subitem is grouped with the other citation subitems in Citation 1, Item 1, and the total penalty for all the subitems within Citation 1, Item 1 is \$700.00.

Findings related to Citation 1, Item 1c

20. With regard to Citation 1, Item 1c, the parties stipulated as noted in Paragraph 10, above. In addition, the parties entered into the following stipulations (the number and letters correspond to the paragraph and subparagraphs of the parties' written stipulations):

"2. . . .

- e. There were spaces of 42 inches between the inner ends of the two outside scaffold towers and the ends of inside scaffold tower;
- f. Employees of Jose Pena Rodriguez were climbing between the platforms of different scaffold towers, through the spaces described in Paragraph 2(e), above."

21. The platforms of the outer scaffold towers at Respondent's work site were not even, vertically, with the platforms of the inner scaffold tower. The vertical distances between the platforms on the outer scaffold towers varied. These vertical distances were all more than 24 inches, and some were as much as 40 inches. (T. p. 81-82)

22. Due to employees accessing different scaffold platform levels across gaps that were 42 inches horizontally and more than 24 inches vertically, employees were exposed to the hazard of falling from the scaffolds to the ground.

23. Employees accessing different scaffold platform levels across these gaps created the possibility of an accident, which would be a fall from the scaffolds to the ground. The substantially probable result of such falls was that the employees could suffer permanent disability or death. (T. p. 85) This violation is properly classified as a serious violation.

24. The proposed adjusted penalty for this Citation 1, Item 1c is \$700.00. The penalty was correctly calculated by Complainant in accordance with the criteria in Complainant's Field Operations Manual. The penalty is appropriate and correct for this violation. This citation subitem is grouped with the other citation subitems in Citation 1, Item 1, and the total penalty for all the subitems within Citation 1, Item 1 is \$700.00.

Findings related to Citation 1, Item 1d

25. With regard to Citation 1, Item 1d, the parties stipulated as noted in Paragraph 10, above. In addition, the parties entered into the following stipulations (the number and letter correspond to the paragraph and subparagraph of the parties' written stipulations):

"2. . . .

- g. An employee of Jose Pena Rodriguez was standing on an upside-down bucket while working. The bucket was resting on a scaffold platform, more than 10 feet above the ground.”

26. The employee referred to in Paragraph 25, above, had his right foot on top of the bucket, which was on a platform in the center scaffold tower. The employee’s left foot was on a platform on the left scaffold tower, so that the employee’s body was within the gap between the two towers. (T. p. 88) The employee was at a maximum of 30 feet off the ground. (T. p. 89)

27. Due to the employee working while standing on the bucket, which was on a scaffold platform, the employee was exposed to the hazard of falling from the scaffold to the ground.

28. The employee working while standing on the bucket on the scaffold platform created the possibility of an accident, which could be a fall from the scaffolds to the ground. The substantially probable result of such a fall was that the employee could suffer permanent disability or death. (T. p. 90) This violation is properly classified as a serious violation.

29. The proposed adjusted penalty for Citation 1, Item 1d is \$700.00. The penalty was correctly calculated by Complainant in accordance with the criteria in Complainant’s Field Operations Manual. The penalty is appropriate and correct for this violation. This citation subitem is grouped with the other citation subitems in Citation 1, Item 1, and the total penalty for all the subitems within Citation 1, Item 1 is \$700.00.

#### Findings Related to Citation 1, Item 1e

30. With regard to Citation 1, Item 1e, the parties stipulated as noted in Paragraph 10, above. In addition, the parties entered into the following stipulations (the numbers correspond to the paragraphs of the parties’ written stipulations):

“3. The top of the front entrance to the building under construction was nine feet above the ground.

4. Employees of Jose Pena Rodriguez were working on top of the building entrance, using that surface to access the middle scaffold tower described above in Paragraph 1 [of the Stipulations], which was erected on top of the building entrance.

5. While the employees described in Paragraph 4, above, were working on top of the building entrance, they were not protected by fall protection equipment or devices of any kind.”

31. The horizontal working surface on the top of the front entranceway to the building was approximately 15 feet wide, and approximately 6 feet deep. (T. p. 40)

32. On September 16, 2008, the Respondent’s superintendents did not recognize the need for fall protection for the employees who were working on top of the hotel’s entranceway. (T. p. 95)



33. Due to the employees working on the top of the hotel entranceway without any fall protection, the employees were exposed to the hazard of falling from the top of the entranceway to the ground.

34. The employees working on top of the entranceway with no fall protection created the possibility of an accident, which would be a fall from the entranceway to the ground. The substantially probable result of such a fall was that the employees could suffer injuries such as broken ankles or twisted knees. (T. p. 96) This violation is properly classified as a non-serious violation.

35. The proposed adjusted penalty for Citation 1, Item 1e is \$300.00. The penalty was calculated by Complainant in accordance with the criteria in Complainant's Field Operations Manual. The penalty is appropriate and correct for this violation. This citation subitem is grouped with the other citation subitems in Citation 1, Item 1, and the total penalty for all the subitems within Citation 1, Item 1 is \$700.00.

#### Findings Related to Citation 1, Item 1f.

36. On September 16, 2008, Respondent's superintendents failed to acknowledge to Mr. Laurie that there were any problems with the scaffolds at the work site. (T. p. 50)

37. The superintendents indicated they did not have much knowledge about scaffolds, and they relied upon Respondent's Safety Director, Chris Bell, to inspect scaffolds. (T. p. 52, 55-56)

38. Mr. Bell had not done anything prior to September 12, 2008 to determine whether Mud Slingers had a competent person on site. (T. p. 273)

39. Mr. Bell did not inspect the scaffolds in question, yet Respondent's superintendents told Mr. Laurie that he, Mr. Bell, had done an inspection about two weeks prior to Mr. Laurie's inspection. (T. pp. 277, 53-54)

40. The scaffolds were first erected by Mr. Rodriguez and his employees, about two weeks before Mr. Laurie's inspection. (T. p. 53-4) As a result of concerns with the initial installation of the scaffolds, Mr. Rodriguez and his employees took down and re-erected the scaffolds. This occurred approximately two weeks before Mr. Laurie's inspection. (T. p. 54)

41. After reerection, the scaffolds remained in the same condition until Mr. Laurie's inspection. (T. p. 55)

42. One of Respondent's superintendents, Joshua Mason, informed Mr. Laurie on September 16, 2008 that he had not done any inspections of the scaffolds since they were re-erected, but Respondent's Exhibit 7 is a memo/letter dated September 12, 2008 from Mr. Mason to Mudslingers, Inc. indicating Mr. Mason warned Mudslingers that it needed to correct deficiencies in the scaffolds by September 15, 2008. (T. pp. 55, 129; Respondent's Exhibit 7)

43. On the occasion of Mr. Laurie's inspection, Mr. Mason said that no one from Respondent had pointed out to Mr. Rodriguez, or asked him to correct, the scaffold hazards Mr. Laurie identified. (T. pp. 56-57)

44. On September 16, 2008, despite Mr. Laurie requesting documentation of safety records, safety inspections or logbook entries, none were provided. (T. p. 57) Likewise, there were no records offered to Mr. Laurie to show that a competent person had been inspecting the scaffolding. The only person Mr. Laurie was told was doing routine inspections was Mr. Bell. (T. pp.101-102)

45. Respondent had daily safety inspection forms that were not being, and had not been, used. (T. p. 101)

46. Mr. Mason had not been trained by Respondent's Safety Director to be a competent person for the inspection of scaffolds. (T. p. 275)

47. Respondent, at the hearing, offered a "Daily Log of Operations" form for September 12, 2008 that had a space to note safety issues. On the form were notes that Superintendents Mason and Crowder spoke to Jose Pena [Rodriguez] about the need to add end-rails and hand-rails on the scaffold and that Pena said he would take care of it right then. (Respondent's Exhibit 6) Daily Logs of Operations for September 15 and 16 were also offered. The page for September 15, 2008 said there were no safety issues although no one showed up for Mud Slingers as had been promised. (Respondent's Exhibits 6 and 8) The Daily Log of Operations for September 16, 2008, the date of Mr. Laurie's inspection, also says "none" for the space reserved for safety issues. (Respondent's Exhibit 6)

48. Based on the circumstances shown by the above facts, including but not limited to the contradictory evidence as well as the admissions noted herein, Respondent failed to have a competent person conduct frequent and regular inspections at the work site, particularly of the scaffolds, that would have enabled Respondent to identify and demand the correction of hazardous scaffold conditions.

49. The failure to have frequent and regular inspections allowed hazardous conditions, described above, to persist without correction. This resulted in the exposure of the employees of Jose Pena Rodriguez to the hazards presented by the scaffolds, as described above and below.

50. Respondent's failure to conduct frequent and regular inspections of the scaffolds at its work site presented the possibility of accidents, specifically the possibility that employees working on the scaffolds could fall from the scaffolds to the ground, as described above; and the possibility that employees under the scaffolds could be struck by objects falling from the scaffolds, as described below. The substantially probable injuries resulting from such falls, or from being struck by falling objects, would be permanent disability or death. (T. p 103) This violation is correctly classified as serious.

51. The proposed adjusted penalty for this Citation 1, Item 1f is \$700.00. The penalty was correctly calculated by Complainant in accordance with the criteria in Complainant's Field Operations Manual. The penalty is appropriate and correct for this violation. This citation subitem is grouped with the other citation subitems in Citation 1, Item 1, and the total penalty for all the subitems within Citation 1, Item 1 is \$700.00.

Findings Related to Citation 1, Item 2

52. With regard to Citation 1, Item 2, the parties stipulated as noted in Paragraph 10, above. In addition, the parties entered into the following stipulations (the number and letters correspond to the paragraphs and subparagraphs of the parties' written stipulations):

- “6. With reference to the scaffolds referred to in Paragraph 1, above:
  - a. There were no toe boards on the working platforms of the scaffolds to keep tools or objects from falling off the scaffold platforms;
  - b. There was no barricade on the ground adjacent to the scaffolds to keep employees out of that area.”

53. At the time of Complainant's inspection on September 16, 2008, there was a metal canopy in front of the hotel building under construction. This canopy was a roof, under construction, that was to cover the front vehicle driveway of the hotel building. The inside edge of this roof (the edge closest to the hotel building) began a couple feet outside of the hotel's front entranceway. (T. p. 94) The roof was approximately 50 feet wide across the front of the hotel, and it extended out approximately 40 feet from the hotel entranceway. (T. p.107)

54. The driveway roof would have provided some protection from objects falling off the scaffolds for employees who were working or passing under this roof. However, since the driveway roof's inner edge began a couple feet away from the hotel's entranceway, and thus a few feet away from the outer edge of the scaffolds, employees who might be working in this uncovered area of a few feet between the scaffolds and the driveway roof were not protected from being struck by falling objects from the scaffolds, above. (T. p. 107-109)

55. The driveway roof was only approximately 50 feet wide, and it did not extend for the entire width of the three scaffold towers at the front of the hotel building. Thus, employees working on the ground next to the scaffolds, to the left or right of the area covered by the driveway roof, were subject to being struck by falling objects that might fall from the scaffolds. (T. p. 108-109)

56. It is reasonably predictable, either by operational necessity or otherwise (including inadvertence), that employees could be in the areas on the ground where they could have been struck by objects falling from the scaffolds. (T. p. 109-110)

57. The lack of toe boards on the scaffolds, and the lack of barricades on the ground to keep employees from entering the uncovered areas on the ground adjacent to the scaffolds, exposed

employees to the hazard of being struck by objects, such as tools, equipment or buckets of product (e.g., stucco) falling from the scaffolds. (T. p. 109)

58. The lack of toe boards on the scaffolds, and the lack of barricades on the ground to keep employees from entering the uncovered areas on the ground adjacent to the scaffolds, presented the possibility of an accident in which employees working in those areas could be struck by objects falling from the scaffolds. The substantially probable injuries resulting from such accidents include head injuries, which could cause permanent disability or death. (T. pp. 109-110) This violation is properly classified as serious.

59. The proposed adjusted penalty for Citation 1, Item 2, is \$700.00. The penalty was correctly calculated by Complainant in accordance with the criteria in Complainant's Field Operations Manual. The penalty is appropriate and correct for this violation.

#### Findings Related to Citation 2, Item 1

60. With regard to Citation 2, Item 1, the parties entered into the following stipulation:

“7. Employees of Jose Pena Rodriguez were using a flexible electric extension cord to provide electricity to a power saw. There was no strain relief at the female connector of the extension cord.”

61. The flexible electric extension cord was plugged into a temporary electric pole. (T. p. 113)

62. The outer insulation of the extension cord was pulled away from the female connector of the cord, exposing the inner conductors of the cord. (T. p. 113)

63. The outer insulation should have been crimped by the female connector, which would have provided strain relief for the cord. Since it was not, an employee, in unplugging the cord, might grab the cord itself, putting strain on the terminal ends of the inner conductors. If the inner conductors were strained to the point where they broke, the employee might come in contact with the energized copper conductors of the cord. (T. pp. 113-115) Employees working with the cord were exposed to this hazard due to the damaged strain relief at the female connector of the cord.

64. If an employee were to come in contact with the energized conductors of the cord, as described in Paragraph 62, above, he or she could receive a shock. This violation is correctly classified as a nonserious violation.

#### Employer Knowledge of the Violative Conditions

65. The above-referenced scaffolds had been in the same location at the work site, where Mr. Laurie observed them on September 16, 2008, for approximately two weeks before Mr. Laurie's inspection. There had been no changes to the conditions of those scaffolds for approximately two weeks before Mr. Laurie's inspection. (T. pp. 54-5, 67)

66. The week prior to Complainant's inspection, Mr. Rodriguez and his employees had performed stucco work from the scaffolds. At the time this work was done, the scaffolds were in the same condition they were in when Mr. Laurie inspected them on September 16, 2008. (T. pp. 56, 57, 67, 77, 84)

67. The facts described in Paragraphs 65 and 66, above, demonstrate, and the undersigned so finds, that Respondent knew, or with reasonable diligence, could have known of the hazardous conditions constituting the scaffold violations noted above in the discussion of Citation 1, Items 1a, 1b, 1c, and Citation 1, Item 2.

68. Respondent proffered documentary and testimonial evidence that it had, prior to September 16, actually detected safety violations with the scaffolding on multiple occasions, September 4, 11 and 12. (Respondent's Exhibits 6 and 7, T. pp. 207, 222, 223, 228, 272, 279) In spite of the violations noted in this paragraph by Respondent, Mr. Crowder did not inspect the scaffolds on the morning of September 16, 2008 before Mr. Laurie arrived, nor did he note any deficiencies in the scaffolding. (T. p. 248) Further, Mssrs. Mason and Crowder did not even discuss the scaffolds on September 16, 2008 before Mr. Laurie arrived. (T. p.249)

69. Respondent proffered evidence from Mud Slingers to show that it, Mud Slingers, was going to have a general superintendent on site on September 15 to follow up on corrective action it promised regarding the scaffolds. (Respondent's Exhibit 8) No evidence was proffered to show that such a superintendent came to the site on September 15, nor was any evidence offered to show that Respondent followed up with Mud Slingers. Respondent's superintendent, Mr. Crowder, was "waiting" on the Mud Slingers' representative to show up. (T. p. 237)

70. On the morning of September 16, 2008, Joshua Mason and Alfred Crowder, two of Respondent's superintendents, were in Respondent's office trailer at the work site when Mr. Laurie entered the trailer after 8:30 a.m. to begin his opening inspection conference with Respondent's representatives. (T. pp. 45-46) Mr. Crowder had been out walking around the exterior of the work site before Mr. Laurie's visit. (T. p. 211) Mr. Crowder's routine would have caused him to arrive at the site between 6:00 and 6:15 on the morning of the inspection, and Mr. Mason's routine would have caused him to arrive around 6:50 that morning. (T. pp. 204, 211, 234)

71. On the morning of September 16, 2008, Leogardo Sanchez, another of Respondent's superintendents, was standing in front of the scaffolds, in a spot where he could see the scaffolds and the top of the hotel's concrete entranceway, when Mr. Laurie, Mr. Mason and Mr. Crowder came out of Respondent's office trailer and walked to the front of the motel building to look at the conditions Mr. Laurie observed regarding the scaffolds and the entranceway. (T. pp. 48, 94-5)

72. The hazardous scaffold safety conditions constituting the scaffold violations in Citation 1, Items 1a, 1b, 1c, 1d, and Citation 1, Item 2, as discussed above, were visible on the morning of

September 16, 2008 from anywhere on the front portion of the work site, in front of the hotel building. (T pp. 65, 76-77, 82-3, 88, 108)

73. When Mr. Laurie arrived at Respondent's work site on the morning of September 16, 2008, he could see the employees working on top of the hotel entranceway without any fall protection. After Mr. Laurie went into Respondent's office trailer and came back out with Mr. Mason and Mr. Crowder, the employees were still working on top of the hotel entranceway without fall protection. (T. p. 94) One of Respondent's superintendents, Mr. Sanchez, was in sight of the employees working on top of the hotel entrance without any fall protection when Mr. Laurie, Mr. Mason and Mr. Crowder joined Mr. Sanchez to view work site conditions with Mr. Laurie. (T. p. 95)

74. Respondent expected its subcontractors to sign-in in the mornings, but contrary to its suggestion that this policy was in writing, there was no written policy produced that required subcontractors to sign-in. Respondent's only written policy proffered was a dated, yet blank, template for a weekly meeting that stated that, "All *visitors* must report to the Helm Builders Field Office." (emphasis added) Respondent's witnesses testified that the sign-in policy was communicated to subcontractors. (T. pp. 177-181, 252-254, 274-275; Respondent's Exhibits 4, 5)

#### Respondent is Liable for the Violations and Penalties as a Controlling Employer

75. In accordance with Respondent's contract with Mud Slingers, Inc., all work done by subcontractors is required to be done "in accordance with OSHA [sic] safety standards and HELM BUILDERS, LLC safety policies." (Respondent's Ex. 1, Attachment A, ¶13) (T. p. 177).

76. Respondent's contract with subcontractors gave it the right to withhold payments to subcontractors or terminate subcontractors for a failure to comply with laws, codes, ordinances, rules, regulations, etc. (Respondent's Exhibit 1, Article 9.1)

77. Respondent admitted that it had the authority to stop subcontractors, including Mr. Rodriguez, from doing any work if Respondent considered the work to be unsafe. (T. pp. 58, 187, 255-6). Prior to the inspection, Respondent had exercised its authority to stop subcontractors from doing work Respondent considered unsafe. About two weeks prior to the inspection, Respondent found some safety concerns with scaffolds that were being used by Mr. Rodriguez and his employees, and as a result, Mr. Rodriguez took down and re-erected the scaffolds. (T. p. 54)

78. Respondent has taken action against other subcontractors previously when its safety manual was violated. (T. p. 151)

79. As the general contractor at this work site, Respondent had the authority, and undertook the responsibility, to identify and correct safety hazards to which the employees of other employers at the work site, including the employees of Jose Pena Rodriguez, were exposed. Respondent

was thus a controlling employer, and it is liable in that capacity for the cited violations and penalties.

### 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. The Complainant met its burden of proving by a preponderance of the evidence and by substantial evidence that the Respondent committed:
  - a. A serious violation of 29 CFR 1926.451(g)(1)(vii) by failing to protect employees by either a guardrail system or personal fall arrest system when they worked on a scaffold more than 10 feet above a lower level;
  - b. A serious violation of 29 CFR 1926.451(e)(1) by failing to provide ladders or any other safe means of access from one scaffold level to another of more than two feet for employees climbing on scaffolds, and by allowing employees to use the cross bracing of the scaffolds to climb from one scaffold level to another;
  - c. A serious violation of 29 CFR 1926.451(e)(8) by permitting employees to directly access one scaffold surface to another across gaps more than 14 inches horizontally and 24 inches vertically;
  - d. A serious violation of 29 CFR 1926.541(f)(4) by permitting an employee to use a bucket to increase his working level height while on a scaffold;
  - e. A non-serious violation of 29 CFR 1926.501(b)(1) by permitting employees to work on a hotel entranceway surface more than 6 feet above the ground without being protected from falling by the use of guardrail systems, safety net systems or personal fall arrest systems;
  - f. A serious violation of 29 CFR 1926.20(b)(2) by not having a competent person conduct frequent and regular inspections of its job site;
  - g. A serious violation of 29 CFR 1926.451(h)(2) by not protecting employees in the area below a scaffold to which objects can fall by barricading the area or providing toe boards on the scaffold platforms; and
  - h. A nonserious violation of 29 CFR 1926.405(g)(2)(iv) by not providing proper strain relief on a flexible electric cord to prevent pull from being directly transmitted to joints or terminal screws.

## DISCUSSION

This case presents a question of the applicability of the multi-employer worksite doctrine. This doctrine is well established in North Carolina. Respondent's contention that the doctrine should not apply is not in accord with the holding of *Commissioner of Labor of the State of North Carolina v. Weekley Homes, L.P.*, 169 N.C. App. 17, *appeal dismissed and disc. review denied*, 359 N.C. 629 (2005). The *Weekley Homes* decision carefully reviewed the basis for applying the doctrine to a general contractor which it found was liable for an OSHA violation for its subcontractor's employees working without fall protection. The Court of Appeals held that N.C. Gen. Stat. 95-129(2) ["Each employer shall comply with occupational safety and health standards or regulations . . ."] creates a duty that extends to employees of subcontractors; thus, it affirmed a citation against Weekley Homes for failing to conduct "frequent and regular inspections of the job sites [ ]." 29 C.F.R. §1926.20(b)(2). The employer's obligation was "to inspect the job sites to detect safety violations committed by its own employees and also those committed by its subcontractors." *Weekley Homes at 28*.

In this case, Respondent had inspected its work site where it had multiple subcontractors working, and it had found problems with the installation of scaffolding by a subcontractor. Respondent had noted problems with the initial installation of the scaffolding by Mud Slingers on September 4, 2008. As a result of the problems being brought to the attention of the subcontractor, the scaffolding was re-erected. Problems were again noted with the scaffolding, i.e. missing hand rails and toe boards for example, on September 11, 2008. The problems were brought to the attention of the installer, a subcontractor of Mud Slingers, Jose Pena Rodriguez. On September 12, 2008 Respondent's superintendent, Joshua Mason, wrote to Mud Slingers and noted that there were safety problems and expressed deep concerns. Mud Slingers wrote back the same day and said that action "is underway" to correct the deficiencies and that they would have a general superintendent on site on Monday, September 15, 2008 "to follow up on the corrective action."

The issue argued by Respondent is that it believes that it should not be penalized for the misconduct of its subcontractor or its sub-subcontractor. It contends that the multi-employer site doctrine does not apply to justify the imposition of penalties because *Weekley* held that the general contractor is only liable for violations that the subcontractor creates if it could reasonably have been expected to detect the violation by inspecting the job site. In this case, a careful analysis of the facts demonstrates that it is reasonable to hold Respondent liable.

First, Respondent was on notice from September 4, 2008 that the subcontractor might not be on top of safety issues because it caused the subcontractor to reinstall the scaffolding. Second, on or before September 11, 2008 one or more of its superintendents noticed that there were safety issues again with the same scaffolding. Third, on September 12, 2008 the issues still continued to exist, so the Respondent wrote to the subcontractor telling them that it was "deeply concerned." Fourth, the subcontractor responded on September 12, 2008 and said that corrective action was "underway" and to expect a site visit on September 15, 2008 by one of its general superintendents. Fifth, Respondent's superintendents talked with each other about the scaffolds



on September 15, 2008. Sixth, though corrective action was not taken by the subcontractor and there was no evidence of the promised site visit, there was no evidence of any follow up taken by Respondent. Despite the repeated inattention of the subcontractor to the Respondent's safety concerns, Respondent failed to do anything to prevent a safety problem occurring. Even with the chain of occurrences (and non-occurrences) listed, when Respondent's superintendent walked the property on September 16, 2008--well before the OSHA inspection--he did nothing to rope off the scaffolds to prevent their being used in the then existing clearly known unsafe condition. The intent of *Weekley* as well as the whole intent of safety regulations is to prevent employee accidents. When the Respondent superintendent walked the property, a reasonable expectation is that an inspection should reasonably have disclosed that no corrective action had occurred—a fact that could also have been noted the night before—yet no inspection was done and no corrective action was taken to correct a glaring problem that Respondent could have remedied. For that oversight, *Weekley* standards must cause this Respondent to be held liable. Respondent's reliance on the subcontractor not signing in before it began work on the day the OSHA inspection occurred does not excuse the failure of Respondent's superintendents to take preventive action.

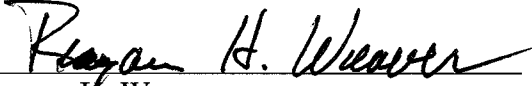
### ORDER

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

- a. Citation 1, Item 1a is affirmed as a serious violation of 29 CFR 1926.451(g)(1)(vii) and a penalty of \$700.00 is imposed;
- b. Citation 1, Item 1b is affirmed as a serious violation 29 CFR 1926.451(e)(1) and this subitem 1b is grouped with the other subitems in Citation 1, Item 1, for penalty purposes;
- c. Citation 1, Item 1c is affirmed as a serious violation of 29 CFR 1926.451(e)(8) and this subitem 1c is grouped with the other subitems in Citation 1, Item 1, for penalty purposes;
- d. Citation 1, Item 1d is affirmed as a serious violation of 29 CFR 1926.541(f)(4) and this subitem 1d is grouped with the other subitems in Citation 1, Item 1, for penalty purposes;
- e. Citation 1, Item 1e is affirmed as a non-serious violation of 29 CFR 1926.501(b)(1) and this subitem 1e is grouped with the other subitems in Citation 1, Item 1, for penalty purposes;
- f. Citation 1, Item 1f is affirmed as a serious violation of 29 CFR 1926.20(b)(2) and this subitem 1f is grouped with the other subitems in Citation 1, Item 1, for penalty purposes;
- g. Citation 1, Item 2 is affirmed as a serious violation of 29 CFR 1926.451(h)(2) and a penalty of \$700.00 is imposed;
- h. Citation 2, Item 1 is affirmed as a nonserious violation of 29 CFR 1926.405(g)(2)(iv).

The above-referenced penalties shall be paid within twenty (20) days of the filing date of this Order.

This the 3 day of March, 2011.

  
\_\_\_\_\_  
Reagan H. Weaver  
Administrative Law Judge