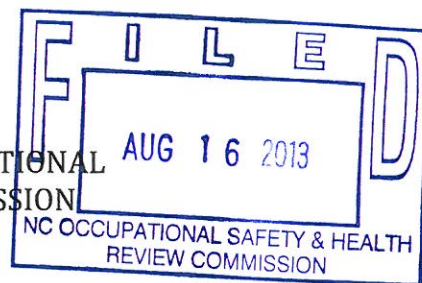


BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2011-5236
OSHA INSPECTION NO. 315958017
CSHO ID: L3827

vs.

PABLO ARIAS
dba JPA CONSTRUCTION
and its successors

ORDER

Respondent.

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on February 26, 2013, at the Lee House, 2nd Floor Hearing Room, 422 North Blount Street in Raleigh, North Carolina.

The complainant was represented by Ms. Larissa Williamson, Assistant Attorney General, North Carolina Department of Justice, and the Respondent was pro se. Present for the hearing for Complainant was Bennett Allen, Safety Compliance Officer for the Department of Labor, OSHA Division. Present for the Respondent was Marisol Nery Arias, spouse of Respondent and serving as an interpreter for the hearing.

After reviewing the record file, hearing the evidence presented at the hearing, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

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 with, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").

2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about October 28, 2011, contesting a citation issued on October 20, 2011, to Respondent, Pablo Arias dba JPA Construction. ("Respondent" or "JPA").
3. Respondent, a construction company, is a North Carolina corporation, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina, subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent maintains a place of business in Knightdale, North Carolina, and employs 5 workers.
4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
5. On September 21, 2011, Compliance Safety and Health Officer Bennett Allen ("SCO Allen"), noticed the construction and he was riding through. SCO Allen opened a complaint inspection of partial scope and inspected Respondent's worksite on Gallery Drive in Spring Lake, North Carolina ("site").
6. Work at the site began 3 weeks before the inspection and at the time of the inspection Respondent was in the process of installing hardie plank siding on a 3 story building.
7. SCO Allen properly entered the site, presented credentials to Pablo Arias ("Mr. Arias"), owner of JPA Construction, and received consent to the inspection by Mr. Arias.
8. SCO Allen conducted an opening conference with Mr. Arias and took photos at the site.
9. SCO Allen conducted a closing conference with Mr. Arias and at the completion of the inspection at the site, he recommended that one serious citation be issued.
10. As a result of the recommendations of the compliance officer, on October 20, 2011 the Complainant issued the following Citations:

Citation 1 Item 1: Serious

Citation 1, Item 1, alleges a serious violation of 29 CFR 1926.102(a)(1): "Eye and face protective equipment was not used when machines or operations presented potential eye or face injury from physical, chemical, or radiation agents:

- a) 321 Gallery Drive (Bldg 111): employees were using pneumatic nail guns (Unknown manufacturer) to install hardy plank siding on a new apartment building without wearing safety glasses for eye protection.
11. There was no eye protection in place to prevent an employee from injuring his eye/face using the pneumatic nail guns.
 12. Arias was present at the site and the pneumatic nail guns were being used 4 or more hours a day at the site.
 13. Three employees were exposed to the hazard.
 14. SCO Allen found the severity to be medium, the probability low, and assessed a Gravity based penalty of \$3,000. He applied a 60% credit for size, 10% for cooperation, 10% for good faith and 10% for history, and proposed an adjusted penalty in the amount of \$300. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

Citation 1 Item 2a: Serious

Citation 1, Item 2a, alleges a serious violation of 29 CFR 1926.451(g)(1)((vii): For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee was not protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section:

- a) 321 Gallery Drive (Bldg 111) (Left Scaffold): a Werner pump jack scaffold was observed not to have end guardrails and the fall height was measured to be approximately 24 feet to compacted soil.
- b) 321 Gallery Drive (Bldg 111) (Right Scaffold): a Werner pump jack scaffold was observed not to have end guardrails nor a safety net, and the fall height was measured to be approximately 27 feet to compacted soil.

Citation 1 Item 2b: Serious

Citation 1, Item 2b, alleges a serious violation of 29 CFR 1926.451(g)(4)(i): Guardrail systems were not installed before the scaffold was released for use by employees other than erection/dismantling crews:

- a) 321 Gallery Drive (Bldg 111) (Left Scaffold): employees were observed installing siding from a Werner pump jack scaffold which did not have guardrails on the ends of the scaffold and the fall height was measured to be approximately 24 feet.
- c) 321 Gallery Drive (Bldg 111) (Right Scaffold): employees were observed installing siding from a Werner pump jack scaffold which did not have guardrails on the ends of the scaffold and the fall height was measured to be approximately 27 feet.

Citation 1 Item 2c: Serious

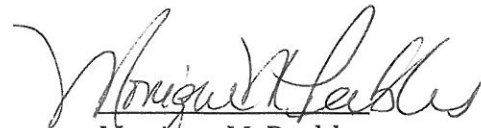
Citation 1, Item 2c, alleges a serious violation of 29 CFR 1926.451(g)(4)(i): Guardrail systems were not installed before the scaffold was released for use by employees other than erection/dismantling crews:

- a) 321 Gallery Drive (Bldg 111) (Left Scaffold): a Werner pump jack scaffold was observed not to have toe boards.
 - b) 321 Gallery Drive (Bldg 111) (Right) Scaffold): a Werner pump jack scaffold was observed not to have toe boards.
15. Under the supervision of Arias, two scaffolds were erected at the site.
 16. The right scaffold used at the site was 27 feet high with no end guardrails, safety net, or toe board.
 17. The left scaffold used at the site was 24 feet high with no end guardrails or toe board.
 18. Three employees were observed working on the edge of these scaffolds with no personal fall arrest system to prevent a fall hazard. (See Exhibits 1a-1h)

2. Respondent is subject to the provisions and jurisdiction of the Act.
3. Complainant proved by a preponderance of the evidence that the Citation 1, Item 1, was a serious violation of 29 CFR §1926.102(a)(1).
4. Complainant proved by a preponderance of the evidence that the Citation 1, Item 2, was a serious violation of 29 CFR §1926.451(g)(1)(vii).
5. Complainant proved by a preponderance of the evidence that the Citation 1, Item 3, was a serious violation of 29 CFR §1926.451(g)(4)(i).
6. Complainant proved by a preponderance of the evidence that the Citation 1, Item 4a, was a serious violation of 29 CFR 29 CFR 1926.451(h)(2)(ii).
7. Respondent provided strong and persuasive evidence of financial hardship.
8. Giving due consideration to the financial condition of the Respondent and the financial hardship that paying the full penalty would have on the Respondent, it is appropriate to have a reduction in penalty.
9. The penalty is reduced to \$1,200 to be paid in 24 equal installments of \$50.00 per month beginning 30 days from the filing of this Order.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED, ADJUDGED, AND DECREED** that all of the citations and penalties are hereby affirmed; and Respondent shall pay the penalties as set forth in the Conclusions of Law above.

This the 13 day of August 2013.


Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER, upon:

MARISOL NERY ARIAS
PABLO ARIAS dba JPA CONSTRUCTION
316 KNOLLCREST LANE
KNIGHTDALE NC 27545

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

LARISSA WILLIAMSON
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

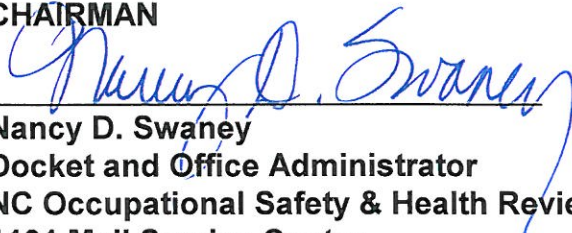
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 19th DAY OF August 2013.

OSCAR A. KELLER, JR.
CHAIRMAN


Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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