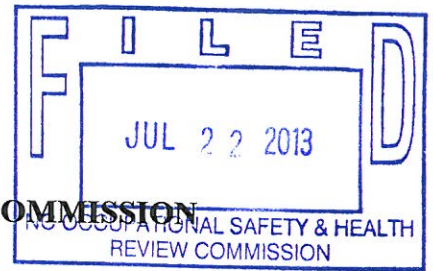


**BEFORE THE NORTH CAROLINA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
RALEIGH, NORTH CAROLINA**



**COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA**

**Complainant,**

v.

**LOMAX CONSTRUCTION INC  
and its successors**

**Respondent.**

**DOCKET NO: 2012 - 5315**

**INSPECTION  
NO: 316226166**

**CSHO ID: W1232**

**ORDER**

THIS MATTER came on for Hearing by the Undersigned on July 16, 2013 at the Guilford County New Courthouse, Grand Jury Room 468, Greensboro, North Carolina. Complainant was represented by Attorney Jason Rosser, Assistant Attorney General. Respondent was represented by Attorneys Robert G. McIver and Mandy L. Castle of Higgins Benjamin, PLLC.

Following an informal pre-hearing conference the parties advised that each party wished to make certain motions. The parties also confirmed that each agreed to the following Stipulations:

1. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act"). The Review Commission has jurisdiction over the parties and subject matter to this action.
2. Respondent 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. Respondent is a general construction contractor engaged in the business of constructing buildings and other structures and managing or supervising subcontractors engaged in such construction work. Respondent was engaged in constructing an apartment complex at 402 West Smith Street, Greensboro, North Carolina (the "Worksite"). Each unit of the complex had a small balcony and a set of doors in the unit opened onto the balcony. Respondent is an "employer" within the meaning of N.C.G.S. Section 95-127(10); all of Respondent's employees referred to in this matter are "employees" within the meaning of N.C.G.S. Section 95-127(9).
3. On March 20, 2012, Compliance Safety and Health Officer ("CSHO") Barnhardt with the North Carolina Department of Labor's Division of Occupational Safety and Health ("OSHA"), observed from the public way the construction taking place on the Worksite. Subsequently CSHO Barnhardt and CSHO Lamont Baldwin (a trainee) went to the Worksite and presented

their credentials to Respondent's Superintendent Marshall Armstrong and conducted an 'non-scheduled' inspection (the "Inspection"). Respondent consented to the Inspection and cooperated fully with the CSHO's Inspection.

4. As a result of the Inspection, on April 11, 2012 Complainant issued a Citation and Notification of Penalty ("Original Citation") to Respondent alleging one serious violation of 29 CFR 1926.501(b)(13) with a proposed penalty of \$1,400.00.

5. Respondent submitted a timely Notice of Contest.

6. Neither party has any objection, procedural or otherwise, to this Hearing.

7. Neither Complainant nor Respondent have received notification from any affected employee that such employee, or its representative, wishes to have a say in, or participate as a party in, this matter, or has any objections in connection with this matter including without limitation objection to the reasonableness of any abatement period.

8. The parties agree that the penalty assessed for Citation 1 Item 1 has been calculated in accordance with the standard Field Operations Manual procedure and giving consideration by Complainant to standard mitigating factors and to specific factors applicable to Respondent, and that Complainant is not required to establish proof of the calculation of such penalty at this Hearing.

The parties further stipulated that Respondent agreed with Complainant that Respondent will implement a fall protection system that complies with OSHA regulations in light of job site conditions.

### **MOTIONS**

Complainant made the following Motion To Amend: to reclassify Citation 1 Item 1 as 'non-serious' and to reduce the penalty to \$1,000.00. Respondent did not object to Complainant's Motion to Amend.

Respondent made the following Motion To Withdraw Notice of Contest: provided Complainant's Motion To Amend is granted, to withdraw its Notice of Contest to the Citation as amended by Complainant's Motion To Amend. Complainant did not object to Respondent's Motion To Withdraw Notice of Contest. The Original Citation recited that the alleged violation was 'Immediately Abated'.

### **FINDINGS OF FACT**

Based on the Stipulations at the time of the Hearing and the record, the Undersigned makes the following Findings of Fact:

1. This Court has jurisdiction over the parties and the subject matter of this Hearing.

2. Respondent is subject to the provisions of the Act and jurisdiction of the Safety and Health Review Commission of North Carolina.
3. Neither party has any procedural objection to this Hearing.
4. Complainant, Commissioner of Labor of the State of North Carolina, is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter "the Act").
5. The Stipulations are incorporated by reference as Findings of Fact to the extent necessary to give effect to the provisions of this Order.


### CONCLUSIONS OF LAW

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.

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

1. That Complainant's Motion To Amend as set forth above is hereby **GRANTED**; and
2. That Respondent's Motion To Withdraw Notice of Contest as set forth above is hereby **GRANTED**. Respondent shall pay the Penalty of \$1,000.00 within 30 days from the date of this Order.

This the 17<sup>th</sup> day of July, 2013

  
\_\_\_\_\_  
R. Joyce Garrett  
Administrative Law Judge

CERTIFICATE OF SERVICE

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

ROBERT G McIVER  
MANDY L CASTLE  
HIGGINS BENJAMIN PLLC  
PO BOX 20570  
GREENSBORO NC 27420

JASON ROSSER  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH NC 27602-0629

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

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 22<sup>nd</sup> DAY OF July 2013.

OSCAR A. KELLER, JR.  
CHAIRMAN

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