



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

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA)	DOCKET NO: 2012-5328
)	
)	INSPECTION
Complainant,)	NO: 316364678
)	
)	CSHO ID: C7621
v.)	
TERRY SPELL MECHANICAL)	<u>FINAL ORDER</u>
SERVICES INC and its successors)	
Respondent.)	

THIS CAUSE coming on pursuant to the Order of Pre-Hearing Conference (“Hearing Order”) on April 16, 2013 at the Lee House, 2nd Floor Hearing Room, 422 North Blount Street, Raleigh, North Carolina at 10:00 a.m. Jill F. Cramer, Assistant Attorney General appeared as counsel for the Complainant, and Benton L. Toups, Attorney, appeared for the Respondent.

Pursuant to the Hearing Order a pre-hearing conference (the “Hearing”) was held for the purpose of considering matters which would simplify the issues and expedite the proceedings in the above referenced case. At the Hearing Complainant and Respondent notified the Undersigned that the parties wish to agree upon certain stipulations (“Stipulations”) and to make certain motions (“Motions”). Complainant and Respondent request that the Stipulations and Motions be made part of the Hearing record and that the Undersigned issue a Final Order. The Stipulations and Motions are as follows:

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”).
2. Respondent is 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 and maintains a place of business in Autryville, North Carolina. Respondent is in the business of electrical

construction specializing in traffic signal construction and maintenance. 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 April 18, 2012, District Supervisor Lafayette Atkinson with the North Carolina Department of Labor, conducted an inspection of a site where Respondent was performing work near the intersection of Interstate Highway 40 and N.C. Highway 24 in the vicinity of Exit 364 (the “Inspection”). Terry Spell, President of Respondent, consented to the Inspection.

4. As a result of the Inspection, on May 17, 2012 Complainant issued one citation (“Citation 1”) as more specifically described on Exhibit “A” (the “Original Citation”).

5. Respondent submitted a timely Notice of Contest.

6. A Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of North Carolina (the “Rules”).

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

8. Respondent posted the Original Citation and the Hearing Order as required by the Rules. 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.

9. Respondent agrees that with respect to work in the future any employee assigned to direct traffic at a work site will be considered to be a ‘flagger’ and such employee will adhere to all applicable requirements of Manual of Uniform Traffic Control Devices for a ‘flagger’.

10. The parties agree that upon granting of the Motions to be made by Complainant the penalty for Item 2 of Citation 1 has been calculated in accordance with the standard Field Operating Manual procedure and giving consideration by Complainant to standard mitigating factors and specific factors applicable to Respondent.

11. Respondent agrees to pay the penalty assessed in this matter of \$1,120.00 on or before May 30, 2013.

12. The parties agree to bear their own fees, costs and other expenses, including attorney’s fees that have been incurred in connection with any stage of these proceedings up to and including the filing of this Final Order.

13. Complainant and Respondent agree that provided the respective Motions of each party are granted there are no other matters that remain to be decided, and that other than a ruling with respect to the Motions no outstanding issues remain to be resolved by a hearing of this matter. The parties agree that this Final Order is a full and final resolution of the claims set out in the underlying Original Citation, as amended pursuant to the Motions by Complainant. The parties further agree that (i) the withdrawal, or modification, of any portion of Citation 1 by Complainant shall not be deemed to be an admission by Complainant that any such portion was

alleged without merit, and (ii) none of the foregoing agreements, statements, stipulations and actions taken by Respondent shall be deemed an admission by the Respondent of any of the allegations contained in the Original Citation as amended or waiver of defenses; provided however that in any subsequent proceeding with respect to matters covered by this Final Order brought directly under the Act by Complainant, this Final Order shall have the full force and effect of a final order. The agreements, statements, stipulations and actions herein by Complainant and Respondent are solely for the purpose of resolving this matter economically and amicably without litigation and shall not be used for any other purpose except for proceedings and matters arising under the Act.

MOTIONS

Complainant moved to

amend Citation 1 by (i) deleting Item 1 in its entirety including the penalty; (ii) by amending Item 2 by deleting each subsection (c) in its entirety and inserting in lieu thereof the following: “c) jobsite, Intersection of Interstate 40E (Exit 364) and Hwy 24 – flaggers were observed standing in the travel lane while stopping vehicular traffic without proper flagging devices.”; and (iii), by reclassifying Item 2 from serious to non-serious with a reduction in the proposed penalty to \$1,120.00.

Respondent did not object to Complainant’s Motion.

Respondent requested that upon the granting of Complainant’s Motion that the Undersigned consider the following motion by the Respondent, and Respondent confirmed that all violations alleged in Citation 1 Item 2 as amended have been abated:

to withdraw Respondent’s Notice of Contest to the Citation 1 as amended pursuant to Complaint’s Motion set forth above.

Complainant did not object to Respondent’s Motion.

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 is hereby **GRANTED**; and
2. That Respondent's Motion is hereby **GRANTED**.

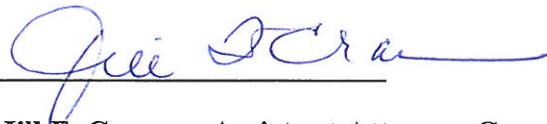
This the 16th day of April, 2013.



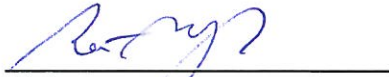
R. Joyce Garrett

Administrative Law Judge

CONSENTED TO:

A handwritten signature in blue ink, appearing to read "Jill Cramer", written over a horizontal line.

**Jill F. Cramer, Assistant Attorney General
Attorney for Complainant**

A handwritten signature in blue ink, appearing to read "Benton L. Toups", written over a horizontal line.

**Benton L. Toups, Partner, Cranfill Sumner & Hartzog LLP
Attorney for Respondent**

A handwritten signature in blue ink, appearing to read "Terry Spell", written over a horizontal line.

**Terry Spell, President
Respondent**

Exhibit "A"
Original Citation

CITATION 1 (Type of Violation: Serious)

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	29CFR 1926.200(g2)	5/22/2012	\$ 1,400.00
Or in the alternative			
1	N.C.G.S. Sec 95-129(1)	5/22/2012	\$ 1,400.00
2	29CFR 1926.201(a)	5/22/2012	\$ 1,400.00
Or in the alternative			
2	N.C.G.S. Sec 95-129(1)	5/22/2012	\$ 1,400.00
TOTAL			<u>\$2,800.00</u>

CERTIFICATE OF SERVICE

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

BENTON TOUPS
CRANFILL SUMNER & HARTZOG LLP
319 N 3RD STREET
SUITE 3000
WILMINGTON NC 28401

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

TERRY SPELL
TERRY SPELL MECHANICAL SERVICES
PO BOX 310
AUTRYVILLE NC 28318

MELISSA TAYLOR
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, First Class; and

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 17th DAY OF April 2013.

OSCAR A. KELLER, JR.
CHAIRMAN



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