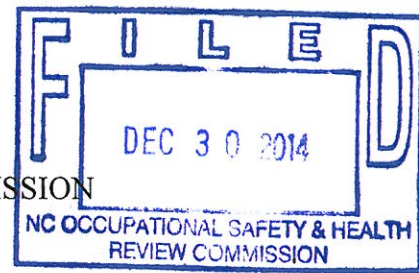


BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA



| | | |
|------------------------------|---|---------------------------|
| COMMISSIONER OF LABOR OF THE |) | DOCKET NO: 2014-5606 |
| STATE OF NORTH CAROLINA, |) | |
| |) | INSPECTION |
| |) | NO: 316779818 |
| Complainant, |) | |
| |) | CSHO ID: D4557 |
| v. |) | |
| |) | <u>FINAL ORDER</u> |
| JOSHUA MACARONI, |) | |
| |) | |
| Respondent. |) | |

THIS MATTER was heard pursuant to an Order for Pre-Hearing Conference (“Pre-Hearing Order”) on October 15, 2014 at the Lee House, 2nd Floor Hearing Room, 422 North Blount Street, Raleigh, North Carolina at 10:00 a.m. Victoria Voight, Special Deputy Attorney General; Larissa Williamson, Special Deputy Attorney General; and Rory Agan, Associate Attorney General appeared as counsel for the Complainant. Brady Yntema appeared as counsel for the Respondent. Also present for the Complainant were Mary Fletcher King, intern; Phillip Hooper, Eastern Bureau Chief; and Jane Gilchrist, General Counsel for the North Carolina Department of Labor.

The Pre-Hearing Conference (“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 (collectively referred to as the “Parties”) notified the Undersigned that the parties wished to agree upon certain stipulations (“Stipulations”) and to make certain motions (“Motions”).

The Hearing was not an evidentiary hearing and the specific facts and circumstances relevant to the Inspection (hereinafter defined) and the Original Citation (hereinafter defined)

were not introduced and such facts and circumstances are not included in the Stipulations hereinafter set forth. The Original Citation contended that one or more employees working on the Vortex ride at the 2013 North Carolina State Fair were exposed to the hazard of being struck by moving parts of an amusement device when the ride started up unexpectedly during the unloading process. Following an inspection of the ride after the incident, the Commissioner alleged two willful serious violations of NCGS 95-129(1) (commonly referred to as the “General Duty Clause”) under a Citation with two items that each assessed a separate fine of \$28,000.00 for a total fine of \$56,000.00.

As a result of this Hearing, Complainant and Respondent request that the following Stipulations and Motions be made part of the Hearing record and that the Undersigned issue a Final Order.

STIPULATIONS

1. Complainant, as Commissioner of Labor of the State of North Carolina, is charged by law with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the “Act”).
2. Respondent is a resident of Georgia who conducted business in North Carolina. Respondent is in the business of presenting amusement rides at fairs and carnivals.
3. Respondent is subject to the provisions of NCGS Chapter 95, Article 16.
4. During the period of October 30, 2014 through April 17, 2014, an Occupational Safety and Health Compliance Officer with the North Carolina Department of Labor, conducted an inspection in connection with an incident that occurred on October 24, 2013 at the North Carolina State Fair during which a Vortex employee was injured when the ride unexpectedly started-up during the unloading process (“Inspection”).

5. As a result of the Inspection, Complainant issued a Citation with two items (“Original Citation”). Citation 1, Item 1 alleged a willful serious violation of NCGS 95-129(1) of the Occupational Safety and Health Act for which a penalty of \$28,000.00 was assessed. Citation 1, Item 2 also alleged a willful serious violation of NCGS 95-129(1) of the Occupational Safety and Health Act for which a penalty of \$28,000.00 was assessed.
6. Respondent submitted a timely Notice of Contest.
7. A Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of the North Carolina (“Review Commission”).
8. The Review Commission has jurisdiction over the parties and the subject matter to this action.
9. Respondent posted the Original Citation and the Pre-Hearing Order as required by the Review Commission rules.
10. The Parties agree to bear their own fees, costs, and other expenses, including attorney’s fees, if any, that have been incurred in connection with any stage of these proceedings up to and including the filing of this Final Order.
11. The Parties agree that 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 an evidentiary 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 Complainant’s Motion. The parties further agree that: (i) the modification of any portion of the Original Citation 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 Respondent of any of the allegations contained in the Original Citation as amended or constitute a waiver of defenses; provided, however, that in any subsequent proceeding with respect to matters covered by the 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 by 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 and Article 21, Chapter 95 of the North Carolina General Statutes.

MOTIONS

Complainant moved to do the following (“Complainant’s Motion”):

1. Reclassify Citation 1, Item 1 from “Willful Serious” to “Serious” and reduce the penalty from \$28,000.00 to \$12,500.00;
2. Reclassify Citation 1, Item 2 from “Willful Serious” to “Serious” and reduce the penalty from \$28,000.00 to \$12,500.00; and
3. Allow Respondent to pay the new proposed penalty of \$25,000.00 in twelve (12) monthly installments. The first installment of \$2,087.00 will be due and payable on the first business day of the second month immediately after the entry of this Final Order by the Hearing Examiner. The eleven (11) subsequent installments of \$2,083.00 shall be due and payable on the first business day of each month following payment of the first installment. In no event shall the payment term extend beyond a consecutive twelve (12) month period, unless agreed upon by Complainant. In the event that Respondent does not pay each monthly installment as agreed upon, all remaining installments become

immediately due and payable, and the Commissioner retains the right to institute collection proceedings as allowed by law. Except as set forth in this Motion, the Original Citation and Items shall remain unmodified or amended.

Respondent did not object to Complainant's Motion.

Respondent confirmed that the violations alleged in the Original Citation as Amended have been abated.

Upon the granting of Complainant's Motion, Respondent moved to withdraw its Notice of Contest to the Original Citation as Amended pursuant to Complainant's Motion set forth above.

Complainant did not object to Respondent's Motion.

FINDINGS OF FACT

Based on the Stipulations set forth above, 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 Review Commission.
3. Neither party has any procedural objections to the Hearing.
4. Complainant is charged with the administration and enforcement of the provisions of 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 Final 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 Final 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 26 day of December, 2014.



Ellen R. Gelbin
Hearing Examiner

CONSENTED TO:

Victoria Voight
Victoria Voight
Attorney for Complainant

Brady Yntema
Brady Yntema
Attorney for Respondent

CERTIFICATE OF SERVICE

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

BRADY A YNTEMA
NELSON LEVINE DeLUCA & HAMILTON LLC
800 GREEN VALLEY ROAD
SUITE 302
GREENSBORO NC 27408

VICTORIA VOIGHT
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602-0629

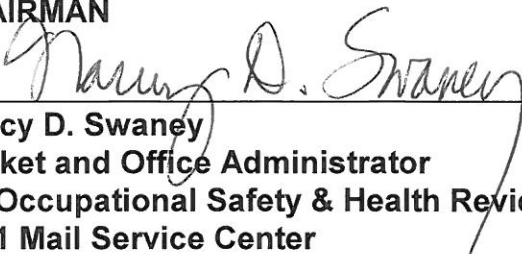
by depositing a copy of the same in the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

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 5th DAY OF January 2015.

OSCAR A. KELLER, JR.
CHAIRMAN



Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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Raleigh, NC 27699-1101
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