

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



<b>COMMISSIONER OF LABOR FOR</b>	)	<b>DOCKET NO: 2014 - 5554</b>
<b>THE STATE OF NORTH CAROLINA</b>	)	
	)	<b>INSPECTION</b>
<b>Complainant,</b>	)	<b>NO: 317094597</b>
	)	
	)	<b>CSHO ID: K2333</b>
<b>v.</b>	)	
<b>AOS DEVELOPER AND INVESTOR, INC</b>	)	<b><u>FINAL ORDER</u></b>
<b>and its successors</b>	)	
<b>Respondent.</b>	)	

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**THIS CAUSE** coming on pursuant to the Order of Pre-Hearing Conference (“Hearing Order”) on May 13, 2014 at the Lee House, 2nd Floor Hearing Room, 422 North Blount Street, Raleigh, North Carolina at 10:00 a.m. Jason Rosser, Assistant Attorney General appeared as counsel for the Complainant, and John M. Constantinou, Attorney at Law, 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. No affected employee of Respondent, or its representative, attended to have a say in, or participate as a party in, the Hearing. 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”).

This Hearing was not an evidentiary hearing and many of the specific facts and circumstances relevant to the Inspection (hereinafter defined) and the Original Citation (hereinafter defined) were not introduced of record, and such facts and circumstances were not included in the Complaint issued by Complainant, in the Answer, Motion To Dismiss & Request For Pre-Hearing Conference filed by Respondent, and in Complainant’s Response To Motion To Dismiss and Response To Answer and are not included in the Stipulations hereinafter set forth. Based on the Original Citation, and on Respondent’s Notice of Contest, on the Complaint, on the Answer, Motion To Dismiss & Request For Pre-Hearing Conference, and on the Response To

Motion To Dismiss and Response To Answer it appears that some injuries (but no death) were sustained and that: Respondent was providing construction services as a subcontractor at a construction site in Cary, North Carolina; the Inspector (hereinafter defined) alleged that (a) there was a violation of 29 CFR 1926.451(f)(7): Scaffolds were not erected, moved, dismantled, or altered under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling, or alternation, asserting specifically that on the job 2 employees were installing NichiBoard (TM) siding from a pump jack scaffold with a fall height of approximately 21 feet and the vertical poles of the scaffold had not bottom braces installed; which indicated that the employee erecting the scaffold was not a competent person in scaffold erection; (b) there was a violation of 29 CFR 1926.454(a): the employer did not ensure that each employee who performs work while on a scaffold was trained by a person qualified in the subject matter to recognize hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards as listed in (1)-(5), asserting specifically that on the site 2 employees trained by a non qualified person were installing NichiBoard (TM) siding from a pump jack scaffold with a fall height of approximately 21 feet and the vertical poles of the scaffold had not bottom braces installed; [a and b were grouped and designated as serious]; and (c) there was a serious violation of 29 CFR 1926.452(j)(2): poles were not secured to the structure by rigid triangular bracing or equivalent at the bottom, topo and other points as necessary, asserting specifically that at the left side of the house 2 employees were installing NichiBoard (TM) siding from a pump jack scaffold with a fall height of approximately 21 feet and the vertical poles of the scaffold had no bottom braces installed; Respondent initially denied all such allegations in its December 20, 2013 Notice of Contest; however in its January 23, 2014 Statement of Position Respondent contested only (a) and (c) above, although in its Answer, Motion To Dismiss & Request For Pre-Hearing Conference Respondent denied that Respondent did not object to (b) above.

As a result of this Hearing, 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"). The Review Commission has jurisdiction over the parties and the 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 and maintains a place of business in Durham, North Carolina. Respondent is in the business of construction. 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 August 23, 2013, Altagracia Guzman, an Occupational Safety and Health Compliance Officer with the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at Cameron Pond Subdivision Lot #503, 728 Magalloway Drive in Cary, North Carolina (the "Inspection"). Mr. Manual Cortes Negrete, co-owner of Respondent, consented to the Inspection. At the time of the Inspection Respondent was a subcontractor performing siding installation.
4. As a result of the Inspection, on December 2, 2013, Complainant issued a citation ("Citation 1") consisting of Item 1a and 1b (grouped) and Item 2, as more specifically described on **Exhibit "A"** (sometimes herein referred to as the "Original Citation").
5. Respondent submitted a timely Notice of Contest dated December 20, 2013.
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 the violations alleged in Citation 1 have been abated, and agrees to use its best efforts to comply with the requirements of the Act with respect to the Standards cited.
10. The parties agree that upon granting of Complainant's Motion the penalty for each Item designated in the Original Citation as amended pursuant to Complainant's Motion has been calculated in accordance with the standard Field Operations Manual procedure and giving consideration by Complainant to standard mitigating factors.
11. Respondent agrees as part of the settlement of this matter as follows: (a) Respondent's designated competent person shall receive needed training to evaluate job site and scaffolds used by Respondent including but not limited to pump jack scaffolds; and (b) Respondent shall re-train its employees who work on pump jack scaffolds to recognize hazards with respect to such scaffolds.
12. Respondent agrees to pay the penalty assessed in this matter of \$2,520 in 12 equal monthly installments of \$210 each, with the first installment due and payable on the first business day of July, 2014. All subsequent installments shall be due and payable on the first business day of each month thereafter. In no event shall the payment term extend beyond a consecutive 12 month period, unless agreed upon by the Complainant. In the event Respondent does not pay each monthly installment as agreed upon, all remaining installments become

immediately due and payable, and the Complainant retains the right to institute collection proceeding as allowed by law. Respondent agrees to pay attorney's fees to Complainant in the event that the Complainant has to institute collection proceedings to collect the debt.

13. 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 Order.

14. 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 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 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 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 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"):

**\*amend Citation 1 Items 1(a) and (b) by reducing the proposed penalty from \$2,100 to \$1,260; and to amend Citation 1 Item 2 by reducing the proposed penalty from \$2,100 to \$1,260; the total penalty for Citation 1 shall be \$2,520;**

**except as set forth in this motion, the Original Citation shall remain unmodified or amended.**

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 ("Respondent's Motion"), and Respondent confirmed that the violations alleged in the Original Citation as amended have been abated:

**\*to withdraw Respondent's Motion to Dismiss and to withdraw Respondent's 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 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 13th day of May, 2014.

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

**CONSENTED TO:**

A handwritten signature in black ink, appearing to read "JR Rosser", written over a horizontal line.

**Jason R. Rosser, Assistant Attorney General  
Attorney for Complainant**

A handwritten signature in black ink, appearing to read "John M. Constantinou", written over a horizontal line.

**John M. Constantinou, Attorney At Law  
Attorney for Respondent**

**Exhibit "A"**  
**Original Citation**

**CITATION NUMBER 1 (Type of Violation: Serious)**

<b><u>Item No.</u></b>	<b><u>Standard</u></b>	<b><u>Abatement Date</u></b>	<b><u>Penalty</u></b>
1(a)	29 CFR 1926.451(f)(7)	12/06/2013	\$2,100.00
1(b)	29 CFR 1926.454(a)	12/06/2013	Grouped
2	29 CFR 1926.452(j)(2)	11/05/2013	\$2,100.00
		<b>TOTAL</b>	<b>\$4,200.00</b>

CERTIFICATE OF SERVICE

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

JOHN M CONSTANTINOU  
CONSTANTINOU LAW GROUP PA  
120 EAST PARRISH STREET  
SUITE 300  
DURHAM NC 27701

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

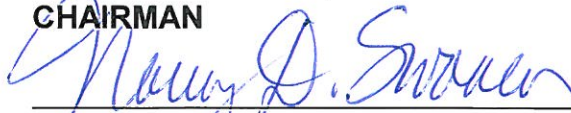
by depositing a copy of the same in the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

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 14<sup>th</sup> DAY OF May 2014.

OSCAR A. KELLER, JR.  
CHAIRMAN



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