

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

FEB 14 2018

COMMISSIONER OF LABOR OF)	
THE STATE OF NORTH CAROLINA,)	
COMPLAINANT,)	
v.)	
GOLDEN STONE BRICKS, <i>and its</i>)	DOCKET NO.: OSHANC 2016-5829
<i>successors,</i>)	INSPECTION NO.: 318067980
RESPONDENT.)	CSHO ID: I-6715
	ORDER AFFIRMING PENALTIES

THIS MATTER came onto be heard and was heard before the undersigned Administrative Law Judge, Ellen R. Gelbin, on January 23, 2018 in Greensboro, North Carolina. Complainant was represented by Ms. Larissa Williamson, Special Deputy Attorney General for the North Carolina Department of Justice. Respondent Mr. Gaudencio Acahua Tequipile appeared, testified and represented himself. Mr. Gaudencio's brother, Juan Leonides was present to observe.

Also appearing were Safety Compliance Officer (CO) Ms. Michelle Evans from the North Carolina Department of Labor (NCDOL).

Professional interpreter, Mr. Ramon Alonso, was duly sworn in and duly translated English to Spanish for respondent and Spanish to English for the complainant, the bench and the court reporter.

After considering the NCOSH Review Commission's record file; the NCDOL certified file; the evidence proffered, the testimony given and the arguments made on all sides during the hearing; and after researching the relevant legal authorities, the undersigned makes the following:

FINDINGS OF FACT:

1. The Occupational Safety and Health Act of North Carolina (the Act) charges the NCDOL with the duty of enforcing the Act. N.C. Gen. Stat. §95-126 *et seq.*
2. The Act also provides for the creation of a Safety and Health Review Commission to hold independent hearings regarding contested citations and/or penalties.
3. Respondent is a construction company specializing in masonry, with its primary place of business in Winston-Salem, NC and is an employer within the meaning of and subject to the provisions of the Act.
4. Respondent has 5 employees and all were on site during the inspection. Respondent's job site crew are employees within the meaning of the Act.

5. On May 16, 2016 and pursuant to Forsyth County's Special Emphasis Program on construction, CO Evans and others were driving through the sub-division of Brookberry Farms in Winston-Salem, NC, where residential homes were under construction.
6. The CO observed bricking operations in progress on a new single story residential house under construction and that the scaffolding was unsafely configured, to wit: without proper foundation, without guard rails, without an access ladder and with large gaps in the planks on the working platform.
7. The CO took photographs from the street and then entered the job site.
8. The CO held an opening conference with respondent, who was present on the site and working atop the scaffolding when she arrived. She presented her credentials, explained the purpose of the inspection and received respondent's consent to inspect his job site.
9. The inspection was initially comprehensive and after speaking with the general contractor, the inspection involving respondent sub-contractor was narrowed to a "focused" inspection.
10. After following proper protocol for obtaining permission, inspecting the job site, interviewing employees, taking more photos and conducting a closing conference with respondent, the CO issued 2 citations as follows:

Citation 1, Item 1a – Repeat Serious

29 CFR 1926.451(e)(1): Portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used were not used when scaffold platforms were more than 2 feet above or below a point of access:

- a) Jobsite 1585 Sweetgrass Trail – Lot #353 – for the employees climbing the frames of tubular welded frame scaffolding to a height of 13 feet 11 inches above hard solid ground without the use of a ladder for access.

GOLDEN STONE & BRICK, INC. WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD 1926.451(e)(1) WHICH WAS CONTAINED IN OSH INSPECTION NUMBER 316849371, CITATION NUMBER 1, ITEM NUMBER 3a, ISSUED ON 8/29/2013, WITH A FINAL ORDER DATE OF 10/11/13.

Date By Which Violation Must Be Abated: Corrected During Inspection
Proposed Penalty: \$4,000.00

Citation 1, Item 1b – Repeat Serious

29 CFR 1926.451(b)(1)(i): Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) was not installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary.

- a) Jobsite 1585 Sweetgrass Trail – Lot #353 – the 2nd tier platform located on the tubular welded frame scaffolding used by the masons had spaces between the planks that ranged in width from 2 inches to 6 inches.

GOLDEN STONE & BRICK, INC. WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD 1926.451(e)(1) WHICH WAS CONTAINED IN OSH INSPECTION NUMBER 316849371, CITATION NUMBER 1, ITEM NUMBER 3b, ISSUED ON 8/29/2013, WITH A FINAL ORDER DATE OF 10/11/13.

Date By Which Violation Must Be Abated: Corrected During Inspection
Proposed Penalty: \$0.00

Citation 1, Item 2 – Repeat Serious

29 CFR 1926.451(g)(4)(1): Guardrail systems were not installed along all open sides and ends of platforms before being released for use by employees other than erection/dismantling crews.

- a) Jobsite 1585 Sweetgrass Trail – Lot #353 – guardrail systems were not installed along all the open sides and ends of platform for the employees using the tubular welded frame scaffolding to a height of up to 15 feet 11 inches above solid ground surface.

GOLDEN STONE & BRICK, INC. WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD 1926.451(e)(1) WHICH WAS CONTAINED IN OSH INSPECTION NUMBER 316849371, CITATION NUMBER 1, ITEM NUMBER 4, ISSUED ON 8/29/2013, WITH A FINAL ORDER DATE OF 10/11/13.

Date By Which Violation Must Be Abated: Corrected During Inspection
Proposed Penalty: \$4,000.00

Citation 2, Item 1 – Serious

29 CFR 1926.451(c)(2): Supported scaffold poles, legs, posts, frames, and uprights did not bear on base plates and mud sills or other adequate firm foundation.

- a) Jobsite 1585 Sweetgrass Trail – Lot #353 – base plates were not present on two legs of the three section, two tier high tubular welded frame scaffolding used by employees at a height of 13 feet 11 inches above hard solid surface while installing brick siding on a new two-story home.

Date By Which Violation Must Be Abated: Corrected During Inspection

Proposed Penalty: \$2,000.00

Citation 1, Item 1a and Proposed Adjusted Penalty (Absence of Ladders)

11. Respondent filed a written response to the citations, stating *verbatim*, “I Denied all the Penalty(s), Case needs to be revise and discuss in regards to the Amount of the Charges.”
12. Respondent and two of his employees were working on scaffolding at a height of 13’ 11” above solid ground without a ladder for means of access in violation of 29 CFR 1926.451(e)(1). (Complainant’s Exhibit Numbers 1B, C & F)(hereafter C#___).
13. The lack of a ladder constituted a hazard, to wit: a fall from a height while ascending or descending the scaffold.
14. The substantial probable result of a fall from such a height is temporary or permanent disability or death.
15. Respondent knew or with reasonable diligence should have known of the hazard because he was one of the employees working atop the scaffolding (C# 1D & E) and abated the hazard after the CO arrived by installing a ladder. (C# 1L & M)
16. Using the NC Department of Labor Field Operations Manual (FOM)(C#2), the CO properly calculated the following proposed penalty:
 - a. The frequency assessment was less than an hour a week. This was based upon the fact that respondent and his employees had begun work at 8:30 am before the CO arrived at 10:30 am;
 - b. The severity assessment was High because the probable result of a fall from such a height is temporary or permanent disability or death;
 - c. The probability assessment was low as a result of averaging the probability factors such as the number of employees, the frequency and the proximity of the hazard;

- d. The Gravity Based Penalty (GBP) is \$5,000, due to the high severity and lesser probability assessments;
- e. The repeat violation within 3 years requires doubling of the GBP to \$10,000;
- f. Due to small size, a 60% adjustment was applied to reduce the GBP to \$4,000;
- g. No credit was given for good faith because it was a repeat penalty;
- h. No credit was given for history because it was a repeat penalty and,
- i. **The proper proposed adjusted penalty was \$4,000.**

Citation 1, Item 1b and Proposed Adjusted Penalty (Gaps in Work Platform)

- 17. Respondent and two employees were working on scaffolding at a height of 13' 11" above solid ground where there were 2" to 6" gaps between the planks of the working platform, in violation of 29 CFR 1926.451 (b)(1)(i). (C#s 1D & E)
- 18. Gaps between the planking in excess of 2" constituted a hazard, to wit: a trip and fall from a height.
- 19. The substantial probable result from a fall from such a height is temporary or permanent disability or death.
- 20. Respondent knew or with reasonable diligence should have known of the hazard because 1) he was one of the employees working atop the scaffolding; 2) after he saw the OSHA official getting out of her car, respondent added a plank to the work platform. Even after adding a plank, the work platform still had gaps greater than 2 inches. (C# 1G)
- 21. Respondent abated the hazard immediately by adding still another plank to the working platform. (C#1i)
- 22. This was a repeat violation of planking standard 29 CFR 1926.451(b)(1)(i) as documented in OSH Inspection Number 316849371, Citation 1, Item 3b, issued on 8/29/2013, with a final Order date of 10/11/13. (C#3)
- 23. Using the FOM, the CO properly determined that the frequency, severity and probability assessments were identical to those in Citation 1, Item 1a and properly grouped it with Citation 1, Item 1a with no further penalty assessed.

37. Using the FOM, the CO properly determined that the frequency, severity and probability assessments were identical to those in Citation 1, Item 1a.
38. The CO properly determined that the GBP was \$5,000.
39. This violation was not a repeat violation of the Code of Federal Regulations (CFR).
40. The CO properly applied the same reduction factors as Citation 1, Item 1a to reduce the GBP by 60% to **an Adjusted Proposed Penalty of \$2,000.**
41. **The total penalties for all Citations equals \$10,000 (Ten Thousand Dollars).**

Discussion

1. The Scaffolding Was Not Still Under Construction

Respondent testified over objection from complainant, that work had not yet started when the CO arrived and he and his employees were still in the process of configuring the scaffolding. The testimony is inadmissible, irrelevant and disingenuous on the grounds that respondent contested only the penalties.

In addition, respondent's testimony was not credible. By the time the CO arrived on site, respondent and his employees had already: 1) built the scaffold without proper foundations; 2) accessed the higher scaffold platforms without a ladder or guard rails; and 3) hauled up and placed two piles of bricks and three or four white buckets onto the highest and second highest levels of the scaffold planking, respectively. (C# 1A. C and D) Two of the three employees on the second level of scaffolding were facing and attending to their work on the brick wall. (C#1A-E). No one was in the process of putting up a ladder, planking the platform or affixing guard rails until after the CO arrived. Respondent admitted the violations to the CO and only contested the amount of the penalties. Respondent was cited and paid penalties for the same violations within three years.

2. Employer Failed to Proffer Evidence of Financial Inability to Pay Penalties

Respondent testified and argued at the hearing that he could not afford the penalties.

North Carolina General Statutes §95-138 *et seq.* (hereafter "N.C.G.S.") provides the Commissioner of Labor with the authority to propose civil penalties for violations of the Act and sets minimum and maximum penalties. The legislation also establishes the factors to be used for calculating penalties in a uniform and equitable way. The Act provides that one factor to be considered is the size of the business, cooperation, good faith effort to have a safety and health program and history of violations. N.C.G.S. §95-138(a). The Department of Labor Field Operations Manual (FOM) provides detailed rules on calculating penalties, which CO Evans properly applied in the instant case.

The Hearing Examiner has discretion to review the proposed penalty of the Commissioner of Labor in a *de novo* review, which is subject to the abuse of discretion standard on review. Brooks v. Household Building Systems, Inc., 3 NCOSH 836 (RB 1991). The standard requires that the discretion be plausibly based on the evidence presented before the Hearing Examiner.

Before a reduction is permitted, evidence must be documented to support it, as there must be evidence elicited during the hearing on which a Hearing Examiner may justify changing the penalty proposed by the Department of Labor. Id. At 841 (quoting Brooks v. Southmet Recycling Corporation, 1 NCOSHD 942, at 944 (1985)).

The burden of proof is on the Commissioner [of Labor] to show that the proposed penalty is fair, reasonable in amount, and assessed equitably and uniformly. The burden then shifts to the respondent to show why he should be treated exceptionally. Failure of respondent to carry its burden usually results in affirmation of the penalty The respondent can present as mitigating factors evidence concerning business size, history, financial incapacity, good faith efforts and gravity of violations.

Id. at 943.

Respondent testified at the hearing, but he proffered no documentation, corroboration or other tangible evidence that he was financially incapable of paying the proposed penalties. The Hearing Examiner has no discretion to modify the proposed penalties.


Based upon the foregoing FINDINGS OF FACT, the undersigned CONCLUDES as a MATTER OF LAW as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order;
2. The Review Commission has jurisdiction of this case and the parties;
3. Complainant has proffered evidence to support a *prima facie* case for each violation and each proposed penalty assessed;
4. Complainant properly calculated the proposed penalties for each citation.
5. Respondent failed to proffer any documentation or corroboration of his financial capacity to pay.

Based upon the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, the undersigned enters the following **Order**:

1. Citation 1, Item 1a is hereby AFFIRMED with a penalty of \$4,000;
2. Citation 1, Item 1b is hereby AFFIRMED with no additional penalty;
3. Citation 1, Item 2 is hereby AFFIRMED with a penalty of \$4,000;
4. Citation 2, Item 1 is hereby AFFIRMED with a penalty of \$2,000;
5. Respondent is hereby Ordered to pay the total penalty of \$10,000 (Ten Thousand Dollars) within ten days (10 days) of the filing date of this Order.

It is hereby **ORDERED, ADJUDGED and DECREED** on this, the 10th day of February, 2018



Ellen R. Gelbin
Hearing Examiner