

6. The COs parked their car to the side of Penry Lane across the street from the home under construction and tried to photograph the workers on the roof without fall protection, but the traffic between the COs and the house prevented them from obtaining pictures of their personal observations.
7. As the COs pulled their car into the driveway of the house under construction at 144 Bethel Oaks Court, Lot 24, the COs observed the two workers on the roof reach for the protection lines and tie themselves off. (Complainant's Exhibit A8)

After following proper protocol for obtaining permission, inspecting the job site, interviewing employees and taking photographs, the COs issued two citations as follows:

Citations

Citation 01 Item 001 Type of Violation: Serious

29 CFR 1926.102(a)(1): Eye and face protective equipment was not provided when machines or operations presented potential eye or face injury from physical, chemical, or radiation agents:

- a) job site at 144 Bethel Oaks Court, Lot # 24, Clemmons, NC - employee engaged in residential framing activities while using machines (exposed to eye hazard - while using pneumatic nail gun (HITACHI -3/4"- serial number unreadable) and was not protected from eye or face injury from physical agents.
- b) job site at 144 Bethel Oaks Court, Lot # 24, Clemmons, NC - employee engaged in residential framing activities while using machines (exposed to eye hazard - while using a circular saw (Makita 5007 MG- # 0588174Y- 120V) and was not protected from eye or face injury from physical agents.

Citation 01 Item 002 Type of Violation: Serious

29 CFR 1926.501(b)(13): Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels was not protected by guardrail systems, safety net system, or personal fall arrest system, nor was the employee provided with an alternative fall protection measure under another provision of paragraph 1926.501 (b):

- a) job site at 144 Bethel Oaks Court, Lot # 24, Clemmons, NC - for the employees engaged in framing/roofing operations approximately (18 feet) above lower levels, without the use of any type of fall protection system (guardrail systems with toe boards, safety net systems, or personal fall arrest systems).

Citation 01 Items 001 and 002 were grouped because they involve similar or related hazards that may increase the potential for injury or illness.

Citation 01 Item 003a Type of Violation: Serious

29 CFR 1926.501(b)(14): Each employee working on, at, above, or near wall openings (including those with chutes attached) where the outside bottom edge of the wall opening was 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening was less than 39 inches (1.0 M) above the walking/working surface, was not protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system:

a) job site at 144 Bethel Oaks Court, Lot # 24 Clemmons, NC - for the employee on the second floor of the building adjacent to a window opening of more than 2 feet wide and approximately 14 feet above the next lower level that was not protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system:

Citation 01 Item 003b Type of Violation: Serious

29 CFR 1926.503(b)(1): The employer did not verify compliance with paragraph (a) of this section by preparing a written certification record including the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer at the job site at 144 Bethel Oaks Ct, Clemmons NC- where employees engaged in framing/roofing operations, the employer did not have a written certification record for fall protection training.

Citation 01 Item 004 Type of Violation: Serious

29 CFR 1926.1053(b)(1): When portable ladders were used for access to an upper landing surface and the ladder's length allows, the ladder side rails did not extend at least 3 feet (9 m) above the upper landing surface being accessed:

a) job site at 144 Bethel Oaks Court, Lot # 24, Clemmons, NC- where the extension ladder used to gain access to and from the roof approximately (18 feet above lower level) did not extend at least 3 feet above the landing surface (roof).

Citation 02 Item 001 Type of Violation: Non Serious

29 CFR 1926.405(g)(2)(iv): Flexible cords were not connected to devices and fittings so that strain relief was provided to prevent pull from being directly transmitted to joints or terminal screws:

a) job site at 144 Bethel Oaks Ct, Clemmons, NC - where the extension cord that was connected to an operable GFCI, that powered the electrical tools, was not connected to devices and fittings so that strain relief was provided that would prevent pull from being directly transmitted to joints or terminal screws.

8. Respondent `accepted responsibility for Citation 1, Item 001 (eye and face protective equipment) and did not protest the properly calculated penalty of \$1,500 (One Thousand-Five Hundred Dollars).
9. Respondent denied responsibility for violating 29 CFR §1926.501(b)(3) as alleged in Citation 1 Item 002 (fall protection), testifying that — at the time of the COs arrival — his employees were tied off to the fall protection system he provided. Respondent's testimony is incredible for the following reasons:
 - a) COs Fombin and Bryant testified that they were present at the site and personally observed respondent's employees on the roof without being tied off to the fall protection system provided;
 - b) The COs provided a plausible explanation and corroboration for why they were unable to photograph the men on the roof without being tied off (Complainant's Exhibit C);
 - c) The COs testified to their personal observations of the roofers as they tied off after seeing the COs enter the jobsite;
 - d) Respondents foreman and competent person on site, Gerardo Domingo-Camilo (Domingo) and respondent's laborer Ricardo Gimanez (Ricardo) admitted to the COs during their inspection that — at the time of the COs arrival — they were on the roof and were not tied off to the fall protection system provided;
 - e) Mr. Guerrero was not present and has no personal knowledge of whether his employees Domingo and Ricardo were properly tied off when the COs arrived at the job site or whether the men admitted their violations to the COs during inspection;
 - f) Neither Domingo nor Ricardo were present to testify to the contrary; and,
 - g) Respondent admitted that his employees were in violation of eye protection and flexible cord standards when the COs arrived, thus weakening respondent's testimony that he is experienced in and properly trains his employees regarding construction standards.
10. Complainant properly calculated the penalty for Citation 1 Item 2 as \$2,100 (Two Thousand One Hundred Dollars).
11. Respondent denied liability on Citation 1, Item 3a (fall protection) *per* 29 CFR 1926.501(b)(14).
12. The second story level of the house — which was more than 6 feet above the next lower level — contained a wall opening more than 2 feet wide (window). The inside bottom

- edge of the window under the left gable was less than 39 inches above the working/walking surface for the employees sawing wood on the second floor.
13. The employees working on the second floor on, at, near, above, over or adjacent to the open window were not protected from falling by the use of a guardrail system, a safety net system or a personal fall arrest system. (Complainant's Exhibits A1-13)
 14. Complainant properly calculated the penalty for Citation 1, Item 3a as \$900.
 15. Respondent denied responsibility for Citation 1, Item 3b (written certification of training compliance) pursuant to 29 CFR §1926.503(b)(1), testifying that his employees were all properly trained in fall protection.
 16. Complainant requested but respondent did not provide written certification records for fall protection training for the employees engaged in framing/roofing operations.
 17. Complainant properly grouped this citation with the other items in Citation 1 and no additional penalty was applied.
 18. Respondent denied violating 29 CFR 1926.1053(b)(1) as set forth in Citation 1, Item 4 (ladder safety), arguing that even though the ladder extended to the roof-line, his employees used it solely to access the second floor.
 19. Respondent's employees admitted to the COs during their inspection that they had been using the ladder to climb to the roof even though the top of the ladder did not extend above the roof by 3 feet. (Complainant's Exhibits A1-13)
 20. Respondent's testimony that the employees used the ladder only to access the second floor and not the roof was incredible because, among other things:
 - a) Mr. Guerrero was not present and has no personal knowledge of whether his employees were using the ladder to access the roof or whether the men admitted their violations to the COs during inspection;
 - b) None of respondent's employees were present to testify to the contrary; and,
 - c) Respondent admitted that his employees were in violation of eye protection and flexible cord standards when the COs arrived at the job site, thus weakening respondent's testimony that he is experienced in and properly trains his employees regarding construction standards.
 21. Complainant properly calculated the penalty for Citation 1, Item 4 as \$1,500.
 22. Respondent accepted responsibility for Citation 2, Item 1 (flexible cords) pursuant to 29 CFR 1926.405(g)(2)(iv) and since it was a non-serious violation, complainant properly proposed no penalty.

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. Respondent stipulated to his noncompliance of the violated standards in Citation 1, Item 1 and Citation 2, Item 1; and,
5. Complainant properly calculated the proposed penalties for each citation.

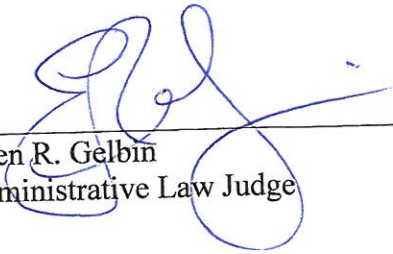
Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

ORDER

Citation I, Items 1-4 and Citation 2, Item 1 are hereby AFFIRMED and respondent shall pay the penalties totaling **\$6,000.00 (Six Thousand Dollars)**.

The penalties shall be paid within ten (10) days of the filing date of this Order.

It is hereby **ORDERED, ADJUDGED and DECREED** on this, the 1st day of March, 2017.



Ellen R. Gelbin
Administrative Law Judge

CERTIFICATE OF SERVICE

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

CARLOS GUERRERO
GUERRERO CONSTRUCTION, INC.
407-B DOLLEY MADISON RD
GREENSBORO, NC 27410

JASON ROSSER
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

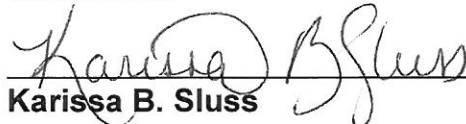
by depositing a copy of the same in the United States Mail, First Class;

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 9 DAY OF March 2017.

ARLENE K. EDWARDS
CHAIRMAN



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Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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