

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

FILED

JAN 23 2018

NC Occupational & Safety  
Commission

**COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,** )  
)  
)  
**COMPLAINANT,** )  
)  
**v.** )  
)  
**SEXTON CONSTRUCTION, INC., and** )  
***its successors.*** )  
)  
**RESPONDENT.** )

**DOCKET NO.: OSHANC 2017-5887**

**INSPECTION NO.: 318092608**

**CSHO ID: K0085**

---

**ORDER DISMISSING CITATION 1, ITEM 1a and  
ORDER AFFIRMING CITATION 1, ITEM 1b and PENALTY**

This matter came on to be heard and was heard before Ellen R. Gelbin, the undersigned Administrative Law Judge, on December 19, 2017 in Greensboro, North Carolina. Complainant was represented by Jason Rosser, Assistant Attorney General, the North Carolina Department of Labor (NCDOL). Safety Compliance Officer (SCO) Mark Rasdall was present and testified.

Owner Shawn R. Sexton represented himself and testified at the hearing.

**AFTER REVIEWING AND CONSIDERING** the record file, the pleadings, the hearing testimony, the exhibits, the parties' arguments, and after researching relevant legal authorities, the undersigned makes the following:

**FINDINGS OF FACT and CONCLUSIONS OF LAW**

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C.G.S. §§95-126 *et. seq.*, the Occupational and Safety and Health Act of North Carolina (the Act).
2. Sexton is subject to the Commission's jurisdiction because it is a North Carolina (NC) corporation, duly organized and existing under NC laws, contracting construction work in NC, with a primary place of business in Asheboro, NC.

3. On November 18, 2016, SCO Rasdall was driving home from a logging inspection in Montgomery, NC, when he observed a worker, high in an aerial lift, standing on the basket mid-rail. It appeared that the employee's harness was not tied off to the bucket.
4. The SCO drove to the construction site, located at 950 Monroe Street in Carthage, NC and determined that Venture Construction Company had hired respondent to remodel a McDonalds.
5. The SCO entered the work site where the employee was approximately 16 feet high, standing on the mid rail of the articulating boom lift bucket, installing wood flashing to the building's exterior. His safety harness did not appear to be tied off to the bucket.'
6. The SCO observed a worker on the ground, standing approximately 5 feet from the lift truck, cutting wood for the lift worker to install.
7. The SCO identified Bill Coble as the lift worker and Robert Sexton as the wood cutter and site foreman.
8. After the SCO properly presented his credentials, Mr. Coble refused to talk with the SCO until project manager John Harrington arrived. After Mr. Harrington conversed with Mr. Coble, Mr. Coble agreed that he was not standing on the floor of the bucket and was not tied off.
9. Mr. Harrington informed the SCO that the company had a policy on tying-off harnesses to the lifts. Mr. Coble had been working in the lift basket most of the day and that he "must have forgotten to attach" his harness.
10. With Mr. Harrington's permission, the SCO conducted a partial inspection related to the aerial lift hazards only.
11. On January 6, 2017, the SCO issued two citations as follows:

Citation 1, Item 1a – Serious

20 C.F.R. 1926.453(b)(2)(ii): Unauthorized persons operated an aerial lift:

- a. Jobsite – (950 Monroe Street, Carthage, NC) where unauthorized employee was allowed to operate a JLG 45 ft. articulating boom lift/aerial lift (model: 450A) while working on a commercial structure.

The hazard was corrected during the inspection and the proposed penalty was \$2,100.

Citation 1, Item 1b – Serious

20 C.F.R. 1926.453(b)(2)(iv): Employee(s) working in an aerial lift were not standing firmly on the floor of the basket:

- a) Jobsite - (950 Monroe Street, Carthage, NC) where an employee working in elevated JLG 45 ft. articulating boom lift/aerial lift (model: 450A) approximately 16 feet above the lower elevation and was standing on the mid rail while working on a commercial structure.

The hazard was corrected during the inspection and this citation was grouped with Citation 1, Item 1a, “because they involve similar or related hazards that may increase the potential for injury or illness” and for purposes of calculating the penalty.

12. The SHCO calculated the amount of respondent's penalty for Citation 1, Item 1a as \$2,100.00 (Two Thousand, One Hundred Dollars) according to the Field Operations Manual (FOM) as follows:
  - a. The violation gave rise to the possibility of an accident; to wit: a fall from height;
  - b. The probability of an accident occurring was greater due to the height of the lift;
  - c. The severity of an accident was high because the substantial probable result of a fall from a height of 16 feet is permanent disability or death;
  - d. The gravity based penalty (GBP) for an accident of greater probability and high severity is \$7,000.00 (Seven Thousand Dollars);
  - e. A 60% reduction in the GBP was applied for the respondents small worker roster;
  - f. No good faith reduction was applied as a result of respondents initial refusal to cooperate with the SCO;
  - g. A 10% reduction to the GBP was applied for respondent’s lack of history of OSHA violations in the three years prior to the inspection at issue;
  - h. The adjustment factors total 70%; and,
  - i. The adjusted GBP was \$2100.00 (Two Thousand, One Hundred Dollars).
13. Because Citation 1, Item 1b involved similar or related hazards (with identical proposed penalties) that may increase the potential for injury or illness, the SCO grouped it with Citation 1, Item 1a, with no additional penalty.
14. At the beginning of the hearing, complainant moved to dismiss Citation 1, Item 1a, which the undersigned GRANTED.
15. Mr. Sexton testified in his own defense, arguing that — now that Citation 1, Item 1a had been dismissed — there was no penalty attached to Citation 1, Item 1b.

16. Complainant argued that each Citation carried a proposed adjusted gross penalty of \$2,100, however the SCO grouped the Citation penalties because they involve similar or related hazards that may increase the potential for injury or illness.
17. With Citation 1, Item 1a dismissed, the properly calculated penalty for Citation 1, Item 1b is \$2,100 (Two Thousand, One Hundred Dollars).
18. Mr. Sexton argued that the SCO's testimony was not credible because he did not take photographs of Mr. Cole standing on the mid rail of and untethered to the high bucket.
19. The SCO's testimony was entirely credible considering his own personal observations from the highway and on the worksite, and Mr. Coble's admissions.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby ORDERS, ADJUDGES and DECREES and follows:

**ORDER**

1. Citation I, Item 1a is HEREBY DISMISSED;
2. Citation 1, Item 1b is HEREBY AFFIRMED and respondent shall pay the penalty of \$2,100 (Two Thousand, One Hundred Dollars); and,
3. 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 14<sup>th</sup> day of JANUARY, 2018.

  
\_\_\_\_\_  
Ellen R. Gelbin  
Administrative Law Judge