

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

FILED

COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)
)
COMPLAINANT,)
)
v.)
)
MARLON MAYO dba L&L ROOFING)
and its successors,)
RESPONDENT.)

JUN - 9 2020

ORDER

North Carolina Occupational & Safety
Health Review Commission

OSHANC NO: 2018-5983
INSPECTION NO.: 318117603
CSHO ID: S0077

THIS MATTER came on for hearing and was heard remotely before the undersigned on June 3, 2020. The Complainant was represented by Rory Agan and the Respondent represented himself. Complainant's witness was Kirby Atwood, who introduced himself as an OSHA Safety Officer with the North Carolina Department of Labor, Occupational Safety and Health Division. Respondent's witness was the Respondent, Marlon Mayo.

Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion and enters an Order accordingly.

ISSUE PRESENTED

Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.501(b)(13) by permitting an employee to perform roofing operations on the porch of a new two story home under construction that was nine feet, six inches above the ground without protection from falling by providing railings, personal fall arrest systems or an alternative fall protection measure?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.501(b)(13) provides as follows:

Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

FINDINGS OF FACT

1. Complainant, Commissioner of Labor of the State of North Carolina (hereafter Complainant or Commissioner), is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et seq., the Occupational Safety and Health Act of North Carolina (the Act) as well as the regulations adopted pursuant thereto.
2. Respondent, Marlon Mayo, hereafter Respondent or Mayo, was, at all times relevant to this case, in the business of providing roofing services.
3. Respondent Mayo was an employer within the meaning of N.C. Gen. Stat. §95-127(11) and Antonio Hernandez was one of Mayo's employees within the meaning of N.C. Gen. Stat. §95-127(10).
4. Respondent Mayo testified under oath at the hearing that he was not the employer of Mr. Hernandez in this case, but Respondent had acknowledged to Safety Officer Atwood at the time of the inspection that he *was* the employer of the worker on the roof. In spite of the denial at hearing, it is found as a fact that Respondent was the employer of Hernandez.
5. Respondent's purported dba, L&L Roofing, does not exist.
6. OSHA Safety Officer Atwood inspected a residential construction site located at 3276 Waterford Glen Lane, Lot# 044, Clemmons, North Carolina 27012 on September 7, 2017.
7. Officer Atwood observed, from the right-of-way, a worker on a porch roof of the two story home at the above address. The worker was caulking some flashing and was not using any form of fall arrest protection.
8. Officer Atwood called the general contractor whose contact number was found in the inspection box on the property and obtained permission to enter the property for an inspection.
9. Officer Atwood measured the height from the ground to the roof on which the worker was working and found that it measured nine feet, six inches.
10. Respondent had fall protection equipment available on the site that was not being used at the time of Atwood's observation of Antonio Hernandez on the roof.
11. Respondent's employee was exposed to the hazard of falling off the porch roof.

12. There was a substantial probability that if an employee fell from the porch roof onto the solid surface ground below that he would suffer serious injuries involving broken bones and possible hospitalization.
13. Respondent was issued a citation for the September, 2017 inspection as follows:

Citation 01 (Repeat Serious)

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1926.501(b)(13)	Corrected	\$2,400.00

14. Respondent was issued a previous citation for the violation of the same Occupational Safety and Health standard cited above. The previous citation was contained within Inspection #318102480 issued on April 4, 2017. The final order on the previous April, 2017 inspection was dated May 23, 2017.
15. Respondent admitted under oath that he had falsely accepted responsibility as the employer for the previous citation and testified without supporting evidence that he had not been the one who paid the penalty in the previous case. In spite of these assertions, it is found that Respondent was the employer in the previous case.
16. The gravity based penalty, based on the criteria in the North Carolina OSHA Operations Manual, for the citation in this case was discounted 60% for the size of the employer so the penalty before adjustment was \$3,000. After adjustment, the penalty was figured to be \$1,200. Because the violation was for a repeat serious violation, the penalty was doubled to \$2,400. The penalty is appropriate and correct for this violation.

CONCLUSIONS OF LAW

1. 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.
2. Respondent is subject to the provisions of the Act.
3. Complainant proved by a preponderance of the evidence that Respondent committed a serious violation of 29 CFR 1926.501(b)(13) and the penalty and the adjustment of the penalty, as well as the doubling of the penalty amount was correctly calculated in accordance with the Complainant's Operations Manual.

DISCUSSION

This was a straight forward case involving the application of only one regulation. Respondent made no attempt to dispute the observed fact that Mr. Hernandez was on the porch roof well above six feet without any fall protection. Respondent disputed, instead, whether he was the employer — in contrast to the testimony of the OSHA Safety Officer who testified that Mr. Mayo admitted to him at the scene of the inspection that he was the employer. Mr. Mayo

admitted under oath that in the previous case, which was the basis for the repeat serious violation, he had falsely represented that he was the employer then. Given the financial incentive for Mr. Mayo to testify that he was not the employer in either or both cases, his inconsistent statements cast doubt on his later representations.

In order to prove that the Respondent committed a serious violation of a specific standard, the Commissioner must prove by a preponderance of the evidence the following elements:

1. A hazard existed;
2. Employees were exposed;
3. The hazard created the possibility of an accident;
4. The substantially probable result of an accident could be death or serious physical injury; and
5. The employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in *Commissioner of Labor v. Daniel Construction*) of the condition or conduct that created the hazard. *Commissioner of Labor v. Daniel Construction*, 2 OSHANC 309, Docket No. 81 CVS 5703 (Superior Ct. 1983), *affirmed*, 2 OSHANC 311, 73 N. C. App. 426 (Ct. of Appeals 1984).

Commissioner of Labor v. Liggett Group, Inc. OSHANC 94-3175 (1996).

The fact that an employee of the Respondent was caulking flashing on a roof over six feet high above a solid surface without any fall protection demonstrates the existence of the hazard and the exposure of at least one employee to the hazard. The absence of fall protection from such a height shows that the hazard created the possibility of an accident the substantially probable result of which would be serious injury or death. This establishes the third and fourth elements of the proof of the violation. Finally, the Respondent was on site at the time of the conduct observed by the OSHA Safety Officer, and he admitted at the time that he was the employer, thus demonstrating that he either was or should have known of the unsafe conduct.

The violation cited was established to be a repeat of the very same violation for which the Respondent had been previously cited less than four months after the first citation had become a final order.

Having established the elements necessary to justify the finding of a repeat serious violation, the Complainant's citation was appropriate and the penalty imposed is reasonable.

Based on the foregoing Findings of Fact and Conclusions of Law and considering the Discussion, IT IS ORDERED as follows:

Citation 01, Item 001 is affirmed as a repeat serious violation of 29 CFR 1926.501(b)(13) and a penalty of \$2,400 is hereby imposed.

The penalty shall be paid within twenty (20) days of the filing date of this Order. This the ____ day of June, 2020.

Reagan H. Weaver

Reagan H. Weaver

Administrative Law Judge

North Carolina Occupational Safety and Health Review Commission

CERTIFICATE OF SERVICE

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

Marlon Mayo dba
L&L Roofing
1545 Summit Avenue
Greensboro, NC 27405

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

RORY AGAN
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, 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 12 DAY OF June 2020.



Karissa B. Sluss
Docket and Office Administrator
NC OSH Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
FAX: (919) 733-3020