

BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA

FILED

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

JUN 10 2021

COMPLAINANT - RESPONDENT,

DOCKET NO. OSHANC 2018-5995
OSHA INSPECTION NO. 318122124

v.

MERITAGE HOMES of the CAROLINAS,
INC.,
and its successors

ORDER OF THE COMMISSIONERS

RESPONDENT - PETITIONER.

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 18th day of March 2021, via remote online courtroom, by Paul E. Smith, Chairman, Cheyenne N. Chambers, and Terrence Dewberry, Members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Victoria L. Voight, Special Deputy Attorney General; North Carolina
Department of Justice, Raleigh, North Carolina

Respondent: C. Grainger Pierce, Jr.; Van Hoy, Reutlinger, Adams & Pierce, Charlotte,
North Carolina

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission AFFIRMS the Order of Hearing Examiner Richard M. Koch.

ISSUE PRESENTED

WHETHER THE EMPLOYER MERITAGE, AS THE GENERAL CONTRACTOR, COMMITTED A SERIOUS VIOLATION OF 29 CFR § 1926.501(b) (13), BY FAILING TO CORRECT A HAZARD TO WHICH THE EMPLOYEE OF A SECOND TIER SUBCONTRACTOR WAS EXPOSED?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR § 1926.501(b)(13) 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.

FINDINGS OF FACT

1. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. Respondent is an employer within the meaning of N.C. Gen. Stat. § 95-127(10) and is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
3. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
4. On August 5, 2020, a remote hearing was held before the Honorable Richard M. Koch.
5. On August 14, 2020, Hearing Examiner Koch issued an Order finding that the provisions of 29 CFR § 1926.501(b)(13) had been violated and issuing a penalty of \$2,800.00.

6. On September 14, 2020, Respondent timely petitioned the Review Board for a review of the decision of the Hearing Examiner holding that the Respondent committed a serious violation of 29 C.F.R. §1926.501(b)(13).
7. An Order granting review was filed on September 22, 2020.
8. The oral arguments were heard by the full Commission on March 18, 2021.
9. The Review Commission adopts the Hearing Examiner's findings of facts numbered 1 through 16.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission 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 Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The Complainant met its burden of proving by substantial evidence that the Respondent committed a serious violation of 29 CFR § 1926.501(b)(13).
5. The Respondent, as the General Contractor, is responsible for exercising reasonable care to ensure compliance with the Occupational Safety and Health laws.
5. The Commission AFFIRMS the Order of Hearing Examiner Richard M. Koch.

DISCUSSION

As General Contractor, Meritage was subject to the multi-employer doctrine as set forth in *Commissioner of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 609 S.E.2d 407 (2005).

Under the multi-employer doctrine, “an employer who controls or creates a worksite safety

hazard may be held liable under the Occupational Safety and Health Act even if the employees threatened by the hazard are solely employees of another employer.” *Id.* at 23, 609 S.E.2d at 413. “[T]he duty is a reasonable duty and the general contractor is only liable for violations that its subcontractor may create if it could reasonably have been expected to detect the violation by inspecting the job site.” *Id.* at 28, 609 S.E.2d at 415. One way to establish liability under the multi-employer doctrine is to show that the controlling employer had actual or constructive knowledge of the violative condition and failed to take corrective action. Constructive knowledge can be shown by proving that the violative condition was so open and obvious that it should have been detected by the general contractor. *See, e.g., Allred v. Cap. Area Soccer League, Inc.*, 194 N.C. App. 280, 288, 669 S.E.2d 777, 782 (2008) (recognizing that a party has constructive knowledge of a danger if it is “so open and obvious that it should have been known”).

In this case, Meritage was the controlling employer of the worksite and the employee exposed was the employee of a second-tier subcontractor. It is undisputed that a Meritage supervisor was present while the violation was occurring. However, there is conflicting evidence as to whether that supervisor had actual knowledge of the violation. The Hearing Examiner chose not to resolve this dispute. On appeal, we also find it unnecessary to resolve this dispute because the evidence of Meritage’s constructive knowledge is overwhelming.

The violative condition in question was an employee standing on a roof more than six feet above the ground without fall protection. The violation was easily visible. Photographs introduced into evidence show the employee standing on a front porch roof, several yards from the street. The Compliance Officer originally stopped at the worksite because he saw the employee on the roof without fall protection from the road as he was passing by in his vehicle.

Moreover, a Meritage Supervisor was in a position to see the violative condition, as he was standing in the street in front of the house. The supervisor may not have seen the worker's lack of fall protection. But in the exercise of reasonable diligence, he plainly should have, and therefore, he should have taken steps to abate the risk. That is all that is required to hold Meritage accountable under the multi-employer doctrine.

Meritage argues it should not be held liable because their supervisor was busy, because he was addressing other safety concerns, and because the school across the street was being let out. While he may have been busy, it does not excuse his responsibility to the employee on the roof without fall protection. And it does not change the fact that the violation was open and obvious. "If an employer is allowed to 'contract' away his responsibility in providing a safe workplace, the effectiveness of the safety standards employed by the legislative Act would be drastically diminished." *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 34, 426 S.E.2d 282, 287 (1993). As General Contractor, Meritage had a duty of reasonable care. Meritage did not meet that duty.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's August 14, 2020, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. Respondent is furthered **ORDERED** to abate the violations and to pay the assessed penalty of \$2,800.00 within 30 days of the filing date of this Order.

This the 10th day of June, 2021.

Paul E. Smith

PAUL E. SMITH, CHAIRMAN

Cheyenne N. Chambers

CHEYENNE N. CHAMBERS, MEMBER

Terrence Dewberry

TERRENCE DEWBERRY, MEMBER

Signature: Paul E. Smith
Paul E. Smith (Jun 9, 2021 13:35 EDT)
Email: psmith@pathlaw.com

Signature: Cheyenne N. Chambers
Cheyenne N. Chambers (Jun 9, 2021 14:06 EDT)
Email: cchambers@tinfulton.com

Signature: Terrence Dewberry
Terrence Dewberry (Jun 10, 2021 05:57 EDT)
Email: todewberry@aol.com

CERTIFICATE OF SERVICE

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

C. GRAINGER PIERCE JR
VAN HOY REUTLINGER ADAMS & PIERCE
737 EAST BLVD
CHARLOTTE NC 28203

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

VICTORIA VOIGHT
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, 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 10 DAY OF June 2021.



Karissa B. Sluss
Docket and Office Administrator
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