

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

COMMISSIONER OF LABOR OF THE)
STATE OF NORTH CAROLINA)

COMPLAINANT,)

v.)

EASTERN CONSTRUCTORS)
INCORPORATED,)

RESPONDENT.)
_____)

ORDER

OSHANC NO. 2018-6024

FILED

MAR 22 2022

NC Occupational & Safety
Review Commission

THIS MATTER was before the undersigned for hearing via the Lifesize video conference platform on March 22, 2022 beginning at 10:00 A.M. A notice of hearing for this date and time was filed on February 2, 2022 with the Review Commission and was served on the parties on February 7, 2022. For the respondent, the notice of hearing was directed to Brad Kincaid, Eastern Constructors, Inc. at 38004 Cornerview Road, Geismar, LA 70734.

The complainant was represented by Rory P. Agan, Assistant Attorney General; the respondent no longer had counsel appearing for it in this matter and no one in behalf of respondent appeared.

On the day before the hearing, counsel for the complainant, Mr. Agan, sent an email to Mr. Kincaid containing an offer to settle this matter. He did not hear back from Mr. Kincaid that day. When this matter was called for hearing, and neither Mr. Kincaid nor anyone in behalf of respondent was on the Lifesize video conference platform, the undersigned asked Mr. Agan to attempt to contact Mr. Kincaid by telephone and email. Mr. Agan was not able to reach Mr. Kincaid on the telephone, but in response to his email inquiring as to what respondent was going to do about the hearing, at 10:14 A.M. on March 22, 2022, Mr. Kincaid emailed the following to Mr. Agan, "I would like to take the offer that was made yesterday."

Neither the undersigned, the Review Commission, the complainant nor Mr. Agan heard anything further from Mr. Kincaid nor anyone one else in behalf of respondent with reference to the hearing. Pursuant to Rule .0503(a), the respondent has waived any further rights with respect of the hearing. However, since Mr. Kincaid's email appears to be the respondent's position with respect to the hearing and to the complainant's settlement proposal, which is acceptance of the settlement proposal and waiver of the

hearing, the undersigned will enter the provisions of the settlement proposal as the decision in this case.

Based on the evidence, consisting of the citations issued in this case, the respondent's statement of employer's/respondent's position and the emails referenced above, the undersigned makes the following

FINDINGS OF FACTS

1. The complainant as the Commissioner of Labor is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina ("the Act").
2. The respondent is corporation which is authorized to do business in North Carolina. The respondent is in the business of erecting steel products used in the construction of buildings and other structures.
3. On May 21, 2018, the complainant issued two citations with multiple items alleging violations of 29 CFR 1926 by respondent with reference to steel erection work being done on a warehouse at 3725 Westinghouse Boulevard in Charlotte, North Carolina on November 26, 2017. A total of \$20,100.00 in penalties was assessed against respondent based on these citation items.
4. One employee of the respondent was killed during the work on this project and another employee suffered non-life-threatening injuries.
5. The following is the verbatim settlement proposal for this matter submitted by complainant to respondent by email on March 21, 2022:

Subject to a final approval from the director's level office of NCDOL-OSHA, the following offer is being proposed for your consideration:

Reduce overall penalty from 20,100 to 18,090
Payment plan of 12 or 18 months if necessary (\$1507.50 per month for 12 or \$1005.00 per month for 18)

Non-admissions Clause

The following stipulations:

1. The employer will prepare a written Site-Specific Erection Plan for each jobsite where its employees conduct steel erection activities which will at least meet the elements as outlined in Subpart R Appendix A.
2. The employer will provide additional steel erection training to all the employees in North Carolina engaged in/supporting steel erection activities. This training should also include rigging, lifting/handling loads, placement of loads on elevated structures and structural stability where loads are to be placed.

3. Continue any present Safety Program, including conducting periodic safety meetings with employees at regular intervals. In addition, the Employer will conduct weekly toolbox talks with employees. The Employer will actively encourage all workers to participate in workplace safety activities. During such meetings, employees should be able to communicate safety suggestions or complaints to their supervisor;
4. Ensure that safety and health rules are enforced (by the Employer) through regular, scheduled and unscheduled, worksite inspections and established, documented progressive disciplinary procedures. The Employer will ensure that the worksite inspections are conducted on at least a daily basis and are documented at least weekly. The Employer will maintain records of all worksite inspections, audit, evaluations and disciplinary actions associated with safety and health issues.

6. The following is the standard non-admissions clause which the complainant refers to in the settlement proposal:

Complainant and respondent agree that: (a) there are no other matters that remain to be decided and no outstanding issues remain to be resolved by an evidentiary hearing of this matter; (b) this Order is a full and final resolution of the claims set out in the underlying original citation, as amended pursuant to the agreement of the parties; (c) the modification of any portion of the original citation by complainant shall not be deemed to be an admission by complainant that any such portion was alleged without merit, (d) none of the agreements, statements, stipulations and actions taken by respondent shall be deemed an admission by the respondent of any of the allegations contained in the original citation as amended or as a waiver of defenses; provided however that in any subsequent proceeding with respect to matters covered by this Order brought directly under the Act by complainant, this Order shall have the full force and effect of a final order; (e) the agreements, statements, stipulations and actions herein by complainant and by respondent are solely for the purpose of resolving this matter economically and amicably without further litigation and shall not be used for any other purpose except for proceedings and matters arising under the Act and Article 21, Chapter 95 of the North Carolina General Statutes; (f) the penalty for each item designated in the original citation as amended pursuant to the agreement of the parties has been calculated in accordance with the standard Field Operations Manual procedure and giving consideration by complainant to standard mitigating factors and to specific factors applicable to respondent; and (g) there has been no employee objection to the reasonableness of any abatement period.

7. The above settlement proposal and language is considered accepted by the respondent pursuant to Mr. Kincaid's email response to Mr. Agan. Since Mr. Kincaid did not specify which penalty payment plan he was accepting, the undersigned determines to impose the longer payment plan option, namely payment of the revised penalty amount of \$18,090.00 over 18 months at \$1,005.00 per month. That payment plan will start May

5, 2022 with each payment due in complainant's office by the 5th of each consecutive month thereafter until paid in full.

8. The undersigned understands that the director's level office of NCDOL-OSHA has provided its final approval of this settlement.

Based on the foregoing Findings of Fact, the undersigned makes the following

CONCLUSIONS OF LAW

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 respondent is subject to the provisions of the Act.
3. The above reference settlement proposal of the complainant has been accepted by the respondent and this Order is the final order in this matter.

Based on the foregoing Findings of Fact and Conclusion of Law, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Citation 01, Item 001a is affirmed as a serious violation of 29 CFR 1926.757(b)(1).
2. Citation 01, Item 001b is affirmed as a serious violation of 29 CFR 1926.757(c)(1).
3. Citation 01, Item 002a is affirmed as a serious violation of 29 CFR 1926.757(d)(1)(i).
4. Citation 01, Item 002b is affirmed as a serious violation of 29 CFR 1926.757(e)(4).
5. Citation 01, Item 003 is affirmed as a serious violation of 29 CFR 1926.761(c)(2)(ii).
6. Citation 02, Item 001 is affirmed as a non-serious violation of 29 CFR 1926.503(b)(1).
7. The respondent shall pay the revised penalty amount of \$18,090.00 as specified above.

8. All violations not previously abated shall be immediately abated.
9. Each party shall bear its own costs and attorney's fees.

This 22nd day of March, 2022.

Richard M. Koch

RICHARD M. KOCH
HEARING EXAMINER

CERTIFICATE OF SERVICE

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

BRAD KINCAID
EASTERN CONSTRUCTORS INC
38004 CORNERVIEW RD
GEISMAR LA 70734

By depositing a copy of same in the United States Mail, Certified Mail, return receipt requested, 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 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 email to carla.rose@labor.nc.gov .

THIS THE 23 DAY OF March 2022.



Karissa B. Sluss
Docket and Office Administrator
NC OSH Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
NCOSHRC@labor.nc.gov
TEL.: (919) 733-3589