

BEFORE THE OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION OF NORTH CAROLINA

FILED

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

001 - 4 2021

COMPLAINANT - RESPONDENT,

NC Occupational & Safety

DOCKET NO. OSHANC 2018-60390  
OSHA INSPECTION NO. 318137510

v.

LENNAR CAROLINAS, LLC  
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 15<sup>th</sup> day of September 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: Sage Boyd, Assistant Attorney General; North Carolina Department of Justice, Raleigh, North Carolina

Respondent: David Selden: Gammage & Burnham, PLC, Phoenix AZ

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 Koch.

## ISSUES PRESENTED

**WHETHER THE EMPLOYER LENNAR, AS THE GENERAL CONTRACTOR, COMMITTED A SERIOUS VIOLATION OF 29 CFR 1926.100(a), 29 CFR 1926.102 (a)(1), 29 CFR 1926.501 (b)(13), 29 CFR 1926.1053(b)(1), 29 CFR 1926.1053(b)(4), 29 CFR 1926.1053(b)(5)(i), 29 CFR 1926.1053(b)(13), BY FAILING TO CORRECT HAZARDS TO WHICH THE EMPLOYEES OF SECOND TIER SUBCONTRACTORS WERE EXPOSED?**

**WHETHER EMPLOYER LENNAR'S DUE PROCESS RIGHTS WERE VIOLATED?**

## SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.100(a) Employees working in areas where there was a possible danger of head injury from impact, or falling or flying objects, or from electrical shocks and burns, were not protected by protective helmets.

29 CFR 1926.102 (a)(1) The employer did not ensure that each affected employee used appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

29 CFR 1926.501 (b)(13) Each employee engaged in residential construction activities 6 feet (1.8m) 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).

29 CFR 1926.1053(b)(1) Where (a) portable ladder(s) was/were used for access to an upper level landing surface and the ladder's length did not allow the ladder side rails to extend at least 3 feet (0.9m) above the upper landing surface being accessed, the ladder was not secured at its top to a rigid support that will not deflect, and a grasping device was not provided to assist employees in mounting and dismounting the ladder.

29 CFR 1926.1053(b)(4) Ladders were used for purposes other than the purpose for which they were designed.

29 CFR 1926.1053(b)(5)(i) Non-self-supporting ladders were not used at an angle such that the horizontal distance from the top support to the foot of the ladder was approximately

**one-quarter of the working length of the ladder (the distance along the ladder between the foot and the top support).**

**29 CFR 1926.1053(b)(13) The top or top step of the stepladder was used as a step.**

### **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 12, September 17, and September 18, 2020, a remote hearing was held before the Honorable Richard M. Koch.
5. On August 24, 2020, Hearing Examiner Richard M. Koch filed an Order finding that the provisions of 29 CFR 1926.100(a), 29 CFR 1926.102 (a)(1), 29 CFR 1926.501 (b)(13), 29 CFR 1926.1053(b)(1), 29 CFR 1926.1053(b)(4), 29 CFR 1926.1053(b)(5)(i), 29 CFR 1926.1053(b)(13) had been violated and issuing a penalty of \$33,350.00.
6. On December 10, 2020, Respondent timely petitioned the Review Board for a review of the decision of the Hearing Examiner.
7. An Order granting review was filed on January 12, 2021.
8. The oral arguments were heard by the full Commission on September 15, 2021.
9. The Review Commission adopts the Hearing Examiner's findings of facts.

## 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 1926.100(a), 29 CFR 1926.102 (a)(1), 29 CFR 1926.501 (b)(13), 29 CFR 1926.1053(b)(1), 29 CFR 1926.1053(b)(4), 29 CFR 1926.1053(b)(5)(i), and 29 CFR 1926.1053(b)(13).
5. All parties acted in good faith and there was no violation of due process.
5. The Commission AFFIRMS the Order of Hearing Examiner Richard M. Koch.

## DISCUSSION

As General Contractor, Lennar 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 exposed to the hazard are employed solely by 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, Lennar was the controlling employer of the worksite and the employees exposed were the employees of second-tier subcontractors. During their inspection, Compliance Officers identified seven violations, involving employees from three different subcontractors, at three different home sites. The violations included failures to use fall protection and the improper use of ladders. All were visible from the public right of way. It is undisputed that a Lennar supervisor, Construction Manager John Riggins, was on the jobsite while the violations were occurring. Mr. Riggins was photographed walking down the street fronting the three homesites within minutes of the moment the violations were observed and photographed by the Compliance Officers.

Mr. Riggins may or may not have seen the violations. But given his presence at the workplace, his proximity to the hazards, and the number of open and obvious violations at issue, in the exercise of reasonable diligence, he plainly should have. That is all that is required to hold Lennar accountable under the multi-employer doctrine.

Lennar argues it should not be held liable because their supervisor was busy, because he was in the process of doing a closing and was walking to his truck to meet the Compliance Officers. While he may have been busy, it does not excuse his responsibility to the employees endangered by the numerous safety violations. "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 Lennar had a duty of reasonable care. Lennar did not meet that duty.

Employer Lennar also argues it was denied due process for a number of reasons. These arguments are both meritless and not preserved.

Lennar's counsel did state the words "due process" when it became apparent that certain documents had not been produced to it prior to the hearing. However, when this became apparent, the sole request Lennar made was for a fifteen-minute recess to allow time to review the additional documents. The hearing examiner granted Lennar's request. Lennar then expressly stated that the allowance for a fifteen-minute recess was acceptable. Lennar was not unconstitutionally denied due process when it received all the process it requested. Nor did Lennar preserve any constitutional claim based on a deprivation of due process when it failed to object to the hearing examiner's solution and failed to then raise any relevant argument related to due process to the hearing examiner.

Lennar's counsel also filed a pre-hearing motion contending it had a due process right to an in-person hearing. The motion was denied. Lennar did not renew any objection to the format of the hearing before the hearing examiner, either at the hearing or in its post-hearing brief. This argument is therefore also not preserved. Regardless, it too is meritless. The hearing was scheduled remotely because of the global COVID-19 pandemic, consistent with Emergency Directive 3 by then-Chief Justice of the Supreme Court of North Carolina, Cheri Beasley under N.C.G.S. § 7A-39(b)(2). Although this case involves numerous OSHA violations spread throughout Respondent's development, nothing about these violations required an in-person hearing. The procedures afforded were also fair. The hearing used a platform called Lifesize.

Documents were provided via email, sharefile, U.S. mail, and screenshare. Witnesses participated by videoconference. While these procedures were new and perhaps more difficult for the parties, they were more than sufficient to provide Respondent due process. Administrative hearings, including those requiring credibility determinations, are routinely held remotely. Defendant did not have a constitutional right to an in-person hearing, and the hearing examiner did not err in conducting the hearing remotely.

### ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's November 9, 2020, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. Respondent abated the violations during the inspection and is now ordered to pay the assessed penalty of \$33,350.00 within 30 days of the filing date of this Order.

This the 4<sup>th</sup> day October, 2021.

Paul E. Smith

Paul E. Smith (Oct 1, 2021 13:21 EDT)

PAUL E. SMITH, CHAIRMAN

C. N. Chambers

Cheyenne N. Chambers (Oct 1, 2021 16:01 EDT)

CHEYENNE N. CHAMBERS, MEMBER

Terrence Dewberry

Terrence Dewberry (Oct 3, 2021 09:14 EDT)

TERRENCE DEWBERRY, MEMBER

CERTIFICATE OF SERVICE

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

JULIE PACE AND DAVID SELDEN  
GAMMAGE AND BURNHAM  
40 NORTH CENTRAL AVE, 20TH FL  
PHOENIX, AZ 85004

DENNIS JACOBSON  
TUGGLE DUGGINS  
100 N GREENE ST STE 600  
GREENSBORO NC 27401

By depositing a copy of same in the United States Mail, via certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

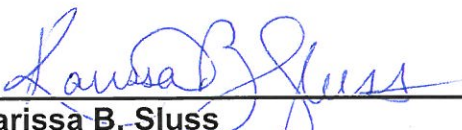
VICTORIA VOIGHT  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
P O BOX 629  
RALEIGH, NC 27602-0629

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](mailto:carla.rose@labor.nc.gov).

THIS THE 5 DAY OF (October) 2021.

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