

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

COMMISSIONER OF LABOR OF THE)
STATE OF NORTH CAROLINA)
)
COMPLAINANT,)
)
)
v.)
)
LENNAR CAROLINAS, LLC)
and its successors)
)
RESPONDENT.)
_____)

ORDER

OSHANC NO. 2018-6039
INSPECTION NO. 318137510
CSHO ID: L 9094

FILED

NOV - 9 2020

NC Occupational & Safety
Review Commission

THIS MATTER was before the undersigned for hearing via the Lifesize video conference platform on August 12, 2020 and September 17 and 18, 2020.

The Complainant was represented by Sage A. Boyd, Assistant Attorney General; the Respondent was represented by Julie A. Pace and David A. Selden of Gammage & Burnham, PLC.

Based on the evidence, consisting of testimony and admitted documents, and the post-hearing briefs of counsel, 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 a Delaware limited liability company which is authorized to do business in North Carolina. The respondent is a general contractor engaged in the business of constructing residential structures.
3. On or about May 22, 2018 the respondent was the general contractor constructing single family residences in the Parkmont subdivision in Mooresville, Iredell County, North Carolina. This subdivision consisted of 145 lots on a piece of property of about 150 acres. Some of the residences had already been constructed but at least three lots had houses under construction on this date. Those houses were situated on Lots 137, 47 and 51, all of which were located on Wrangell Loop. Iredell County is identified as one of the

counties in North Carolina to receive special emphasis for inspection of construction activities by the complainant.

4. The respondent served as the general contractor for construction in this neighborhood, and on the date of the inspection was not providing any of the actual construction. On Lot 137, the respondent had contracted with Sandy Sierra dba Sandy Sierra Construction, but its subcontractor Francisco Hernandez dba Hernandez Framing was performing work. On Lot 47, the respondent had contracted with Jones Construction Services, but its subcontractor Nancy Gomez dba Portillo Gomez Siding Services was performing work. On Lot 51, the respondent had contracted with Sandy Sierra dba Sandy Sierra Construction, but its subcontractor Davililla Framing Inc. was performing work.

5. All of the work being performed that day was outdoor and on the side of the lots facing Wrangell Loop and was visible from Wrangell Loop.

6. Sometime around 10:00 in the morning on May 22, 2018, three Compliance Safety and Health Officers drove into the Parkmont subdivision and noticed that construction was on going. These three officers were Jill Warren, Grant Quiller and Brian Kemppainen and were all in the same vehicle. They parked on Wrangell Loop and observed the construction taking place on Lots 137, 47, and 51. They moved their vehicle one time on Wrangell Loop in order to be closer to the construction taking place on these lots.

7. These officers took a number of photographs of the construction taking place on each of the lots identified above.

8. On Lot 137, the compliance officers saw employees of Hernandez Framing framing the first floor of a house. These employees were exposed to hazards relating to lack of fall protection while exposed to fall hazards exceeding six feet, lack of eye protection while utilizing pneumatic nail guns, lack of head protection while setting a header overhead and using a portable A-frame and other ladders while standing on the top step and standing on the top rung of a multi-positional ladder.

9. On Lot 51, the compliance officers saw employees of Davililla Framing performing framing work on the second-floor level of a house. These employees were exposed to hazards relating to lack of fall protection while exposed to fall hazards exceeding six feet near the edge of the structure and also near the open stairwell of the structure, lack of eye protection while using pneumatic nail guns and using a ladder to access the second story that was not three feet above the upper landing surface.

10. On Lot 47, the compliance officers saw an employee of Portillo Gomez Siding Services performing siding work on the porch awning of the house. This employee was exposed to hazards relating to lack of fall protection while exposed to fall hazards exceeding six feet, also using a portable A-frame ladder for a purpose other than the purpose for which it was designed by standing on it in the closed position leaning against the side of the structure while installing siding and using a non-self-supporting extension ladder to perform siding work on the 22nd rung that was positioned at an angle that created a fall hazard.

11. As the officers were observing these conditions and taking their pictures, John Riggins, respondent's Construction Manager/Superintendent, was observed walking down Wrangell Loop toward Lots 137, 47 and 51. At the time the officers were not aware of who Mr. Riggins was, but subsequently learned who he was and his position with the respondent. Mr. Riggins was observed walking on Wrangell Loop for about 14 minutes until he got in his car which was parked in front of Lot 50, between Lots 47 and 51. Mr. Riggins walked by both Lots 137 and 47 on his way to his car. Lot 51 is adjacent to Lot 50 and visible from where his car was parked.

12. During the period of time Mr. Riggins was walking along Wrangell Loop, the above construction activities were taking place on Lots 137, 47 and 51. The houses being constructed on those lots are close to the street such that the activities were clearly visible to the naked eye from the street. From the photographs admitted in to evidence, Wrangell Loop is an average size subdivision two-lane street and the lots are not big or wide. Part of Mr. Riggins' duties as Construction Manager/Superintendent involved overall safety on the job site in Parkmont, including safety of the employees of subcontractors working on respondent's houses, under the Multi-Employer Worksites Policy.

13. Mr. Riggins did not testify at the hearing. However, he submitted a statement that was allowed in to evidence. In this statement he indicated that he has worked for the respondent for 15 years and has 30 years in the construction industry. He has an OSHA 10 certification and has conducted and attended tool box talks and other safety meetings. He states that on the day of the inspection he was involved with a closing walk with a new homeowner and dealing with issues arising from that. He states that he did not see any of the violations of the OSHA standards occurring on Lots 137, 47 and 51 that day or during his walk down Wrangell Loop that morning to his car.

14. Most of the violations occurring on those lots are ones that could be seen and recognized as violations from a basic knowledge of OSHA standards, if one were simply paying attention to the construction going on that morning along Wrangell Loop. Mr. Riggins may not have seen the violations, but given the duties of his job with respondent, he should have seen them and recognized the violations from his OSHA training, during his walk down Wrangell Loop. Therefore, whether the pictures taken by the officers used a zoom lens and were not exactly from Mr. Riggins' perspective does not matter.

15. There was undisputed evidence that the respondent emphasizes safety on its jobsites and that it has a good safety record. Its contracts with its subcontractors require safety on the job and there was evidence that it conducts safety inspections in its subdivisions and that it takes punitive action against its subcontractors for violations of safety policies and contracts. Under the Multi-Employer Worksites Policy, respondent is considered a controlling employer in this subdivision and is only required to exercise reasonable care in identifying workplace safety violations by its subcontractors. Here, the violations occurred during a time when respondent's responsible employee was in a position to personally observe them if he had just looked at the construction going on under his nose. The respondent's position that the three compliance officers had the responsibility to stop the work not in compliance with OSHA standards, immediately upon observing it, is not supported by the case law, particularly since all violations were abated before the compliance

officers completed the inspection. It was Mr. Riggins' responsibility, since he was on the scene, to see work being performed contrary to OSHA standards and to correct it.

16. The respondent does not deny that the violations cited in the citation and its individual items occurred as the complainant has alleged. The respondent denies that it is responsible for any and all of the items.

17. All of the citation items were abated on the scene during the inspection. All of the citation items were classified as serious because the hazards identified created the possibility of an accident, the substantial probability of which could be death or serious bodily injury.

18. All penalties were computed in accordance with the North Carolina Field Operations Manual.

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

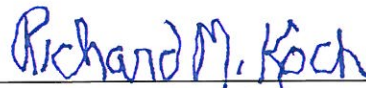
CONCLUSIONS OF LAW

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 respondent violated the provisions of 29 CFR 1926.100(a), as alleged in Citation No. 1, Item 1, and such violation was a serious violation of the standard.
4. The respondent violated the provisions of 29 CFR 1926.102(a)(1), as alleged in Citation No. 1, Item 2, and such violations were serious violations of the standard.
5. The respondent violated the provisions of 29 CFR 1926.501(b)(13), as alleged in Citation No. 1, Item 3, and such violations were serious violations of the standard.
6. The respondent violated the provisions of 29 CFR 1926.1053(b)(1), as alleged in Citation No. 1, Item 4, and such violation was a serious violation of the standard.
7. The respondent violated the provisions of 29 CFR 1926.1053(b)(4), as alleged in Citation No. 1, Item 5, and such violation was a serious violation of the standard.
8. The respondent violated the provisions of 29 CFR 1926.1053(b)(5)(i), as alleged in Citation No. 1, Item 6, and such violation was a serious violation of the standard.
9. The respondent violated the provisions of 29 CFR 1926.1053(b)(13), as alleged in Citation No. 1, Item 7, and such violations were serious violations of the standard.

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

1. The respondent has violated the provisions of 29 CFR 1926.100(a), which violation is affirmed as a serious violation of the standard, with a penalty of \$4,500.00.
2. The respondent has violated the provisions of 29 CFR 1926.102(a)(1), which violation is affirmed as a serious violation of the standard, with a penalty of \$4,500.00.
3. The respondent has violated the provisions of 29 CFR 1926.501(b)(13), which violation is affirmed as a serious violation of the standard, with a penalty of \$7,000.00.
4. The respondent has violated the provisions of 29 CFR 1926.1053(b)(1), which violation is affirmed as a serious violation of the standard, with a penalty of \$7,000.00.
5. The respondent has violated the provisions of 29 CFR 1926.1053(b)(4), which violation is affirmed as a serious violation of the standard, with a penalty of \$4,500.00.
6. The respondent has violated the provisions of 29 CFR 1926.1053(b)(5)(i), which violation is affirmed as a serious violation of the standard, with a penalty of \$4,500.00.
7. The respondent has violated the provisions of 29 CFR 1926.1053(b)(13), which violation is affirmed as a serious violation of the standard, with a penalty of \$1,350.00.
8. The respondent shall pay the total penalties of \$33,350.00 within ten (10) days of the filing date of this Order.
9. All violations not previously abated shall be immediately abated.

This 4th day of November, 2020.



RICHARD M. KOCH
HEARING EXAMINER

Lennar Carolina Exhibits

Complainant's

1-3

4 a-c

5 a-c

6-1 a-h

6-2 i-p

7-1 a-g

7-2 h-o

7-3 t-u

7-4 b-z

7-5 aa-ee

7-6 ff- kk

7-7 ll-qq

7-8 7-11

8-9

10-1 a-e

10-2 f-j

10-3 k-o

10-4

10-5 u-z

10- 6 aa-ee

10-7 ff-kk

11 a- 11b

12-15

Respondent's

1-8

11-12

39

CERTIFICATE OF SERVICE

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

JULIE A. PACE
DAVID A. SELDEN
GAMMAGE & BURNHAM, PLC
40 NORTH CENTRAL AVE 20TH FLOOR
PHOENIX, AZ 85004

by depositing same in the United States Mail, First Class postage prepaid at Raleigh, North Carolina, and upon:

SAGE BOYD
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 10 DAY OF November 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

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THIS THE _____ DAY OF _____ 2020.

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