

**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.)
)
LENNAR CAROLINAS, LLC)
and its successors,)
)
RESPONDENT.)

MAY - 8 2022

ORDER *NC Occupational & Safety
Health Commission*

OSHANC NO: 2019-6084
INSPECTION NO.: 318148079
CSHO ID: D1115

This matter was duly noticed and came on for hearing before the undersigned on March 24 and 25, 2022, via the Lifesize video platform. The Commissioner of Labor of the State of North Carolina (“Complainant”) was represented by Assistant Attorney General Sage Boyd, and Lennar Carolinas, LLC (“Respondent”) was represented by David Selden of Messner Reeves LLP in Phoenix, AZ.

Prior to hearing the parties stipulated to the facts set out on Appendix A, attached, which are incorporated herein by reference.

At the hearing the following Exhibits were admitted: Complainant’s Exhibits 1, 2, 3.1-3.3, 3.4-3.7, 3.8-3.12, 3.13-3.21, 3.22-3.32, 3.33-3.52, 4.4-4.17, 5, 6; and Respondent’s Exhibits 1-6, 10-12, 21-23, 26, and 30. Additionally, Respondent’s Exhibits 7 and 29 were admitted for illustrative purposes, and the first two pages of Respondent’s Exhibit 24 (submitted pursuant to Pre-Hearing Order) were admitted as Respondent’s Exhibit 24A.

During the hearing, the following witnesses testified under oath: Carl Burgette, N.C. OSH Compliance Safety and Health Officer; Shawn Bilsza, Respondent’s former Construction Manager; Sergio Flores, owner of S Flores Construction, Inc.; Angel Ortiz, owner of Mike’s Framing; and Steve Hampson, Respondent’s Area Construction Manager.

After considering the parties’ stipulations, the exhibits admitted during the hearing, the testimony of witnesses, judicially noticed information pursuant to N.C.Gen.Stat. §8C-1-201, the arguments of the parties and the applicable law, the undersigned makes the following:

Findings of Fact:

1. This case was initiated by Respondent’s Notice of Contest challenging a serious citation issued by the Complainant on December 18, 2018 to enforce the Occupational Safety and Health Act of North Carolina, N.C.Gen.Stat. § 95-126 *et seq.* (“the Act”).
2. The Complainant is responsible for enforcing the Act.

3. Respondent is a Delaware limited liability company and has been authorized to do business in North Carolina since July 2005. Respondent is active and current and maintains a place of business in North Carolina.

4. Respondent is a person engaged in the business of residential construction and has employees.

5. Respondent is an employer within the meaning of N.C.Gen.Stat. § 95-127(9), and is subject to the provisions of the Act.

6. In October 2018 Respondent was the general contractor building new single-family homes in the Ladera subdivision in Waxhaw, N.C. ("Ladera"), in Union County.

7. In October 2018 Union County was a county included in the Complainant's Special Emphasis Program for Construction Activities, pursuant to North Carolina Department of Labor, OSH Division, Operational Procedure Notice 123T.

8. In October 2018 Ladera was a multi-employer worksite within the meaning of N.C. Department of Labor, OSH Division CPL 2-01.124 (3/16/2000) (multi-employer citation policy).

9. On October 17, 2018, Respondent was in the process of constructing multi-story homes in Ladera.

10. Sometime prior to October 17, 2018, Respondent contracted with Mike's Framing, Inc. ("Mike's Framing") to perform the framing work on the multi-story home built on Lot 2 of Ladera, 1008 Ladera Drive. In turn, Mike's Framing subcontracted the work to S. Flores Construction ("Flores").

11. Respondent had a written contract with Mike's Framing that, among other things, required Mike's Framing to maintain competent and sufficient supervision on the job site when its work was being performed, enforce strict discipline and good order, immediately remove any worker Respondent deemed unfit, and comply with OSHA requirements. However, Respondent retained the authority to stop the work and remedy the unsafe condition or require Mike's Framing to correct the unsafe condition or assess safety violation penalties of up to \$200 for each violation of jobsite safety rules or governmental safety laws/regulations.

12. Respondent had general supervisory authority over the construction work performed in Ladera, and more particularly on Lot 2 of Ladera, including the authority to stop work and correct safety and health violations or require that its subcontractors correct them.

13. The Respondent was a controlling employer as well as a correcting employer under the Complainant's multi-employer worksite policy, CPL 2-01.124.

14. In October 2018 the Respondent's Construction Manager (CM) at Ladera was Shawn Bilsza, who oversaw construction on approximately twelve lots including Lot 2. At the time of this inspection Mr. Bilsza had worked for Respondent or its predecessor for approximately five years, had approximately sixteen years of experience in construction, and in

2014 completed OSHA's 10-hour Occupational Safety and Health Training Course in Construction Safety and Health.

15. At approximately 11:05am on October 17, 2018, the Complainant's Compliance Safety and Health Officer (CSHO) Carl Burgette was driving his vehicle on a public right of way (New Town Road) in Waxhaw, N.C., with CSHO Chris Ray, when Mr. Burgette saw multiple employees working on the upper level of a construction on Ledara Drive, apparently without guardrails, safety nets or personal fall arrest systems ("fall protection"). Mr. Burgette turned onto Ledara Drive to investigate further, later identifying Lot 2 as the location of the construction.

16. CSHO Burgette parked his vehicle at various locations along the curb of Ledara Drive, and he or Mr. Ray took multiple photos of the worksite on Lot 2 and the employees working on that construction.

17. The home under construction on Lot 2 was a 5,000+ sq. ft., T-shaped multi-story home, with the top of the "T" comprising the main house with a single garage on the north end (opening to the east) and the base of the "T" comprising a double garage (opening to the north).

18. From vantage points at the curb of Lots 1, 2 and 3 of Ledara Drive a person could easily see – without the aid of zoom lenses or binoculars – that the height of the structure on Lot 2 was greater than six feet, and four employees were working on the upper level of the structure without fall protection.

19. There was no floor decking on the upper level of the structure where these four employees were setting joists/trusses or beams for the second floor of the structure, so that the area was open from the concrete floor to the sky except where they had already placed joists/trusses or beams.

20. The employees working on the upper level of the construction on Lot 2 were employed by Flores, Respondent's second-tier framing subcontractor.

21. CSHO Burgette's photographs establish that the workers on the upper level of the structure were working in two groups, with two employees working on the top of the "T" on the north end of the structure, and two employees working where the top of the "T" joined the base of the "T."

22. More particularly, CSHO Burgette's testimony and photographs establish that on October 17, 2018:

- a. from 11:07am to 11:28am two employees ("Black Shirt" and "Gray Shirt") appeared to be standing on the top plates of the east, west and north walls of the structure as they worked from south to north, placing joists oriented east/west along the top of the "T;"
- b. from 11:07am to 11:23am two employees ("Red Shirt" and "Blue Shirt") appeared to be standing on the top plates of the structure as they placed a beam (oriented north/south) where the top of the "T" joined the base of the "T;"

- c. from 11:26am to 11:28am Red Shirt and Blue Shirt placed a joist (oriented north/south) along the base of the “T” over the double garage, with Red Shirt clearly standing on the top plate of the north wall of the structure, and Blue Shirt standing on the top plate of the south wall of the structure;
- d. between 11:28am and 12:15am workers placed at least two more joists over the double garage.¹

23. CSHO Burgette’s testimony and photographs further establish that from 11:07am to 11:15am on October 17, 2018, CM Bilsza was standing and walking on the front “porch” of the construction (south of where Blue Shirt and Red Shirt were working), entering information and updating construction schedules on an electronic tablet device he was holding in one hand.

24. The south wall of the double garage was approximately 11 feet high, and an employee standing on the top plate of that wall would have been visible to a person on the front porch of the construction, where CM Bilsza was located from 11:07am to 11:15am.

25. CSHO Burgette’s testimony and photographs establish that at 11:28am CM Bilsza was walking south, away from the construction on Lot 2.

26. There is no evidence establishing CM Bilsza’s location or activities from 11:16am to 11:28am or, more importantly, during the approximately two-minute period from 11:26-11:28am when Blue Shirt was standing on the top plate of the south wall of the double garage.

27. CM Bilsza testified that prior to CSHO Burgette’s first photograph at 11:07am, he had walked through the interior of the construction on Lot 2 and observed the employees wearing hardhats and properly using ladders (no one higher than the last two rungs) to set the structure’s beams or joists/trusses, the employees were not up on the upper level of the structure, their equipment was in good working order, and the site was relatively clean without objects where they would be walking and could trip over. This testimony is credible because CSHO Burgette’s subsequent photographs show the workers wearing hard hats, a relatively uncluttered worksite, the Citation implicitly confirms the presence of adequate ladders to abate the condition, and CSHO Burgette admitted that at the time of his inspection the ladders were set up in a way that the workers could have been working off the ladders to set the joists/trusses.

28. When CSHO Burgette saw CM Bilsza walking away from Lot 2 without taking any corrective action, he called his supervisor to obtain permission to open an inspection. After obtaining permission, he got out of his vehicle, approached Mr. Bilsza, introduced himself, presented his credentials, and explained why he was there.

29. After determining that Respondent maintained an adequate and effective safety and health program/plan and that CM Bilsza was the designated competent person responsible and capable of implementing Respondent’s program throughout the jobsite, CSHO Burgette conducted a focused inspection pursuant to OPN 96F, limiting his inspection to fall hazards, electrical hazards, caught in/between hazards, struck by hazards, and any other “plain view”

¹ Cf. Complainant’s Exh. 3.51 and 4.13. There is no evidence that Red Shirt or Blue Shirt placed these joists, or that they were standing on the top plates of the structure when they did so.

hazards brought to his attention during the inspection.

30. CSHO Burgette obtained Mr. Bilsza's consent to enter the worksite, where he took measurements and additional photographs establishing that the upper level of the construction did not have floor decking, and the distance from the top plates where the workers were standing to the concrete floor below was more than 13 feet.

31. During CSHO Burgette's inspection the hazard was abated by the workers getting off the upper level of the construction and using ladders to install the joists/trusses.

32. During his inspection, the employees told CSHO Burgette that they had been "working on the structure more than an hour," but there is no evidence of their start time or end time, which would have included an unknown period of time before 11:07am when they were not on the upper level of the structure (per Mr. Bilsza's testimony) as well as an unknown period of time after 11:28am (Mr. Burgette's last pre-walkthrough photo) when they may or may not have been on the upper level of the structure.

33. CSHO Burgette testified that CM Bilsza could/should have seen the workers on the upper level of the construction because the lack of floor decking made it possible to see anyone working on the upper level as they walked through the double garage (as Mr. Bilsza indicated he had done). However, Mr. Burgette admitted he did not know, and had no evidence, that the workers were on the upper level of the structure when Mr. Bilsza did his walkthrough and, as stated above, Mr. Bilsza testified that the workers were properly using the ladders when he inspected.

34. One of CSHO Burgette's photographs (Complainant Exh. 3.12) establishes that at 11:10am Red Shirt was standing on the top plate of the north wall of the double garage when he opened a bottle of soda, and that CM Bilsza was standing on the front porch and looking in that direction when Red Shirt did so. However, Mr. Bilsza testified that at that time he was not looking at the workers or at the top of the south wall of the double garage, other photographs establish that Red Shirt, Black Shirt and Gray Shirt would not have been visible from CM Bilsza's vantage point on the front porch,² and the evidence is inconclusive as to the visibility of Blue Shirt at that time from that vantage point.³ Moreover, there is no evidence that Mr. Bilsza heard the sound of the bottle being opened, or that the sound should have alerted him to the presence of the workers on the upper level of the construction, or of a need to investigate.

35. As a result of the October 17, 2018 inspection, on December 18, 2018, the Complainant issued one citation to Respondent, asserting a serious violation of 29 C.F.R. § 1926.501(b)(13) ("Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system...."), and alleging "four subcontractor employees were working on a newly constructed two-story residential structure without fall protection, exposing them to a fall hazard

² See, e.g., Complainant Exhs. 3.4, 3.5, 3.7.

³ The Complainant offered no evidence regarding the distance from Mr. Bilsza's various vantage points to the south wall of the double garage, nor are there any photographs or measurements showing Blue Shirt's precise location vis-à-vis the edge of the south wall. Similarly, there are no photographs taken from Mr. Bilsza's various locations on the porch to the top of the south wall, so that one could assess whether any worker would have been visible.

of approximately thirteen (13) feet four (4) inches onto a solid service.”

Actual or Constructive Knowledge of Respondent

1. While the actions of these employees were extremely dangerous and an obvious violation of OSH standards, there is no evidence that CM Bilsza had actual knowledge of the violation.

2. Additionally, the evidence does not establish that the violative conditions on Lot 2 were open and obvious from the vantage point of CM Bilsza.

3. With respect to Respondent’s reasonable diligence in preventing or detecting the violative conditions, Respondent presented evidence establishing:

- a. Respondent implemented an extensive Injury & Illness Prevention Program, which among other things emphasized the duty of each of Respondent’s employees to identify and immediately correct safety issues, including OSH violations;
- b. Respondent required its subcontractors to comply with OSH requirements and to implement safety programs and training;
- c. As part of his duties, CM Bilsza walked through each construction site each day and noted the status of the site, as well as any safety violations he observed.
- d. From August 31 to October 12, 2018, CM Bilsza documented five such inspections (October 31, September 21, September 28, October 5, and October 12, 2018), during which he noted only two safety violations: August 31 (Lot 42 painter was not wearing hardhat and scaffold was not set up properly) and October 5 (Lot 58 framers had trash/lumber on the ground);
- e. Respondent’s first-tier subcontractor, Mike’s Framing, had a written Safety Program that prohibited working on top plates and required the use of body harnesses when installing trusses;
- f. Respondent’s first-tier subcontractor, Mike’s Framing, conducted safety meetings on May 18, 2018 (inspection and maintenance of body harnesses), May 25, 2018 (Mike’s Framing’s fall protection program review), June 15, 2018 (PPE), July 20, 2018 (review of Mike’s Framing’s safety manual), August 17, 2018 (reduction of falls during installation of roof trusses), September 21, 2018 (reduction of falls from ladders and scaffolding), October 19, 2018 (Mike’s Framing’s safety program), November 16, 2018 (reduction of falls during installation of floor truss/joists), and December 14, 2018 (reduction of falls during installation of roof cladding). During these safety meetings Mike’s Framing handed out written materials – many in Spanish, and with illustrations – which addressed important safety issues common to framing companies, including fall protection.

- g. Sergio Flores, the owner of Respondent's second-tier subcontractor, Flores, attended each of Mike's Framing's safety meetings, along with multiple employees of Mike's Framing and other entities.
- h. Respondent's second-tier subcontractor, Flores, had a written Safety Plan that prohibited walking on top plates, and required the use of body harnesses when installing trusses, and Sergio Flores testified that Flores' workers were trained that the correct way to set floor joists/trusses for a second floor was to use ladders, but that if he was not there they might do this work from the top plates but then were required to use a harness for fall protection.

Discussion

North Carolina employers are liable for serious violations of the Act unless they did not, and could not with the exercise of reasonable diligence, know of the presence of the violation, N.C.Gen.Stat. § 95-127(18). To establish a violation of a specific OSHA standard, Complainant must establish by a preponderance of the evidence that: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation. *Commissioner of Labor v. Eastwood Constr., LLC*, No. OSHANC 2019-6162, Slip Op. (12/20/21); *Commissioner of Labor v. Liggett Group*, No. OSHANC 94-3175, Slip Op. (11/1/96). See also *JPC Group, Inc.*, OSHRC Doc. 05-1907, 2009 OSAHRC LEXIS 44 at *6 (8/11/09).

North Carolina has adopted the multi-employer doctrine for analyzing employer liability on construction worksites like Ladera. *Commissioner of Labor v. Weekley Homes*, 169 N.C.App. 17, 28 (2005). Under that doctrine, a controlling employer is liable for violations created by a subcontractor if the controlling employer had actual or constructive knowledge of the violation. Constructive knowledge may be shown by evidence that the violative conditions were open and obvious or that the employer failed to exercise reasonable diligence in preventing or detecting the violative conditions. *In re NDC Constr. Co.*, OSHRC Docket No. 17-1689, 2020 OSAHRC LEXIS 24, *93 (Sep. 4, 2020) (citing *ComTran Group v. United States DOL*, 722 F.3d 1304, 1307-08 (11th Cir. 2013); *Hamilton Fixture*, No. 88-1720, 1993 OSAHRC LEXIS 53, *57 (4/20/93), *aff'd on other grounds*, 28 F.3d 1213 (6th Cir. 1994)). See also *Commissioner of Labor v. Meritage Homes of the Carolinas, Inc.*, OSHANC 2018-5995, Slip Op. at p. 4 (6/10/21) (citing *Allred v. Cap. Area Soccer League, Inc.*, 194 N.C.App. 280, 288 (2008) (party has constructive knowledge of a danger if it is so open and obvious that it should have been known)).

However, the controlling employer's duty is one of reasonableness and not strict liability. This Review Commission has previously recognized that a general contractor cannot anticipate all hazards which others may create as the work progresses and is not required to constantly inspect the jobsite to detect violations created by others. Instead, the controlling employer must make *reasonable* efforts to anticipate hazards to subcontractors' employees and to inspect the jobsite to detect violations that its subcontractors may create. *Commissioner of Labor vs. Sears Contract, Inc.*, No. OSHANC 2020-6343, Slip Op. at p. 8 (10/18/2021) (citing *Commissioner of Labor v. Romeo Guest Assocs., Inc.*, OSHANC 96-3513, Slip Op. at 6-7 (RB 1998)).

The violative conditions in this case were open and obvious from vantage points in the interior of the construction beneath the workers, from the north side of the property, and from the curb on the east side of the property. There is no evidence that CM Bilsza was in any of these locations when these workers were on the upper level of the construction. Additionally, the violative condition was open and obvious from the vantage point of the front porch for approximately two minutes (11:26am-11:28am), but there is no evidence of CM Bilsza's location during that time.⁴ Thus, this case comes down to whether "reasonable diligence" required CM Bilsza to check (again) for safety violations by walking around the property to its north side, or out to the curb, or re-entering the property at some point during the short period⁵ that he remained on Lot 2 after his initial inspection. The undersigned thinks not, particularly as CM Bilsza had just observed the workers complying with applicable safety requirements (hardhats, clean work environment, tools in good condition, properly using ladders), and there was no evidence that this crew had previously violated safety – including fall protection -- requirements.

Moreover, the evidence establishes that the Respondent had an extensive safety program, it had trained its personnel to observe and correct safety hazards, it made clear to its subcontractors that it expected compliance with OSH safety requirements, it regularly performed safety inspections and had just performed an inspection of this construction and this crew, it had previously corrected subcontractors for safety violations, and its subcontractors also had safety programs including requiring the use of fall protection and providing training on fall protection.

Based on the foregoing, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The foregoing is incorporated 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 and the standards promulgated thereunder.
3. The Complainant has proved by a preponderance of the evidence that 29 C.F.R. § 1926.501(b)(13) applied to the construction on Lot 2, that the standard was violated, that four employees of Respondent's second tier subcontractor were exposed to the hazard covered by the standard, and that the violation was serious.
4. However, the Complainant has failed to prove by a preponderance of the evidence that the Respondent had actual knowledge of the violation, or that the Respondent had constructive knowledge because the violative condition was open and obvious from the vantage

⁴ Arguably, the violative condition would also have been open and obvious from the porch from 11:28 until 11:40 (when the opening conference began), if there was evidence that the workers continued to work on the upper level after 11:28 (there isn't), but by then CM Bilsza was no longer on the porch: at 11:28am he was walking away from Lot 2 to inspect Lot 3, and there is no evidence that the violative condition would have been visible to him along that path, had he turned around and looked.

⁵ We don't know how long this period was because there was no evidence regarding the time of CM Bilsza's initial inspection. We only know that Mr. Bilsza was on the front porch from 11:07am-11:15am, and he was photographed walking away from the construction at 11:28am.

point of CM Bilsza or because the Respondent did not exercise reasonable diligence in preventing or detecting the violative condition.

DECISION

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that the Complainant's Citation alleging violation of 29 C.F.R. § 1926.501(b)(13) in this matter is **DISMISSED**.

This the 28th day of April, 2022.



Digitally signed by Laura J Wetsch
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Laura J. Wetsch
Hearing Examiner
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APPENDIX A - JOINT STIPULATIONS:

The Complainant and Respondent have stipulated to the following:

1. Respondent, Lennar Carolinas, LLC, is an active and current Delaware limited liability company that maintains a registered agent address in Charlotte, North Carolina.
2. Respondent is engaged in the construction business.
3. Specifically, Respondent is in the business of residential construction and was the general contractor involved in this case.
4. Respondent was the general contractor at the site involved in building new single-family homes in a subdivision called Ladera subdivision.
5. Respondent was the general contractor at 1008 Ladera Drive, Lot 2 in Waxhaw, North Carolina.
6. On October 17, 2018, Mr. Carl Burgette, a Compliance Safety and Health Officer, employed by the North Carolina Department of Labor (NCDOL) Occupational Safety and Health (OSH) Division, and Mr. Chris Ray, a Compliance Safety and Health Officer in training, also employed by the NCDOL OSH Division, conducted an inspection of Respondent's worksite located at 1008 Ladera Drive, Lot 2 in Waxhaw, North Carolina.
7. Respondent contracted with Mike's Framing, Inc. (first tier framing subcontractor) to perform framing activities on the residential structure at the site.
8. Mike's Framing, Inc. (first tier framing subcontractor) contracted with S Flores Construction, Inc. (second tier framing subcontractor) to perform framing activities on the residential structure at the site.
9. The worksite was a multi-employer work-site.
10. As a result of the inspection, one Serious citation was issued to Respondent on December 18, 2018.
11. **Citation Number One, Item 1** alleged one instance of serious violations of 29 CFR 1926.501(b)(13).
12. 29 CFR 1926.501(b)(13) requires that:

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.
13. The citation carried a proposed penalty of \$7,000.00.

14. The citation was classified as Serious.
15. The date by which the violation must be abated was listed as “corrected during the inspection”.

CERTIFICATE OF SERVICE

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

JULIE PACE
DAVID SELDEN
MESSNER REEVES, LLP
7250 N. 16TH ST.
SUITE 410
PHOENIX, AZ 85020

DENIS JACOBSON
TUGGLE DUGGINS, P.A.
100 N. GREEN ST
SUITE 600
GRENSBORO, NC 27401

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

SAGE BOYD
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

via email to carla.rose@labor.nc.gov.

THIS THE 2 DAY OF May 2022.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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