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

MAR 11 2022

*NC Occupational & Safety
Health Commission*

**COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA**

Complainant,

v.

**WARCO CONSTRUCTION, INC.
and its successors**

Respondent.

DOCKET NO: 2019 - 6094

INSPECTION NO: 318144169

CSHO ID: # K2192

DECISION AND ORDER

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on March 9, 2022 pursuant to a Notice of Hearing. Rory Agan, Assistant Attorney General, North Carolina Department of Justice, appeared for Complainant. Greg C Ahlum, Attorney with Johnston Allison & Hord, P.A., Charlotte, North Carolina, appeared for the Respondent.

At the commence of the Hearing Mr. Agan gave notice that Complainant was withdrawing Citation 01 Item 001 [alleged violation of NCGS 95-129(1)] and would proceed to Hearing on Citation 01 Item 002 [alleged violation of 29 CFR 1926.21(b)(2)] and Citation 02 Item 001 [alleged violation of 29 CFR 1904.39(a)(2)]. NC Commission Rule .0401 provides that Complainant may withdraw a citation “[a]t any stage of a proceeding”. The withdraw is self-effectuating and terminates the matter with respect to the withdrawn citation. Accordingly, for purposes of brevity and clarity the portion of Citation 01 related to Item 001 is not included and no further reference or discussion pertaining to Citation 01 Item 001 shall be included in this Decision and Order.

At the Hearing Complainant called the following witnesses: Compliance Safety and Health Officer Peggy Reme (“CSHO Reme”) and Compliance Safety and Health Officer Griselle Negron (“CSHO Negron”). Witnesses called by Respondent were Hans Warren, President of Respondent, Dwight Dawson, former employee/laborer of Respondent, and Bill Morrissey, Superintendent of Respondent.

The Citations (Collectively referred to herein as the "Original Citation")

The following citations issued by Complainant to Respondent are the subject of this evidentiary Hearing:

Citation 01 --- Type of Violation: Serious

Item Number	Standard	Abatement Date	Penalty
002	29 CFR 1926.21(b)(2)	Immediately Upon Receipt	\$ 5,600.00

Citation 02 --- Type of Violation: NonSerious

Item Number	Standard	Abatement Date	Penalty
001	29 CFR 1904.39(a)(2)	Corrected During Inspection	\$ 3,000.00

Citation 01 Item 002

Complainant alleged a violation of the Occupational Safety and Health Act of North Carolina in Citation 01, Item 002 as follows:

Citation 01 Item 002 Type of Violation: Serious

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to their work environment to control or eliminate any hazards or other exposure to illness or injury:

a) job site, where a laborer under direct supervision a Warco foreman was assigned to use a Makita ½ inch spade handle drill (Model DS4012, SN 51131A) with a mixing paddle attachment and was not instructed in the recognition and avoidance of unsafe conditions associated with the use of the equipment. On or about July 28, 2018, the employee was seriously injured when his glove became caught in the rotating shaft.

Date By Which Violation Must Be Abated: Immediately Upon Receipt
 Proposed Penalty: \$5,600.00

Complainant alleged a violation of the Occupational Safety and Health Act of North Carolina in Citation 02, Item 001 as follows:

Citation 02 Item 001 Type of Violation: NonSerious

29 CFR 1904.39(a)(2): The employer did not report to OSHA within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident.

a) job site, where a laborer under the direct supervision of a Warco foreman suffered an amputation injury on July 28, 2018 and the injury was not reported to OSHA until August 3, 2018.

Date By Which Violation Must Be Abated: Corrected During Inspection
Proposed Penalty: \$3,000.00

The Standards

29 CFR 1926.21(b)(2) specifically provides the following:

“(b) Employer responsibility.

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.”

29 CFR 1904.39(a)(2) specifically provides the following:

“(a) Basic requirement.

(2) Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.”

Summary Background

The matter arises from an amputation accident which occurred during construction of a commercial building located in Charlotte, North Carolina (the “Project”). The Project was a

multi-employer worksite: Edifice, Inc. (“Edifice”) was the general contractor; Warco Construction, Inc. (Respondent or “Warco”) was the first tier subcontractor; and Men in Motion, Inc. (“Men in Motion”) was the second tier subcontractor. Respondent’s scope of work included providing fireproofing and apply spray fireproofing material; Men in Motion was a fireproofing and drywall subcontractor. Both Respondent and Men in Motion provided laborers for the installation/spraying of fireproofing material.

On Saturday July 28, 2018 an employee of Men in Motion sustained an amputation of portions of two fingers when he got his glove and hand caught in the shaft of a power drill with a mixing paddle attachment.

On August 3, 2018 Men in Motion notified NC OSHA of the accident. On August 7, 2018 CSHO Reme contacted Men in Motion, and on August 8, 2018 CSHO Reme conducted an opening conference with Edifice and Respondent initiating the inspection (the “Inspection”). The Inspection was a partial inspection limited to the accident and any hazards that existed in plain view.

Based on the Stipulations at the time of the Hearing, and on the testimony/evidence presented at the Hearing and considering the record and the briefs/memoranda of the parties, and applicable law, the Undersigned makes the following Findings of Fact and Conclusions of Law hereinafter set forth.

Stipulations

At the time of the Hearing the parties agreed upon and consented to the following factual Stipulations, a copy of which was designated as Court Exhibit 1:

1. This OSHA matter stems from an accident that occurred on Saturday July 28, 2018 during construction of a new five-story commercial building containing approximately 300,000 square feet and located at 1213 W. Morehead Street in Charlotte, North Carolina (“Project”).
2. Edifice, Inc. was the general contractor for the Project and controlled the jobsite.
3. Edifice had four (4) employees present on the Project site including one (1) safety director, one (1) project superintendent and two (2) project managers. These employees oversaw, supervised and controlled the Project, the jobsite and the subcontractors working thereon.
4. Respondent Warco was a first-tier subcontractor for Edifice on the Project. Warco’s scope of work included providing fireproofing and applying spray fireproofing material.
5. On the day of the accident, Saturday July 28, 2018, Warco only had two (2) employees on site. One employee was Mr. Jeff Mills, a senior laborer and sprayer of the fireproofing material, and the other employee was Dwight Dawson, a laborer and sprayer of the fireproof material. Other than Mr. Mills and Mr. Dawson, no other Warco employees were on the Project site the day of the accident, including Warco’s project manager, Bill Morrissey.

6. Men in Motion was a second-tier subcontractor on the Project. Men in Motion is a fireproofing and drywall subcontractor. Men in Motion had a written master subcontract with Warco to perform fireproofing work on the Project. At the time of the accident, Men in Motion had a total of only ten (10) employees company-wide, including office and administrative personnel.

7. During the day of the accident, Saturday July 28, 2018, Men in Motion had one employee working at the Project, Mr. Juan Santos. Men in Motion did not have its supervisor onsite that day.

8. Likewise, Warco did not have its project manager onsite Saturday July 28, 2018, the day the accident occurred.

9. Mr. Santos was an employee of Men in Motion. Mr. Santos considered himself an employee of Men in Motion.

10. Mr. Santos' work on the Project as an employee of Men in Motion was limited to two (2) days -- Friday July 27, 2018 and Saturday July 28, 2018.

11. Men in Motion purchased and supplied to Mr. Santos personal protective equipment including hardhat, safety glasses and work gloves.

12. Men in Motion also provided both general and specific safety training to Mr. Santos.

13. Among other things, Men in Motion provided Mr. Santos with general job safety training and also required Mr. Santos to watch safety training videos in Spanish.

14. Men in Motion also provided Mr. Santos with specific safety training for fireproofing and drywall work including how to properly use a hand-held power drill with a mixing attachment. The training Men in Motion provided Mr. Santos with regard to power drills with mixing attachments was provided using a DeWalt handheld drill prior to Mr. Santos being assigned by Men in Motion to work on the Project.

15. Mr. Santos was first assigned and sent to the Project by Men in Motion on Friday July 27, 2018. During his first day on the Project and prior to performing any work, Warco's project manager, Bill Morrissey, specifically instructed Mr. Santos on the use of a power drill with mixing attachment. The power drill on site was a handheld Mikata drill. The initial onsite instruction, safety training and demonstration by Warco lasted approximately fifteen (15) minutes. During this instruction session, Warco verbally went over training while simultaneously demonstrating the proper use of the power drill with a mixing attachment.

16. The fifteen (15) minute instruction session was conducted by Warco's project manager, Mr. Morrissey, in front of the entire crew onsite for Warco and Men in Motion. The instruction and training session for the Mikata drill and mixing attachment included an on-the-job training demonstration and was followed by an observation session where Warco observed and directly instructed Mr. Santos in the proper use and operation of the Mikata drill with the paddle attachment.

17. To insure Mr. Santos understood the proper and safe use of the drill, Mr. Morrissey then observed Mr. Santos using the drill for numerous mixing applications as part of the on-the-job

demonstration, training and instruction before Mr. Santos was permitted to use the drill on his own.

18. On Saturday July 28, 2018, Warco's project manager, Mr. Morrissey was not onsite. Nevertheless, prior to the accident, one of Warco's employees observed Mr. Santos reach out and touch the mixing attachment of the drill in an attempt to stop the drill. By way of gestures, demonstration and verbal instructions, Warco reminded and again instructed/warned Mr. Santos not to touch or put his hands close to any moving or rotating parts of the drill including the mixing paddle attachment.

19. Thereafter, on Saturday July 28, 2018, while mixing fireproofing material outside the presence of Warco's two employees, and unknown to Warco at the time, Mr. Santos' left hand and glove were caught between the shaft and the chuck of the drill, thereby amputating $\frac{3}{4}$ of his pinkie finger and $\frac{1}{4}$ of his left ring finger.

20. After the accident, Mr. Santos' employer, Men in Motion, conducted an accident investigation and issued an Accident Investigation Report.

21. Based on Men in Motion's accident investigation including discussions with Mr. Santos, it was concluded and set forth in the Accident Investigation Report that:

Mr. Juan Santos used bad judgment in underestimating the force at which the drill was turning at which time Mr. Santos reached with his left hand to try and stop the motion of the Mikata drill, it was at this time (10:15 am) that Mr. Santos' left hand and glove was caught between the shaft and the chuck of the Mikata $\frac{1}{2}$ drill, within seconds Mr. Santos panicked and accidentally squeezed the Mikata drill control with his right hand, causing the Mikata drill to continue spinning in a forward motion, thereby amputating $\frac{3}{4}$ of the pinkie finger and $\frac{1}{4}$ of left ring finger.

22. As confirmed by the Men in Motion Accident Investigation Report, no one witnessed the accident at the time when it happened.

23. The following week, August 3, 2018, Mr. Santos' employer, Men in Motion, contacted NC OSHA and reported the accident.

24. Warco was issued citations for alleged violation of N.C.G.S. §95.129(1)(General Duty Clause) and 29 C.F.R. 1926.21(b)(2)(Failure To Instruct Employees in The Recognition and Avoidance of Unsafe Conditions Associated with Operating the Drill) and an alleged violation of 29 C.F.R. 1904.39(a)(2)(Failure to Report Incident to OSHA within 24 Hours).

25. As a preliminary matter at the start of the hearing, the Commissioner will withdraw Citation 1 Item 1, alleged violation of N.C.G.S. §95.129(1)(General Duty Clause).

26. No citations were issued to Edifice as the general contractor in control of the Project.

27. No citations were issued to Men in Motion, the employer of Mr. Santos.

Further, the parties also agreed upon and consented to the following Stipulations:

28. The Hearing in this matter shall be conducted via the video conferencing platform known as “Lifesize”;
29. The presence of a court reporter during the Hearing is waived;
30. The Hearing’s audio and video will be recorded through Lifesize (the “Recording”);
31. The Recording will be the official record of the Hearing;
32. The Recording will be made available to all counsel after the Hearing concludes (the Host will send a link to the Recording as soon as is practicable after the Hearing concludes);
33. The Administrative Law Judge shall control when the Hearing is on and off the record;
34. The Hearing will be deemed to have taken place in Raleigh, North Carolina;
35. Neither party objects to R. Joyce Garrett, Administrative Law Judge, conducting the Hearing;
36. Pursuant to N.C.G.S. §95-135, the Review Commission has jurisdiction over the parties and subject matter of this action;
37. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Act, including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. § 95-133 et seq.;
38. Respondent is an “employer” within the meaning of N.C.G.S. § 95-127(11).

FINDINGS OF FACT

1- 27 Stipulations 1 through 27 inclusive are incorporated by reference as if fully set forth herein as Findings of Fact 1 through 27 inclusive.

28. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter the “Act”). The Review Commission has jurisdiction over the parties and the subject matter to this action.

29. Respondent is a North Carolina corporation, active and in good standing, in the State of North Carolina, and maintains a place of business in North Carolina. Respondent at all times relevant to this action maintained a place of business in North Carolina, where it was engaged in construction, a class of activity which as a whole affects interstate commerce. Respondent is, therefore, an “employer” as defined by N.C.G.S. Section 95-127(11). Respondent maintains employees as defined by N.C.G.S. Section 95-127(10).

30. On or about August 7 and 8, 2018 Compliance Safety and Health Officer Peggy Reme employed by the North Carolina Department of Labor conducted a referral inspection of a multi-employer worksite involving new construction of a five-story commercial building containing

approximately 300,000 square feet located at 1213 W Moorehead Street in Charlotte, North Carolina.

31. CSHO Reme did a walk-around of the accident site and interviewed witnesses primarily at the OSHA office. On August 22, 2018 Compliance Safety and Health Officer Griselle Negron employed by the North Carolina Department of Labor assisted CSHO Reme with Spanish translation in an interview with Juan Santos, the employee of Men in Motion who was injured.

32. Witness statements were taken and incorporated into CSHO Reme's investigation file.

33. As a result of the Inspection, on January 31, 2019 Complainant issued two citations alleging a serious violation of 29 CFR 1926.21(b)(2) and a nonserious violation of 29 CFR 1904.39(a)(2).

34. The Respondent submitted a timely Notice of Contest.

35. A Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of North Carolina (the "Rules").

36. Relative to Citation 01 Item 002, the alleged violation of 29 CFR 1926.21(b)(2) asserting failure to instruct in the recognition and avoidance of unsafe conditions associated with operating a drill:

(i) undisputed evidence was presented that Mr. Juan Santos ("Santos"), an employee Men in Motion:

a. was injured on Saturday July 28, 2018 when he was working at the Project; his glove and hand were caught between the shaft and the chuck of a hand-held Mikata power drill resulting in amputation of $\frac{3}{4}$ of his left small finger and $\frac{1}{4}$ of his left ring finger (the "Accident");

b. Santos was working alone and there were no witnesses to the Accident;

c. CHOS Reme did not observe the Accident and had no personal knowledge of the Accident;

d. CHOS Reme obtained information about the Accident including the training provided to Santos from interviews;

(ii) considering the Stipulations of the parties and the testimony of and evidence introduced through CHOS Reme, Mr. Hans Warren, Mr. Dwight Dawson, and Mr. Bill Morrissey, a preponderance of evidence establishes:

a. Santos' first day of work at the Project was Friday, July 27, 2018;

b. on the day of the Accident, Saturday July 28, 2018, Men in Motion had only 1 employee (Santos) working at the Project;

c. Santos was classified as a laborer;

d. Men in Motion did not have a supervisor at the Project on either July 27 or July 28, 2018;

d. on July 27, 2018 Respondent's project manager Bill Morrissey was at the Project as well as Jeff Mills and Dwight Dawson who were classified as laborers; Jeff Mills was the 'lead' person and sometimes referred to as a 'foreman' but he did not hold a management position;

e. on July 28, 2018 Respondent's two laborers, Jeff Mills and Dwight Dawson, and Men in Motion's laborer Santos were at the Project; Respondent did not have a supervisor at the Project on that date;

f. on the morning of July 27 and July 28, 2018, the three laborers rode together from Respondent's office to the Project; carpooling was because of a limitation of parking facilities at the Project;

g. prior to July 27, 2018 Santos was given training by Men in Motion with respect to the safe use and operation of power drills and had used a DeWalt hand-held drill, which drill was similar to the Mikata drill used at the Project;

h. Santos' primary language was Spanish, but he could understand and speak 'a little' English;

i. the training by Men in Motion given to Santos was partly in English and partly in Spanish;

j. on July 27, 2018 before Santos was allowed to work with the Mikata drill he was given additional training by Respondent's project manager Bill Morrissey; Morrissey held a training/demonstration session with all three laborers on the use of the Mikata drill, using gestures and giving verbal instructions in both English and 'broken Spanish'; after the instruction/demonstration to the group, Morrissey had an 'observation' session with Santos where Morrissey observed Santos use the drill and personally instructed Santos in the safe use and operation of the drill, again using gestures and broken Spanish; the instructions included but was not limited to keeping hands/gloves/clothing and body parts away from the moving parts of the drill and firmly holding the drill with two hands.

k. that Santos understood instructions relating to the Mikata drill is evidenced by his statements contained in the witness statement taken by CHOS Reme with the assistance of CHOS Negrón, a Spanish/English translator; in that witness statement Santos stated "The Mikata drill I used for this job required two hands: one hand activates the drill and the other hand on the handle is for stability and control of the drill. I used my left hand to activate the drill and my right hand to hold the additional handle."

l. Santos used the Mikata drill on July 27, 2018 for about 8 to 9 hours without any incident;

m. on July 28, 2018 Jeff Mills, one of Respondent's laborers, saw Santos reach out to touch the mixing attachment while the drill was operating; Mills warned Santos not to touch the moving parts, and again, multiple times, using both verbal and gestures, instructed Santos on proper use of the drill; Santos indicated to Mills his understanding to not touch the moving parts.

n. Santos had been train how to properly and safely use two-handed power drills before being assigned to the Project;

o. Respondent's management had no knowledge, either actual or imputed, that on July 28, 2018 Santos attempted to touch a rotating part of the Mikata drill contrary to the training which had been given to Santos by Men in Motion and by Morrissey.

36. Relative to Citation 02 Item 001, the alleged violation of 29 CFR 1904.39(a)(2) asserting failure to report incident to OSHA within 24 hours:

(i) considering the Stipulations of the parties and the testimony of and evidence introduced through CHOS Reme, Mr. Hans Warren, Mr. Dwight Dawson, and Mr. Bill Morrissey, a preponderance of evidence establishes:

- a. Santos was assigned to Respondent to work as a laborer;
- b. Edifice, the general contractor, oversaw, supervised and controlled the Project, the jobsite and the subcontractors working on the Project;
- c. Respondent was a subcontractor on the Project and supervised and controlled its own employees assigned to work on the Project;
- d. Respondent had a written Subcontract with Men in Motion which provided, among other things, that Men in Motion would “perform and complete Work ...under the general direction of” Respondent; (Article 2 of Subcontract)
- e. on July 28, 2018 Men in Motion did not have a supervisor at the Project; its only employee was Santos who was classified as a laborer;
- f. on July 27, 2018 Respondent’s project manager, Bill Morrissey, specifically instructed Santos on where work would be performed, where to set up equipment, where to paint, how to drill, the laying down of protective tarps/plastic, and on the use/safe operation of the power drill with mixing attachment;
- g. on July 28, 2018 Dwight Dawson, an employee of Respondent, showed Santos how to open containers with a knife, reminded him to wear gloves to protect himself from the fireproofing spray mixture, and Jeff Mills, another employee of Respondent, again reminded Santos regarding the use of the power drill;
- h. Respondent specified to Santos the output and result to be accomplished by his work;
- i. Respondent supervised the details, methods and processes by which the work was to be accomplished by Santos;
- j. Respondent had a written safety program which was communicated to its employees, and Respondent ensured through its written Subcontract, that Men in Motion complied with applicable safety requirements;
- k. for this alleged violation a Gravity Based Penalty of \$5,000 was assessed and adjustments given for size 20%, good faith 10% and history 10%, for a proposed penalty of \$3,000; Respondent objected to the good faith credit being only 10%;
- l. except for the credit for good faith being only 10%, Respondent stipulated that the penalty was correctly calculated in accordance with Complainant’s Field Operation Manuel;
- m. on the Valuation of Safety and Health Programs worksheet CSHO Reme reported that Respondent had no Safety Committee; however, testimony at the Hearing established that Respondent did have a safety committee;
- n. according to CSHO Reme’s Valuation of Safety and Health Programs worksheet Respondent had fall protection-training program, fall protection-training certification; scaffolds – daily inspections; scaffolds- training program; ladders-training program; excavations-daily inspections; PPE assessment conducted/certified; appropriate PPE provided/required; respirators-voluntary use training; hazardous communication written program developed, safety data sheets maintained and employee training;
- o. based on the elements and implementation of Respondent’s safety program, its safety program should be evaluated as Basic which carries a credit of 25%;

p. the Gravity Based Penalty of \$5000 was proper and Respondent should receive a 20% credit for size, a 25% credit for good faith and a 10% credit for history for a total credit of 55%; accordingly the proposed penalty should be \$2,250.

DISCUSSION

To establish a violation of a specific OSHA standard, Complainant must establish the following elements: (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 (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). To establish that the violation was properly classified as serious the Complainant must also establish that the hazard created the possibility of an accident and that the substantially probable result of an accident could be death or serious bodily injury. See *Commissioner of Labor v Liggett Group, Inc.*, OSHANC 94-3175 (1996); *Commissioner of Labor v Yates Construction Company, Inc.*, OSHANC 93-2967 (1995); *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009); *Commissioner of Labor v. Young Construction Co.*, OSHANC 02-4130 (2004). A reasonable person standard is used to determine if an employer knew or should have known of the condition or conduct. *Daniel Construction Co. v. Brooks*, 73 N.C. app. 426 (1984).

Complainant has the burden of establishing each element by a preponderance of the evidence. *Rule .0514(a)*; See *Hartford Roofing Co.*, 17 BNA OSCH 1361 (No. 92-3855, 1995). A preponderance of the evidence is “that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false.” *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982).

If Complainant fails to meet its burden of proof on any one of the required elements, then the violation and/or classification cannot be sustained.

In this case Respondent, a first tier subcontractor, was cited for failure to instruct an employee of its second tier subcontractor on the recognition and avoidance of unsafe conditions associated with the use of a hand-held power drill. CSHO Reme did not have any personal knowledge of the accident which occurred; her findings with respect to the accident and the training provided to the injured worker were obtained during her investigation from interviews. CSHO Reme seemed to be particularly concerned that the injured worker spoke and understood Spanish and only spoke or understood ‘a little’ English, and had concluded that the worker had not been adequately instructed in Spanish. However, testimony at the Hearing established that the second tier subcontractor (i.e. the employer of the worker) had instructed the worker on the use/safety of power drills in both English and Spanish. Testimony also established that Respondent also instructed the worker on the use/safety of the specific power drill the worker would use in both English and in ‘broken Spanish’ and that the worker had safely used the power drill for at least 8 to 9 hours before the accident. Further, the injured worker in his interview with CSHO Reme stated some specific information about the proper operation of the power drill, which specific information had been given to the worker at a training session held by Respondent in English and broken Spanish. Accordingly, the Complainant did not establish that

Respondent failed to instruct the worker in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

In this case Respondent was also cited for not reporting the work-related finger amputation incident to OSHA within 24 hours. Evidence at the Hearing showed (i) the second tier subcontractor employer of the injured worker did not have a supervisor at the work site on the day of the injury; (ii) the injured worker was classified as a laborer; (ii) the injured worker was being directed by Respondent's employees on where to work, the sequence of the work, and the specific tasks which needed to be performed. OSHA's recordkeeping regulation at Section 1904.31(a) requires an employer to record the recordable injuries and illnesses of employees not carried on that employer's payroll if that employer supervises the employee on a day-to-day basis.

OSHA standard 29 CFR 1904.31(b)(4) provides that companies and their subcontractors, must coordinate their efforts to ensure that each injury and illness is recorded only once-- by the employer who provides day-to-day supervision. Only one employer can actually provide day-to-day supervision under OSHA's recordkeeping regulations. The determination regarding which entity must record the injuries and illnesses must be based on the facts concerning day-to-day supervision at the worksite.

OSHA clarifies the meaning of day-to-day supervision.
<https://www.osha.gov/recordkeeping/entryfaq.html> Day-to-day supervision occurs when "in addition to specifying the output, product or result to be accomplished by the person's work, the employer supervises the details, means, methods and processes by which the work is to be accomplished." This means that the entity that actually provides day-to-day supervision of a worker is responsible for recording cases regardless of the wording of the parties' contractual agreements. See, OSHA's June 6, 2012, letter to Belal Kayyali at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28637 and OSHA's October 19, 2015, letter to Jeff Dahlquist at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=29951.

Respondent immediately reported the accident to the second tier subcontractor and to the general contractor. However, such reporting did not satisfy the reporting requirements of 29 CFR 1904.39(a)(2).

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent, at all times material to this proceeding, was engaged in a business affecting commerce within the meaning of the Occupational Safety and Health Act of North Carolina, N.C.G.S. 95-126 et seq (the "Act").

3. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Review Commission has jurisdiction of the parties and of the subject matter.

4. The burden of proof is on the Complainant to prove by a preponderance of the evidence that Respondent violated the terms of the standards cited in the Original Citation.

5. With respect to Citation 01 Item 002 alleging a violation of 29 CFR 1926.21(b)(2) the Complainant did not prove by a preponderance of the evidence that Respondent did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to their work environment to control or eliminate any hazards or other exposure to illness or injury.

6. With respect to Citation 02 Item 001 alleging a violation of 29 CFR 1904.39(a)(2) the Complainant carried its burden of proof to establish that on the day of the Accident Respondent supervised the details, means, methods and process by which Mr. Santos was to accomplish his work and that Respondent did not report to OSHA the work-related amputation incident within 24 hours.


ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED that:

1. Citation 01 Item 002 in violation of 29 CFR 1926.21(b)(2) is VACATED.
2. Citation 02 Item 001 in violation of 29 CFR 1904.39(a)(2) is AFFIRMED as a NonSerious violation with a penalty of \$2,250 imposed, which penalty shall be paid on or before April 30, 2022.

For confirmation purposes Citation 01 Item 001 in violation of NCGS 95-129(1) was withdrawn by Complainant.

This the 11th day of March, 2022.



R. Joyce Garrett
Administrative Law Judge

CERTIFICATE OF SERVICE

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

GREG C AHLUM
JOHNSTON ALLISON HORD
PO BOX 36469
CHARLOTTE NC 28236

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
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RALEIGH, NC 27699-1101

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

THIS THE 18 DAY OF March 2022.



Karissa B. Sluss
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