

**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.)
)
HAND 2 HAND PROPERTIES 8, INC.)
dba TOM'S CONSTRUCTION)
and its successors,)
RESPONDENT.)

JUN 24 2020

ORDER Occupational & Safety
Commission

OSHANC NO: 2019-6109
INSPECTION NO.: 318158631
CSHO ID: S0077

THIS MATTER came on for hearing and was heard remotely before the undersigned on June 9, 2020. The Complainant was represented by Assistant Attorney General, Sage Boyd, and the Respondent was represented, without counsel, by Thomas Hedrick, President. Complainant's witness was Kirby Atwood, an OSHA Safety Officer with the North Carolina Department of Labor, Occupational Safety and Health Division. Respondent's witness was Thomas Hedrick.

Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion and enters an Order accordingly.

STIPULATIONS

Stipulations were agreed to by the parties at the beginning of the hearing. On behalf of the Respondent, Mr. Hedrick agreed that Respondent violated the regulations that were the basis for Citation I, Item 1, as well as Citation II, Items 1 and 2. Mr. Hedrick stated that he wished only to contest the penalty for Citation I, Item 1, and he did not wish to contest the penalty for Citation II, Items 1 and 2 because they carried a zero dollar penalty. On behalf of the Commissioner, Ms. Boyd agreed to the stipulation.

ISSUE PRESENTED

In light of the stipulations, the issue was whether the Respondent proved by a preponderance of the evidence that the penalty imposed for the Repeat Serious violation of 29 CFR 1926.501(b)(13) should be \$14,000.00 versus a lower amount.

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.501(b)(13) provides as follows:

Residential construction. 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. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

29 CFR 1926.25(a) provides as follows:

During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

29 CFR 1926.1052(c)(1) provides as follows:

Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with: [at least one handrail pursuant to (i)]

FINDINGS OF FACT

1. Complainant, Commissioner of Labor of the State of North Carolina (hereafter Complainant or Commissioner), is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et seq., the Occupational Safety and Health Act of North Carolina (the Act) as well as the regulations adopted pursuant thereto.
2. Respondent, Hand 2 Hand Properties 8, Inc., hereafter “Respondent” or “Hand 2 Hand,” was, at all times relevant to this case, in the business of providing framing services.
3. Hand 2 Hand was an employer within the meaning of N.C. Gen. Stat. §95-127(11) and had employees, within the meaning of N.C. Gen. Stat. §95-127(10), working for it as framers.
4. OSHA Safety Officer, Kirby Atwood, inspected a residential construction site located at Lot #109 at 4780 Farm Bell Court, Winston-Salem, North Carolina on March 5, 2019.
5. Officer Atwood observed, from the right-of-way, fall hazards on the site.
6. Officer Atwood called a representative of the general contractor, R3B, LLC and learned that Respondent’s President, Thomas Hedrick, was the contact for the crew Atwood observed on the property. Hedrick was called by Atwood and

Hedrick gave permission to Atwood to speak with Nick Currence who was the site supervisor for Respondent.

7. Atwood observed the conditions for which the Citations were issued.
8. Per the stipulations reported above, the basis for all the Citations was admitted.
9. Citation I, Item 1 was a Repeat Serious violation of 29 CFR 1926.501(b)(13). It was issued because employees, including a supervisor, were working in residential construction at heights of fourteen feet above the hard surface of the ground as well as nine feet above the floor below around an unprotected internal stairway and there were no guardrail systems, safety net systems, personal fall arrest systems or combination of the systems. The violation was corrected during the inspection and carried a proposed penalty of \$14,000.00.
10. Final Orders dated February 13, 2017 and March 7, 2018 were previously issued to Respondent for the violation of the identical regulation — 29 CFR 1926.501(b)(13).
11. The penalty for the violation cited in Citation I, Item 1 was based on the North Carolina Department of Labor’s Occupational Safety and Health Division’s Field Operations Manual, Chapters VI and IV.
12. Safety Officer Atwood computed the severity of the violation as “high” based on the distances that employees could fall — either nine or fourteen feet — and the likelihood of death or permanent disability resulting from a fall from either height.
13. Safety Officer Atwood computed the probability of injury as “greater.” He based his computation on the number of employees exposed to the hazard, the frequency of exposure and the proximity to the hazard. Applying those factors to his calculations, Atwood found the number of employees to be three who were engaged in framing for 4-5 hours per day, and he found that the employees came within one foot of the edge of the second story where they were framing.
14. The Field Operations Manual allows penalties to be reduced in certain cases for three factors: size of the employer, good faith, and history.
 - a. Respondent was entitled to a 60% credit for being a small employer, but as identified below, that was the only credit allowed in the calculation of the penalty.
 - b. Judicial notice is taken of the Field Operations Manual(FOM), Chapter VI B.9.(b)(i) p. 13 which was admitted as an exhibit at hearing. The provision provides that a Respondent is not entitled to credit for good faith if the severity of the violation was considered “high” and the probability

of injury was considered “greater.” Further, according to the same chapter of the FOM, paragraph 11.a., p.16, repeat violations are only allowed credits for size.

- c. Respondent was not entitled to credit for history because it had a previous violation, which is the same thing as history, resulting in a Final Order within three years. Chapter VI B.9.(b)(ii), p.13.
15. The gravity based penalty for a serious violation of 29 CFR 1926.501(b)(13) because the probability of injury was greater and the severity was high was \$7,000.00 based on the Field Operations Manual. With the credit for Respondent being a small employer, the penalty was reduced to \$2,800.00. Because the violation was the third occurrence of the same violation, a multiplier of five was used to determine the amount of the penalty, thus the penalty imposed was $5 \times \$2,800.00 = \$14,000.00$.
16. Respondent had trained Nick Currence, as well as the two subordinates who reported to Currence, in fall protection and fall protection equipment was on the job site.
17. Mr. Hedrick was sick at home when the inspection occurred.
18. Respondent’s profit from operations according to his 2018 tax return was \$82,000 or more. Respondent had not, at the time of the hearing, prepared his 2019 tax return.
19. Respondent did not prove financial hardship would interfere with its payment of the penalty.

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 is subject to the provisions of the Act.
3. Complainant proved by a preponderance of the evidence that Respondent committed a repeat serious violation of 29 CFR 1926.501(b)(13) and the penalty and the adjustment of the penalty, as well as the multiplying by five of the penalty amount was correctly calculated in accordance with the Complainant’s Operations Manual.

DISCUSSION

This case concerned a serious fall hazard governed by 29 CFR 1926.501(b)(13). The violation was defended forthrightly by the President of the company, Thomas Hedrick.

He admitted the company's responsibility for all the citations, and appeared only for the purpose of trying to reduce the penalty amount. The undersigned appreciates Mr. Hedrick's advocacy and point of view. Unfortunately for Mr. Hedrick, on the basis of the evidence admitted, there is no legal basis to allow a reduction of the penalty.

Respondent had been cited two times before within the prior three years for the very same violation. Actually, the two prior violations had occurred within just 26 months. In this most recent matter, there was fall protection equipment available on the job site at the time of the inspection. Mr. Hedrick, testifying for the Respondent, asserted that he had a problem like the old saying, 'You can lead a horse to water, but you can't make it drink.' Mr. Hedrick said he had trained all three of the employees who were on site the day of the inspection in how to prevent falls. He had also provided fall protection equipment for the employees, but it was not being used. There was no evidence entered as to what kind of disciplinary action had been taken with employees after the two previous violations, but it is apparent that Respondent's employees on this occasion were not being faithful to the instructions they had been given.

The only conclusion for this hearing examiner is that when the horse ignores the opportunity to be lead to water—forget drinking, then it may be time to put the horse out to pasture and look for another horse. If an employee does not pay attention to the employer's instructions, then maybe that employee needs to be moved to a job that carries less risk of injury. The sad reality is that construction workers fall from heights as in this case, and they can die or become permanently disabled. The impact on society of a worker dying or becoming permanently disabled means that not only are the lives of that worker's family forever changed, but the employer, coworkers and others are affected as well. Falling back on the time-worn idea that you cannot make a horse drink is just an excuse. Certainly, this violation might have been avoided had Mr. Hedrick been well and on the job site the morning of the inspection; however, past violations suggest that this is speculation.

When a worker fails to abide by the safety instructions given to him or her, then there needs to be a consequence for such a serious violation. Similarly, an employer whose employees repeatedly violate the same safety regulation year after year needs to experience a more and more serious penalty. This is the basis for the public policy behind increasing penalties for repeat violations.

Having established the elements necessary to justify the finding of a third serious violation of the same regulation, the Complainant's Citation I, Item 1 was appropriate and the penalty imposed is reasonable.

Based on the foregoing Findings of Fact and Conclusions of Law and considering the Discussion, IT IS ORDERED as follows:

Citation I, Item 1 is affirmed as a twice repeated serious violation of 29 CFR 1926.501(b)(13) and a penalty of \$14,000.00 is hereby imposed.

Citation II, Items 1 and 2 are affirmed as stipulated in this Order.

The penalty shall be paid within thirty (30) days of the filing date of this Order.

This the 24 day of June, 2020.

A handwritten signature in black ink that reads "Reagan H. Weaver". The signature is written in a cursive style with a horizontal line underneath the name.

Reagan H. Weaver

Administrative Law Judge

rweaver@capitolaw.com

CERTIFICATE OF SERVICE

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

THOMAS E HEDRICK
HAND 2 HAND PROPERTIES 8 INC
DBA TOM'S CONSTRUCTION
8603 N NC HWY 150
STE D
CLEMMONS NC 27012

SAGE BOYD
NC DEPARTEMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602-0629


By email to sboyd@ncdoj.gov and tomsconstruction@triad.rr.com respectively

And by depositing a copy of the same in the United States Mail, postage prepaid, at Raleigh, North Carolina, within 30 days and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

By email to jill.cramer@labor.nc.gov and by depositing a copy of the same in the NCDOL Interoffice Mail within 30 days.

THIS THE 17 DAY OF July 2020.



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