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

FILED

APR - 7 2022

NC Occupational & Safety Review Commission

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	
COMPLAINANT,	)	**ORDER**
v.	)	
LENNAR CAROLINAS, LLC *and its successors,*	)	**OSHANC NO: 2019-6131** **INSPECTION NO.: 318162112** **CSHO ID: D115**
RESPONDENT.	)	

This matter was duly noticed and came on for hearing before the undersigned on February 28 and March 1, 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 Schedule 1, attached, which are incorporated herein by reference.

At the hearing the following Exhibits were admitted: Complainant's Exhibits 1, 2, 3.1-3.11, 3.12-3.25, 3.26-3.37, 3.38-3.46, 4.1-4.15, 5.1, 6, 7, 8; and Respondent's Exhibits 1-6, 8-10, 24-27, 40.

During the hearing, the following witnesses testified under oath: Carl Burgette, N.C. OSH Compliance Safety and Health Officer; Scott Pittman, Respondent's Senior Construction Manager; Jason Billingsley, Respondent's Construction Manager; Christopher Lancaster, Respondent's Senior Construction Manager; William Jones, owner of W.C. Jones Construction, Inc; 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 May 22, 2019 Notice of Contest challenging a serious citation issued by the Complainant on May 2, 2019 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 April 2019 Respondent was the general contractor building new single-family homes in the Rea Farms subdivision in Charlotte, N.C. ("Rea Farms"), in Mecklenburg County.

7. In April 2019 Mecklenburg 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 April 2019 Rea Farms 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 April 4, 2019, Respondent was in the process of constructing multi-story homes on Lots 10, 11 and 103 of Rea Farms.

10. Sometime prior to April 4, 2019, Respondent contracted with 84 Lumber Company LP ("84 Lumber") to perform the framing work on multi-story homes built on Lots 10 and 11 of Rea Farms. In turn, 84 Lumber subcontracted the work to F&C General Construction, who then subcontracted the work to Charlotte Framing (Lot 10) and Merino Framing LLC (Lot 11).

11. Sometime prior to April 4, 2019, Respondent contracted with W.C. Jones Construction, Inc. ("W.C. Jones") to perform the framing work on the multi-story home being built on Lot 103 of Rea Farms. W.C. Jones then subcontracted the work to Gomez Framing Contractors Corp. ("Gomez Framing").

12. Respondent had written contracts with both 84 Lumber and W.C. Jones, under which each subcontractor was required to supervise its employees and subcontractors, train its employees and supervisors and/or provide trained/competent personnel, and comply with Respondent's and OSHA's safety and health requirements. Under each of those Agreements, Respondent retained the authority to take such action as it deemed necessary to protect the safey and health of workers including stopping the work and remedying the unsafe condition or requiring the subcontractor to correct the unsafe condition, or terminating the agreement. The Agreement with W.C. Jones also authorized the Respondent to assess safety violation penalties of up to $200 for each violation of jobsite safety rules or governmental safety laws/regulations.

13. Respondent had general supervisory authority over the construction work performed in Rea Farms, and more particularly on Lots 10, 11 and 103 of Rea Farms, including the authority to stop work and correct safety and health violations or require that its subcontractors correct them.

14. In January, February and March 2019, the Respondent repeatedly directed employees of its subcontractors to put on hardhats each week, and on or around February 13, February 27, March 6, and March 13, 2019 directed employees of its subcontractors to stop work due to lack of fall protection or directed these employees to use fall protection.

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

16. In April 2019 Respondent had a 219-page Injury & Illness Prevention Program ("IIPP") covering various policies and procedures, which its Construction Managers were familiar with, setting out Respondent's policies regarding safety, assignment of responsibilities, communication, workplace hazards, and its "code of safe work practices." Among Respondent's express policies described prevention of accidents as "an integral part of its corporate culture," and "[t]he prevention of accidents by Communicating, Acting, obtaining Results and Empathizing ("CARE") is a major objective of the Company," requiring "active and sincere cooperation of all Associates;" required Associates to be familiar with company safety guidelines, make accident prevention part of their daily return, address dangerous conditions immediately, constantly surveille for safety hazards and notify trade partners immediately of safety violations, and use progressive discipline for violations, including verbal and written warnings, fines, dismissal from the worksite, training, or termination of a trade partner's contract.

17. Respondent's Construction Managers ("CMs") at Rea Farms knew that they had the authority and duty to immediately stop work at any of their worksites and correct safety hazards, or require that the subcontractor correct the safety hazard.

18. On April 4, 2019, CMs Scott Pittman and Brandon Hutchens were assigned to Rea Farms, and were responsible for monitoring the construction at Rea Farms including the construction on Lots 10, 11 and 103.

19. On April 4, 2019, Mr. Pittman had been employed by Respondent for approximately three years and had approximately 21 years of experience in construction, working as a construction manager for another home builder and as a framer framing custom homes. Both he and Mr. Hutchens had completed 10-hour OSHA training and were familiar with Respondent's IIPP.

20. During the hearing, Respondent's map of the development was admitted into evidence (R Exh 24), and is helpful to understanding the vantage points and movements of the various actors, so is reproduced in pertinent part here:

21. Sometime around 12:00pm on April 4, 2019, Mr. Pittman and Mr. Hutchens left a model home at Rea Farms in the southeast corner of the development, traveled west in a golfcart on Raffia Road until they got to Cornhill Avenue, and then turned right and traveled north up Cornhill Avenue until they reached Lot 13, where Mr. Pittman parked the golfcart at the southeast corner of Lot 13, facing north. The CMs' purpose for traveling to this area was to inspect the construction on Lots 10, 11 and 103.

22. Sometime between approximately 12:15pm and 12:26pm, before the CMs began their inspection a representative of 84 Lumber came to the golfcart and asked for help getting trusses unloaded from an 18-wheeler truck. CM Hutchens left the golfcart and walked south to approximately the first alley south of Wheat Ridge Road, where the trusses were being unloaded. CM Pittman remained in the driver seat of the golfcart and sometime prior to 12:27pm was joined by a county building inspector.

23. At approximately 12:26pm on April 4, 2019, the Complainant's Compliance Safety and Health Officer (CSHO) Carl Burgette was driving south on Red Rust Lane when he saw on his right individuals who appeared to be working on an upper level of a construction who were not protected by guardrail systems, safety net systems, or personal fall arrest systems (hereinafter "fall protection"). CSHO Burgette pulled over and took a photograph[1], which showed workers setting trusses on a structure that was partially hidden by a berm. CSHO Burgette turned right onto Wheat

[1]During the hearing, the parties agreed that CSHO Burgette's photographs were actually taken an hour later than depicted in the timestamp on the photographs. Pursuant to N.C.Gen.Stat. § 8C-1-201 the undersigned takes judicial notice that there was a time change on March 10, 2019 due to daylight savings time which, coupled with CSHO Burgette's testimony (that his camera failed to automatically update the time), explains the discrepancy. To avoid confusion throughout this Order, the actual time that the photo was taken, rather than the time depicted, will be used.

Ridge Road to investigate and at approximately 12:27pm parked at Lot 99 on the corner of Wheat Ridge Road and Cornhill Avenue, taking an additional photo that showed the CMs' golfcart parked at Lot 13 with Mr. Pittman seated in it and the county building inspector standing next to it. At this point CSHO Burgette did not know the identities of the two individuals but believed they might both be representatives of the general contractor.

24. While parked at Lot 99, CSHO Burgette also observed and photographed additional workers on the upper level of a structure on a lot northwest of the CMs' golfcart (Lot 11[2]) who did not appear to have fall protection.

25. CSHO Burgette then turned right onto Cornhill Avenue, passed the golfcart, parked facing north approximately ten feet in front of the golfcart, and took additional photos of CM Pittman continuing to sit in the golfcart and the workers on Lot 11 continuing to work without fall protection.

26. CM Pittman saw CSHO Burgette pass the golfcart as he sat in the driver's seat, and park in front of the golfcart. CM Pittman was looking in the direction of the violative condition on Lot 11 when he saw CSHO Burgette.

27. From approximately 12:29pm to approximately 12:32 CSHO Burgette drove his vehicle approximately ½ mile north to the end of Cornhill Avenue where he turned around and came back to park at approximately Lot 101 on Cornhill Avenue, on the east side of the street with his truck facing south toward the golfcart (and CM Pittman) still parked at Lot 13. As he drove this route, he observed and took photos of workers standing, sitting, walking and crouching on the top plate of construction located at the next lot north of Lot 11 (Lot 10), as well as additional photos of the workers on the upper level of Lot 11 – all without fall protection.

28. CM Pittman saw CSHO Burgette drive north to the end of Cornhill Avenue, but did not watch his vehicle drive back, next noticing Mr. Burgette's vehicle when it was parked at approximately Lot 101 on the east side of Cornhill Avenue. CM Pittman was looking in the direction of the violative conditions on Lots 11 and 10 when he watched CSHO Burgette drive north on Cornhill Avenue, and was looking in the direction of the violative condition on Lot 103 when he saw CSHO Burgette parked at approximately Lot 101.

29. At approximately 12:35pm, after Mr. Burgette had parked at Lot 101, CM Brandon Hutchens returned to the golfcart (and CM Pittman) still parked at Lot 13, walking north on Cornhill Avenue from the first alley south of Wheat Ridge Road to the golfcart. He then walked north/northwest from the golfcart to and onto Lot 12, where he discussed the construction on that lot with the county building inspector who had been waiting at the golfcart (C Exh. 3.37-3.41).

30. CSHO Burgette continued to observe and from 12:40-12:41pm took additional photos of the construction on Lot 103 that originally brought him into the development, where

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[2]Both CSHO Burgette's testimony and his reports identified the lot north of the golfcart on the west side of Cornhill Avenue as Lot 10, and the lot north of that lot as Lot 11, based on information he testified he received from CM Pittman. However, the Respondent's map of the development reverses these numbers, so that the lot Mr. Burgette identified as Lot 10 was identified on the map as Lot 11, and the lot Mr. Burgette identified as Lot 11 was identified on the map as Lot 10. In order to avoid confusion, this Order will use the lot numbers identified on the map.

workers continued to set trusses on the upper level of that construction without fall protection.

31. The entire timeframe from when CSHO Burgette first observed the potentially violative condition on Lot 103 until he obtained permission from his supervisor and opened the investigation was approximately 34 minutes (C Exh. 3, R Exh 10).

32. During this 34-minute period CSHO Burgette saw neither CM Pittman nor CM Hutchens take any action to address the hazards on Lots 11, 10 or 103, so he called his supervisor to obtain permission to open an inspection. Mr. Burgette then got out of his vehicle, donned his boots, vest, safety glasses and hardhat, and introduced himself to CMs Hutchens and Pittman, presenting his credentials and explaining why he was there. Mr. Pittman identified himself and Mr. Hutchens as Construction Managers for Respondent, confirmed that Respondent was the general contractor and identifying 84 Lumber as the framing subcontractor for Lots 10 and 11, and W.C. Jones as the framing subcontractor for Lot 103. (84 Lumber later identified its 2nd and 3rd tier subcontractors for Lots 10 and 11).

33. CSHO Burgette obtained consent to enter each worksite, observed each worksite and took additional photographs and measurements that day and ten days later, and determined:

a. Lot 10 - four employees of third tier subcontractor Charlotte Framing (second tier F&C General Construction's subcontractor) were completing the first-floor framing on the structure at Lot 10, with <u>two</u> employees walking/sitting/crouching/standing on the top plate of the structure without fall protection. The distance from the upper level where employees were working to the compacted earth below was more than 11 feet (C Exh. 4.14, 4.15; R Exh. 9);

b. Lot 11 - six employees of third tier subcontractor Merino Framing (second tier F&C General Construction's subcontractor) were working on the structure on Lot 11, with <u>four</u> employees installing subflooring on the upper level of the structure without fall protection. The distance from the upper level where the employees were working to the compacted earth below was more than 11 feet (C Exh. 4.12, 4.13; R Exh. 9); and

c. Lot 103 - five employees of second tier subcontractor Gomez Framing (W.C. Jones' subcontractor) were working on the structure on Lot 103 with <u>two</u> employees setting trusses on the upper level of the structure without fall protection. There was no subflooring to walk on. The distance from the upper level where employees were working to the concrete floor and construction material/ pipes below was more than 11 feet (C Exh. 4.1-4.4, 4.9-4.11; R Exh. 9).

34. During CSHO Burgette's inspection, personal fall arrest system equipment (harnesses and ropes) was discovered on Lot 103. There is no evidence that personal fall arrest system equipment was present or available to the workers on Lots 10 and Lots 11.

35. The conditions leading to the citation were abated during the inspection.

36. Through observation and interview, CSHO Burgette determined that each of the employees working without fall protection on Lots 10, 11 and 103 were exposed to a fall hazard

for more than eight hours per day, for several days,[3] and were at the point of danger for the hazard (at the unprotected/ leading edge).

37. There was a substantial probability that death or serious physical harm (including concussion, broken bones, and/or internal injuries) would result if an employee fell from the upper level of the construction on Lots 10, 11 or 103 to the compacted earth and/or concrete and construction materials below.

38. As a result of the June 17, 2019 inspection, on September 10, 2019, 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 describing three instances:

> a) job site – where four subcontractor employees were working on the sub-floor of the second level on a newly constructed two-story residential structure on Lot #[11] without the use of fall protection, exposing them to a fall hazard of approximately 11'1" to a concrete surface;
>
> b) job site – where two subcontracted employees were framing the walls of the first floor with the two employees working on the top of the walls of the newly constructed two-story residential structure on Lot #[10] without the use of fall protection, exposing them to a fall hazard of approximately 11' to a concrete surface
>
> c) job site – where two subcontracted employees were setting trusses on a newly constructed two-story residential structure on Lot #103 without the use of fall protection, exposing them to a fall hazard of approximately 11'5" to a concrete surface.

<u>Actual or Constructive Knowledge of Respondent</u>

39. CSHO Burgette testified at hearing that during the opening conference Mr. Pittman admitted that he could see the workers on the upper level of the construction, but Mr. Pittman denied making this statement.

40. Mr Pittman admitted at hearing that that he could see each of the structures on Lot 10, 11, and 103 from his golfcart, but then clarified that the structures on Lots 10 and 11 were the same distance from the curb and from his vantage point in the golfcart he could only see the front of the structure on Lot 10.

41. Mr. Pittman avoided saying whether he saw or could have seen the workers on the structures on Lots 10, 11 and 103, testifying instead that he didn't look that way and wasn't paying any attention to those lots as he was conversing with third parties.

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[3] The Complainant identified the duration of workers on Lot 10 and 11 was 2 days, and the duration of work on Lot 103 was 5 days. (R Exh. 8) Ultimately, as the Complainant also determined that the frequency of exposure was 8+ hours (which the Respondent has not challenged), the Respondent is in the "greater" probability category regardless of the number of days exposed. *See* Complainant's Field Operations Manual, chapter VI at p. 7, Appendix A-1.

42. The evidence establishes that the structures on Lots 11 and 103 could be seen with the naked eye from the vantage point of Mr. Pittman as he sat in the golfcart at Lot 13 and from the vantage points of Mr. Hutchens as he sat in the golfcart at Lot 13, approached the golfcart from the south, and walked to, around and from Lot 12.

43. The evidence establishes that the four employees on the upper level of Lot 11, and the two employees on the upper level of Lot 103, could also be seen by CMs Pittman and Hutchens from the vantage points described above, as could the lack of guardrails and safety net system.

44. The evidence establishes that although the workers on the upper levels of the structures on Lots 11 and 103 were wearing devices that a person might initially mistake for harnesses used as part of a personal fall arrest system, the lack of a D-ring on these devices and, more importantly, the lack of a lifeline or lanyard attached to the devices was also obvious and apparent with the naked eye from the CMs' vantage points described above.

45. The evidence establishes that the violative condition and hazards on Lots 11 and 103 were open and obvious from the vantage point of Mr. Pittman and Mr. Hutchens, and if they did not actually see them, they certainly could have seen them with even minimal diligence.

46. The evidence does <u>not</u> establish, however, that the structure on Lot 10, and the workers on the upper level of that structure, or their lack of fall protection, could be seen from the vantage points of either Mr. Pittman or Mr. Hutchens. CSHO Burgette testified that he could see the structures at Lots 11 and 10 when he came around the corner from Wheat Ridge Road onto Cornhill Avenue (2/28/22 Transcript at 3:13), but the CMs were parked further west of Mr. Burgette's turning point and Mr. Burgette further testified on direct examination:

> Q: And so, um, when you – when you were – after you pulled in front of the location of where the general contractors were positioned, the golf cart was positioned, could you – what – which structure could you observe?
>
> A: I could definitely see structure [11] and 103 from, I mean I could see them clearly at that point, so I could definitely see structure [11] and I could see 103 also.
>
> Q: And so, um, when did structure [10] come into view for you?
>
> A: So where I was I could see a little bit of people, or their heads, and I wouldn't know, I wouldn't -- it kind of would look like they might be on structure [11], but *once I drove past structure [11]* I could see those employees on structure [10].

(2/28/22 Transcript at 3:15 (italics added)) CSHO Burgette's testimony confirms that the structure on Lot 11 was blocking a view of the structure (and workers and lack of fall protection) on Lot 10 from the vantage points of the CMs, and Mr. Pittman's admission during the hearing (that he could see the front of the Lot 10 structure) and his alleged admission during the opening conference (that he could see employees working on "these structures") are insufficient to overcome this conclusion or satisfy the Complainant's burden of proof as to Lot 10.

47. During the hearing, Respondent presented evidence describing and demonstrating its safety program, including:

a. testimony that the CMs performed safety inspections once a week but also addressed safety issues as they saw them during their daily inspections of construction sites;

b. its IIPP (described above),

c. Toolbox Safety/Tailgate Meeting topics covered by the Respondent's CMs in January, February March and April 2019; and

d. twelve safety inspections reports in January, February and March 2019[4] which showed workers cited every week for failure to wear hardhats and four times for not having fall protection (2/13/19 (unidentified roofers not tied off), 2/27/19 (unidentified framers not tied off), 3/6/19 (unidentified framers not tied off), 3/13/19 (unidentified framers on Lot 20, no fall protection).

48. During the hearing William Jones, president of W.C. Jones Contracting, testified that W.C. Jones inspected the work of its subcontractors "when we're in the neighborhood;" and proffered a document purporting to reflect a safety inspection of Lot 103 on April 2, 2019, as well as a copy of a safety program that he testified W.C. Jones maintained and communicated to Gomez Framing, but which Gomez Framing was not required to follow.

49. There was no testimony or exhibits offered at hearing regarding the safety programs or enforcement of safety programs of 84 Lumber (Lots 10, 11), F&C General Construction (Lots 10, 11), Charlotte Framing (Lot 10), Merino Framing, LLC (Lot 11), or Gomez Framing (Lot 103).

The Citation and Proposed Penalty

50. The Complainant's citation was sufficient to place the Respondent on notice of the factual and legal bases for its citation, even though the Complainant may have mis-identified Lot 10 as Lot 11, and Lot 11 as Lot 10.

51. The Complainant's citation proposed a penalty of $7000 based on all three instances.

52. The Complainant's proposed penalties were computed in accordance with the North Carolina Field Operations Manual.

53. The proposed penalty of $7000 is consistent with the North Carolina Field Operations Manual even without considering the hazard on Lot 10, which is instance (b) of the citation.

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

[4] Safety inspection reports were completed on a weekly basis. Respondent's Exhibits included reports for January 4, January 11, January 16, January 29, February 5, February 13, February 21, February 27, March 6, March 13, March 22, and March 29, 2019.

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. To establish that the violation was serious, the Complainant must also establish by a preponderance of the evidence 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. *Commissioner of Labor v. Eastwood Constr.*, LLC, No. OSHANC 2019-6162 (12/20/21); *Commissioner of Labor v. Liggett Group*, Doc. No. OSHANC 94-3175 (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 Rea Farms. *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 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)).

Respondent does not materially challenge the Complainant's showing that the standard applied to the work performed on Lots 10, 11 and 103, that the standard was violated, that employees were exposed to the hazard covered by the standard, or that the violation was serious.[5] Rather, Respondent argues that it is not liable for the violation because its representatives did not have actual knowledge of the hazard, and Complainant cannot establish constructive knowledge because Respondent exercised reasonable diligence to prevent and detect the violative condition through its multiple safety programs.

Based upon the evidence at hearing, it is clear to the undersigned that if the Respondent did not have actual knowledge of the open and obvious violative conditions on Lots 11 and 103, it easily could have had such knowledge by exercising reasonable diligence. Although we do not know whether workers were on the upper levels of the Lot 11 and 103 structures without fall protection as the CMs drove north on Cornhill Avenue to Lot 13, it is clear that by 12:27pm they were and the violative condition was open and obvious from the vantage point of the golfcart. CM Pittman had approximately 14 uninterrupted minutes – from at least 12:27pm to at least 12:41pm -- to observe the hazard to those workers while he sat in the golfcart pointed in that direction, visiting with others. The undersigned is not persuaded by arguments that CM Pittman could not look away from the building inspector for fear of offending him, especially when the whole point of being there was to inspect these lots, and when Mr. Pittman admitted he watched CSHO Burgette drive north on Cornhill Avenue and then saw CSHO's Burgette's vehicle parked on the

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[5] Respondent's argument that it did not violate the standard, and its employees were not exposed is beside the point: there is no dispute that this was a multi-employer worksite, and that Complainant's citation against Respondent derives from Respondent's role as the controlling and/or correcting employer.

other side of Cornhill Avenue – both of which would have caused him to look in the direction of the open and obvious violative conditions. Additionally, CM Hutchens would have had a clear view of these open and obvious violative conditions when he walked north toward the golf cart, and when he walked north/northwest onto and around Lot 12. *Cf. Kokosing Constr. Co.*, OSHRC No. 92-2596, 1996 OSAHRC LEXIS 111 at *8 (12/20/96) ("The conspicuous location, the readily observable nature of the violative condition and the presence of the [employer's] crews in the area warrant a finding of constructive knowledge."). The CMs' purported failure to pay attention to their surroundings does not change the fact that the violative conditions on Lots 11 and 103 was open and obvious, or excuse their responsibility to the workers exposed to the hazard. *Meritage Homes of the Carolinas, supra* at p. 5 (citing *Brooks v. BCF Piping, Inc.*, 109 N.C.App. 26, 34 (1993)).

However, the Complainant has failed to establish that the violative condition on Lot 10 was open and obvious, and that the Respondent did not exercise reasonable diligence in preventing and detecting the violative condition: it 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 was about to perform another inspection of these lots, and it had previously corrected subcontractors for safety violations (including fall protection violations). Accordingly, constructive knowledge of this violation is not established.

CSHO Failure to Direct Corrective Action

The Respondent argues that the CSHO on the scene, who was aware of the violative conduct and hazard to workers, nevertheless failed to take immediate action to correct the violations. It is unclear what point the Respondent is trying to make, as the high severity of the injury that could result from the violation is clear, and the CSHO's alleged failure does not relieve the Respondent of its own obligations as the controlling/correcting employer. Moreover, the undersigned finds no merit to the Respondent's premise: the Field Operations Manual requires that a CSHO attempt to obtain consent (or a warrant) prior to entering the worksite, FOM Ch. III, pp. 9-13, and is quite clear that, even as to imminent dangers, the CSHO "has <u>no authority</u> to either order the closing down of an operation or to direct employees to leave the area of the imminent danger or the workplace." FOM Ch. III, pp. 15-16, FOM Ch. VII, p. 6. *See also* FOM Ch. III, pp. 22, 23, 24 (CSHO to notify general contractor and program representatives of plain sight serious hazards on construction site); FOM Ch. VII, p. 3 (CSHO must offer employer opportunity to accompany CSHO on inspection unless imminence of hazard makes it impractical to delay inspection), p. 4 (CSHO must advise employer of imminent danger and ask employer to notify employees of danger and remove them from area of imminent danger), p. 6 (CSHO must call supervisor/director/AG's office if employer does not eliminate imminent hazard). There is no testimony or cites to authority that contradicts the foregoing or affects the undersigned's determination in this case, and this argument is rejected.

Exposure of Respondent's Employees to Hazard

Once again, the Respondent argues that it did not violate the standard because its own employees were not exposed to the hazard. See Post-Hearing Brief at pp. 25, 26. As the Respondent well knows, and as the undersigned has previously explained, because its liability is premised on its role as controlling and/or correcting employer, it is irrelevant that its own employees were not exposed to the hazard. This argument is rejected.

Isolated/Unpreventable Employee Misconduct

The Respondent asserts the affirmative defense of isolated/ unpreventable employee misconduct, which requires that it establish by a preponderance of the evidence that: (1) it established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) it adequately communicated the rule to employees, (3) it took steps to discover incidents of noncompliance, and (4) it effectively enforced the rule whenever employees transgressed it. *New River Electrical Corp. v. Occupational Safety and Health Review* Commission, 25 F.4th 213, 219-20 (4th Cir. 2022); *see also Ted Wilkerson, Inc.*, OSHRC Docket No. 13390, 1981 OSAHRC LEXIS 196 at *23 (6/30/1981) ("'In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule.'")(quoting *H.B. Zachry Co.*, OSHRC Docket No. 76-1383, 1980 OSAHRC LEXIS 626 (1/31/1980)).

Here, Respondent's argument fails because there is no evidence that fall protection requirements were communicated to the framing workers on Lots 11 and 103, or that fall protection requirements were effectively enforced. Instead, there is only evidence that Respondent had a safety plan and W.C. Jones had a safety plan that it did not require its subcontractor to follow. There is no evidence that 84 Lumber, or F&C General Construction or Charlotte Framing or Merino Framing or Gomez Framing had any safety plan at all, much less one that was communicated to the workers on Lots 11 and 103. Moreover, as to enforcement it appears that prior to this incident there were repeated (at least weekly) instances of workers not wearing hardhats, and at least four instances where workers were not using fall protection. This evidence, coupled with the fact that not one worker on any of the three lots was using fall protection, and their failure was open and obvious for a considerable period of time to passersby (and CMs sitting on the corner of Lot 13), suggests that either these employees were unaware of this requirement, or did not care to comply with it because it was not effectively enforced. *Cf. Pace Constr. Corp.*, OSHRC Docket No. 86-758, 1991 OSAHRC LEXIS 47 (4/12/1991) (evidence that multiple employees were not wearing safety belts, and that employer issued multiple reprimands for failure to wear a safety belt without effective results, supported conclusion that employer did not adequately communicate or enforce rule); *Gem Industrial*, OSHRC Docket No. 93-1122, 1996 OSAHRC LEXIS 106 (12/6/1996) (employer failed to show effective enforcement when there was evidence of repeated violations despite oral reprimands, and failure to impose more stringent measures for repeated violations), *aff'd* 149 F.3d 1183 (6th Cir. 1998); *Ted Wilkerson, Inc., supra* at *24 (evidence that three out of 10-12 employees were working in open view without fall protection supports conclusion that employer's work rule was inadequately communicated and enforced, as does evidence of two prior citations for similar violations, which put employer no notice of need for more effective enforcement). The Respondent has failed to establish its affirmative defense.

Confusion in the Evidence

As a final note, it was apparent that reality was not fully consistent with CSHO Burgette's reporting or testimony on some points: the identification of Lots 10 and 11, the time on the

CSHO's photographs, the identity and participation of the county building inspector, the employer of the Lot 103 workers. These discrepancies are concerning and may have been sufficient to defeat the Complainant's case **but for** the multiple photographs and the testimony of Respondent's witnesses, all of which together establish the open and obvious violations on Lots 11 and 103 over a substantial period of time, and the Respondent CMs' ability to see those violations with the exercise of minimum diligence. Accordingly, the cumulative weight of the evidence establishes the Complainant's citation by a preponderance of the evidence.

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 satisfied its burden of proving by a preponderance of the evidence that Respondent violated the provisions of 29 C.F.R. § 1926.501(b)(13) as alleged in instances (a) and (c) of the Citation, and these violations were a serious violation of the standard.

4. The Complainant's proposed penalty of $7,000 is consistent with the Field Operations Manual, even if only instances (a) and (c) of the Citation are considered.

Accordingly, it is hereby **ORDERED**:

The Complainant's Citation alleging violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED as a serious violation with a penalty of $7,000, which penalty shall be paid within thirty days of the filing date of this Order.

This the 7th day of April, 2022.

Digitally signed by Laura J Wetsch
DN: cn=Laura J Wetsch, o=Winslow Wetsch, PLLC, ou, email=lwetsch@winslow-wetsch.com, c=US
Date: 2022.04.07 21:00:12 -04'00'

Laura J. Wetsch
Hearing Examiner
lwetsch@winslow-wetsch.com

APPENDIX A - <u>JOINT STIPULATIONS:</u>

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 Rea Farms.

5. Respondent was the general contractor at Lots 10, 11, and 103 at Rea Farms subdivision.

6. On April 4, 2019, Mr. Carl Burgette, a Compliance Safety and Health Officer, employed by the North Carolina Department of Labor (NCDOL) Occupational Safety and Health (OSH) Division, conducted an inspection of Respondent's worksite located at Rea Farms, Lot 10, 11, and 103 in Charlotte, North Carolina.

7. Lots 10, 11, and 103 at the site are located on Cornhill Avenue, in Charlotte, North Carolina.

8. Lot 10 and 11 are next to each other.

9. Lot 103 is located across the street from Lots 10 and 11.

10. Respondent contracted with 84 Lumber (first tier framing subcontractor at Lots 10 and 11) to perform framing activities on the residential structures at Lots 10 and 11 at the site.

11. 84 Lumber (first tier framing subcontractor at Lots 10 and 11) contracted with F & C General Construction (second tier framing subcontractor at Lots 10 and 11) to perform framing activities on the residential structures at Lots 10 and 11 at the site.

12. F & C General Construction (second tier framing subcontractor at Lots 10 and 11) contracted with Charlotte Framing (third tier framing subcontractor at Lot 10) to perform the framing activities on the residential structure at Lot 10 at the site.

13. F & C General Construction (second tier framing subcontractor) contracted with Merino Framing, LLC (third tier framing subcontractor at Lot 11) to perform the framing activities on the residential structure at Lot 11 at the site.

14. Respondent contracted with W.C. Jones Construction, Inc. (first tier framing subcontractor at Lot 103) to perform framing activities on the residential structure at Lot 103 at the site.

15. W.C. Jones Construction, Inc. (first tier framing subcontractor at Lot 103) contracted with Gomez Framing Contractors Corp. (second tier framing subcontractor at Lot 103) to perform the framing activities on the residential structure at Lot 103 at the site.

16. The worksite was a multi-employer work-site.

17. As a result of the inspection, one Serious citation was issued to Respondent on May 2, 2019.

18. **Citation Number One, Item 1** alleged three instance of serious violations of 29 CFR 1926.501(b)(13).

19. 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.

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

21. The citation was classified as Serious.

22. 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 A PACE
MESSNER REEVES LLP
7520 N. 16TH STREET, SUITE 410
PHOENIX, ARIZONA 85020

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 11 DAY OF April 2022.

KB Sluss

Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
NCOSHRC@labor.nc.gov