



**The Citations (Collectively referred to herein as the “Original Citation”)**

Citation 01 -- Type of Violation: Serious

Item Number	Standard	Abatement Date	Penalty
001	29 CFR 1926.102(a)(1)	Corrected during inspection	\$1,950.00
002	29 CFR 1926.451(g)(1)(vii)	Corrected during inspection	\$3,250.00
003	29 CFR 1926.452(j)(2)	Corrected during inspection	\$3,250.00
004	29 CFR 1926.502(d)(16)(iii)	Corrected during inspection	\$3,250.00
Grouped			
005a	29 CFR 1926.1053(b)(4)	Corrected during inspection	\$3,250.00
005b	29 CFR 1926.1053(b)(6)	Corrected during inspection	\$ 0.00
		<b>TOTAL</b>	<b>\$14,950.00</b>

Citation 02 -- Type of Violation: NonSerious

Item Number	Standard	Abatement Date	Penalty
Grouped			
001a	29 CFR 1926.403(b)(1)	Corrected during inspection	\$ 0.00
001b	29 CFR 1926.405(b)(1)	Corrected during inspection	\$ 0.00
		<b>TOTAL</b>	<b>\$ 0.00</b>

**Summary Background**

On June 28, 2019 CSHO Hendrix, from a public way, observed what he considered to be a serious fall hazard on a residential construction site. The Worksite was designated as Lot 79 on which was being constructed a two-story residential home. Lot 79 was part of a larger subdivision being constructed known as Laurel Walk in Belmont, North Carolina.

CSHO Hendrix made entry into the subdivision at approximately 10:40 a.m. and began taking photographs from his truck of the Worksite and activities in the subdivision at 10:49 a.m. At approximately 12:10 p.m. CSHO Hendrix entered onto the Worksite and held an opening conference with Wilson who had entered the Worksite only minutes before.

CSHO Hendrix made his determination that the Worksite was a multi-employer work site with the Respondent being the controlling employer. The siding activity which was the subject of the alleged violations was being performed by a second tier sub-contractor. CSHO Hendrix determined that the inspection would be a “focused inspection” as provided by OPN 96F based on there being project coordination by a controlling contractor with an effective safety and health program and a designated competent person responsible for implementing that program.<sup>1</sup>

<sup>1</sup> Under OPN 96F a “focused inspection” is limited to the four primary causes of fatalities in the industry: Falls, Struck By, Caught In Between and Electrocution.

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.

#### FINDINGS OF FACT

1. 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.
2. Respondent is a North Carolina limited liability company, duly organized and existing under the laws of the State of North Carolina. It is active and current and maintains a place of business at 2875 Westport Road, Charlotte, North Carolina.
3. Respondent 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).
4. On June 28, 2019, Compliance Safety and Health Officer Ted Hendrix, employed by the North Carolina Department of Labor, initiated an inspection (the "Inspection") of Respondent's work site located at 117 Stowe Road in Belmont, Gaston County, North Carolina (the "Work Site").
5. CSHO Hendrix was driving down a public street and saw a man standing on a roof. Since Gaston County was subject to Operational Procedure Notice 123T (Special Emphasis Program for Construction Activities) CSHO Hendrix took the necessary steps to initiate an inspection.
6. CSHO Hendrix testified, which testimony was uncontroverted and considered evidence, that Respondent was the top-tier contractor and had a "great" safety program.
7. The Inspection of the Work Site was conducted as a Focused Construction SEP inspection (i.e. focused inspection, pursuant to Operational Procedure Notice 96F, under the Special Emphasis Program for Construction Activity, OPN 123T).
8. The Worksite was part of a larger residential development which consisted of townhomes and single family houses which were under various stages of construction; the larger residential development was generally known as Laurel Walk.
9. The house being constructed on the Worksite was a two-story 'Charleston type' home with a garage on the back, and had an irregular roof line with multiple pitched roofs.

10. CSHO Hendrix made his determination that the Work Site was a multi-employer work site with Eastwood Construction, LLC, the Respondent, being the top-tier general contractor, who contracted with Dula Construction Company ("Dula") to provide materials/labor for installing exterior siding on the house at the Work Site, who in turn contacted with JSC Siding to provide the actual installation of the siding.

11. Respondent's supervisor at the Work Site was David Wilson ("Wilson"). Wilson had worked for Respondent for at least 4 years, and he was involved with overseeing the development/phasing of Laurel which had been under construction for approximately 2 years.

12. Wilson had the authority to control and direct work at the Work Site; he conducted inspections and when he found problems he could correct them or have them corrected.

13. Based on North Carolina Department of Labor Occupational Safety and Health Section Field Information System CPL 2-0.124 (Multi-Employer Worksite Policy) CSHO Hendrix classified Respondent as a controlling employer but not as an exposing employer.

14. CSHO Hendrix entered the Laurel Walk development on South Point Road at 10:40 a.m..

15. CSHO Hendrix parked his truck to observe the Work Site, and at 10:49 a.m. began taking photographs from his truck of the Work Site and of Laurel Walk. There were numerous people walking around Laurel Walk but he did not know their identity at that time.

16. CSHO Hendrix did not enter onto the Work Site until approximately 12:10 p.m.<sup>2</sup>

17. CSHO Hendrix took numerous photographs and videos of the Work Site and Laurel Walk from his truck during the Pre-entry Period using a Nikon fixed-lens digital camera with 20X zoom; on occasion the photographs were taken using reflections in the truck's side mirror.

18. The photographs and videos taken by CSHO Hendrix of the activities going on at Laurel Walk and at the Work Site were incorporated into the Investigative File; many of which were entered into evidence.

19. During the Pre-entry Period CSHO Hendrix did not know the identity of Wilson or his role/relationship at or to the Work Site.

20. Respondent's employee Wilson arrived at Laurel Walk about 7:30 a.m. on June 28<sup>th</sup>; he was engaged in activities pertaining to Laurel Walk including among other activities an approximate 2-hour walk-through with a homeowner at Lot 78; he met with Gaston County inspector for a slab inspection; talked with sales agent; met with a Builder assistant, met with roofers discussing issues with roof line/vents on some townhouses. None of these activities pertained to the Work Site. The majority of the time Wilson was inside houses/townhouses which were under construction however at times he was outside the houses/townhouses.

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<sup>2</sup> The period between 10:49 a.m. and 12:10 p.m. is herein referred to as the "Pre-entry Period".



21. Identifying Wilson as the man wearing a red shirt in the photographs, it was determined that CSHO Hendrix had photographs of Wilson as Wilson went around Laurel Walk.
22. Whenever CSHO Hendrix saw Wilson outdoors CSHO Hendrix took photographs of Wilson. There were a total of approximately 28 pictures of Wilson taken on June 28<sup>th</sup>.
23. The house on the Work Site (Lot 79) on which siding was being installed was located with the back of the house fronting Mill Point Loop (to the north), with Lot 78 being to the left (to the west), and an alleyway/drive and Lots 80, 81, 82, 83, 84, 85, and 86 being in a line on the same side of Mill Point Loop to the right (to the east).
24. Initially CSHO Hendrix's truck was parked in the area of Town Center Drive and Rocs Road which generally is to the northwest of the Work Site and the 5 Outdoor Locations. The truck was moved at least once during the Pre-entry Period.
25. The photographs and videos taken by CSHO Hendrix showed (i) that Wilson walked past the Work Site on two occasions, and (ii) that when Wilson was outside the houses/townhouses he primarily was located at 5 different outdoor locations ("5 Outdoor Locations").
26. During Wilson's morning activities in connection with Laurel Walk on June 28<sup>th</sup> he walked pass the Work Site on two occasions when he was in route from one location in Laurel Walk to another; on neither occasion did the photographs show Wilson directly facing the Worksite, the Worksite being to his side or back.
27. During one of the occasions when Wilson walked pass the Worksite he noted that the employees who were to install the siding were on the ground.
28. The 5 Outdoor Locations were along Mill Point Loop (the street that passed behind the Work Site on Lot 79) and were generally east of the Work Site between Lot 82 and Lot 85.
29. Wilson was employed by Respondent, and was Respondent's Builder at Laurel Walk; for the 10 days prior to June 28<sup>th</sup> Wilson had been on vacation and was not working at the Worksite.
30. Wilson defined a 'Builder' for Respondent as being 'a superintendent on steroids – oversee everything'.
31. On June 28<sup>th</sup>, 2019 employees of JSC Siding arrived at the Worksite (Lot 79) at approximately 10:30 a.m. for installation of siding on the back and left side of the two-story house.
32. CSHO Hendrix testified that he believed that (i) the violative conditions he observed at the Work Site were open and obvious, and (ii) that such conditions were visible to Wilson as he walked around Laurel Walk, including from the 5 Outdoor Locations.

33. The Work Site itself was visible from the 5 Outdoor Locations; however portions of the roof and portions of the back of the house and left side of the house where JSC Siding employees were working may not have been visible from such areas.
34. CSHO Hendrix took no photographs of the Work Site from the 5 Outdoor Locations where Wilson was primarily located.
35. CSHO Hendrix was not situated at any of the 5 Outdoor Locations and did not view the work going on at the Work Site from any of the 5 Outdoor Locations.
36. The 5 Outdoor Locations where Wilson had been were not in the same line of sight as the line of site of CSHO Hendrix while he was taking photographs from his truck.
37. Respondent introduced into evidence photographs of the Work Site which Respondent took from the 5 Outdoor Locations; these photographs were taken a short time prior to this Hearing and showed the Work Site and Laurel Walk in its 'then as-built' state.
38. The evidence is insufficient to determine which, if any, of the violative conditions alleged in Citation 01 were in plain view [in the line-of-sight] of Wilson when Wilson was located at the 5 Outdoor Locations.
39. On June 28, 2019, initially, JSC Siding with its crew of 5 to 6 men including the owner Jorge Perez, was the only contractor on the Worksite.
40. At least one employee of JSC Siding was wearing a shirt with Dula identified on it.
41. Respondent's employee, Wilson, did not enter the Work Site until approximately 12:08 p.m. At that time Wilson observed a worker on the roof who was not tied off, took a picture with his phone, and ordered the workers to come down from the roof.
42. Wilson did not know that the crew members working at the Work Site were not employees of Dula until after he entered the Work Site.
43. As the workers were descending the ladder as directed by Wilson, CSHO Hendrix entered the Work Site at approximately 12:10 p.m. and initiated an inspection (the "Inspection"). An opening conference was held with Wilson followed by a walk-around inspection. CSHO Hendrix interviewed employees during the walk-around but did not take any formal witness statements.
44. The employees involved in the alleged violations set forth in the Original Citation were not employees of Respondent but were employees of JSC Siding, the second-tier siding subcontractor working at the Worksite. Wilson was Respondent's only employee at the Work Site.
45. As a result of the Inspection, on July 17, 2019, Complainant issued to Respondent the Original Citation.

46. Complainant also issued two citations containing the same alleged violations to JSC Siding, which citations were not timely contested by JSC Siding. No citations were issued to Dula.

47. Respondent submitted a timely Notice of Contest.

48. 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").

49. Relative to Citation 01, Item 001, the alleged violation of 29 CFR 1926.102(a)(1) :

(i) 29 CFR 1926.102(a)(1) provides: "The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids, or caustic liquids, chemical gases or vapors, or potentially injurious light radiation."

(ii) undisputed evidence was presented that an employee of JSC Siding was using a pneumatic nail gun to install siding without the use of eye protection; one or more of JSC Siding's employees were exposed to the hazard of being struck by flying objects; it was possible than an accident could occur; serious physical harm could result from such an accident; a Gravity Based Penalty of \$3,000.00 (based on medium severity and lesser probability) was assessed and Complainant applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty of \$1,950.00: 0% credit for size; 25% credit for good faith, and 10% credit for history (total 35% credit).

50. Relative to Citation 01, Item 002, the alleged violation of 29 CFR 1926.451(g)(1)(vii) :

(i) 29 CFR 1926.451(g)(1)(vii) provides: "For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section."

(ii) undisputed evidence was presented that an employee of JSC Siding was working from a pump jack scaffold that was not protected by guardrails; the employee was wearing a harness but was not properly connected to other components of a personal fall arrest system; one or more of JSC Siding's employees were exposed to the hazard of falling; the employee at times was working at a height of 10 feet 3 inches or more above the lower level which was hard ground; it was possible than an accident could occur; serious physical harm could result from such an accident; a Gravity Based Penalty of \$5,000.00 (based on high severity and lesser probability) was assessed and Complainant applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty of \$3,250.00: 0% credit for size; 25% credit for good faith, and 10% credit for history (total 35% credit).

51. Relative to Citation 01, Item 003, the alleged violation of 29 CFR 1926.452(j)(2) :

(i) 29 CFR 1926.452(j)(2) provides in relevant part: "Poles shall be secured to the structure by rigid triangular bracing or equivalent at the bottom, top, and other points as necessary."

(ii) undisputed evidence was presented that an employee of JSC Siding was working from a pump jack scaffold that was not secured to the structure at the bottom; the top of the scaffold was secured to the structure with rigid triangular bracing; one or more of JSC Siding's employees were exposed to the hazard of falling; the employee at times was working at a height of 10 feet 3 inches or more above the lower level which was hard ground; it was possible that an accident could occur; serious physical harm could result from such an accident; a Gravity Based Penalty of \$5,000.00 (based on high severity and lesser probability) was assessed and Complainant applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty of \$3,250.00: 0% credit for size; 25% credit for good faith, and 10% credit for history (total 35% credit).

52. Relative to Citation 01, Item 004, the alleged violation of 29 CFR 1926.502(d)(16)(iii):

(i) 29 CFR 1926.502(d)(16) provides "Personal fall arrest systems, when stopping a fall, shall:... (iii) be rigged such that an employee can neither free fall more than 6 feet (1.6 m), nor contact any lower level;"

(ii) a preponderance of evidence was presented that an employee of JSC Siding was working on the roof using a fall arrest system that was rigged such that the lifeline slack would allow a free fall of approximately 16 feet 6 inches before engagement; one employee was exposed to the hazard of falling and hitting the ground; the fall would have been to hard ground; it was possible that that an accident could occur; serious physical harm could result from such an accident; a Gravity Based Penalty of \$5,000.00 (based on high severity and lesser probability) was assessed and Complainant applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty of \$3,250.00: 0% credit for size; 25% credit for good faith, and 10% credit for history (total 35% credit).

53. Relative to Citation 01, Item 005a, the alleged violation of 29 CFR 1926.1053(b)(4) :

(i) 29 CFR 1926.1053(b)(4) provides "Ladders shall be used only for the purpose for which they were designed."

(ii) undisputed evidence was presented that an employee of JSC Siding was working on the roof while using a six-foot stepladder as a non-self-supporting ladder by leaning the top of the ladder against the wall of the residential structure; one employee was using the ladder and exposed to a fall hazard of approximately 17 feet; the fall would have been to hard ground; it was possible that that an accident could occur; serious physical harm could result from such an accident; a Gravity Based Penalty of \$5,000.00 (based on high severity and lesser probability) was assessed and Complainant applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty of \$3,250.00: 0% credit for size; 25% credit for good faith, and 10% credit for history (total 35% credit).

54. Relative to Citation 01, Item 005b, the alleged violation of 29 CFR 1926.1053(b)(6) :

(i) 29 CFR 1926.1053(b)(6) provides "Ladders shall be used only on stable and level surfaces unless secured to prevent accidental displacement."



(ii) undisputed evidence was presented that an employee of JSC Siding was working on the roof while using a six-foot stepladder on an un-level surface (the pitched roof of the rear porch); the ladder was not secured to prevent displacement; one employee was using the ladder and exposed to a fall hazard of approximately 17 feet; the fall would have been to hard ground; it was possible that that an accident could occur; serious physical harm could result from such an accident; no penalty was assessed because it was grouped with Citation 01, Item 005a -- there was a common abatement.

55. Relative to Citation 02, Item 001a, the alleged violation of 29 CFR 1926.403(b)(1) :

(i) 29 CFR 1926.403(b)(1) provides in relevant part: "The employer shall ensure that electrical equipment is free from recognized hazards that are likely to cause death or serious physical harm to employees."

(ii) undisputed evidence was presented that the temporary electrical power pole servicing the Work Site had been struck by a vehicle, leaving the pole leaning at an approximately 45 degree angle and separating the conduit from the electrical panel; four electrical cords were plugged into the pole's receptacles and employees of JSC Siding were using the temporary service to supply power to their tools; no live electrical current was exposed; the alleged violation was designated as nonserious by CSHO Hendrix based on the condition created the possibility of an accident not likely to result in death or serious physical harm but which would have a direct and immediate relationship to the safety and health of one or more employees; one of JSC Siding's employees was exposed to the hazard; no penalty was proposed.

56. Relative to Citation 02, Item 001b, the alleged violation of 29 CFR 1926.405(b)(1) :

(i) 29 CFR 1926.405(b)(1) provides: "Conductors entering boxes, cabinets, or fittings. Conductors entering boxes, cabinets, or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall also be effectively closed."

(ii) undisputed evidence was presented that the temporary electrical power pole servicing the Work Site had been struck by a vehicle, leaving the pole leaning at an approximately 45 degree angle and separating the conduit from the electrical panel; the damaged pole had been reported to the appropriate installer who was to send someone to correct the problem; four electrical cords were plugged into the pole's receptacles and employees of JSC Siding were using the temporary service to supply power to their tools; electrical conductors entering the electrical box were not protected from abrasion; no live electrical current was exposed; the alleged violation was designated as nonserious by CSHO Hendrix based on the condition created the possibility of an accident not likely to result in death or serious physical harm but which would have a direct and immediate relationship to the safety and health of one or more employees; one of JSC Siding's employees was exposed to the hazard; no penalty was proposed; CSHO Hendrix testified that he did not know that Wilson actually knew that the electrical conductors entering the electric box were not protected from abrasion although Wilson did know the pole had been struck by a vehicle earlier in the week; the repair person arrived during the time CSHO Hendrix was at the Work Site.

57. CSHO Hendrix recommended the alleged violations in Citation 01 Items 001, 002, 003, 004, 005(a) and 005(b) based on Respondent having constructive knowledge; CSHO Hendrix testified that his basis for constructive knowledge was that he observed Wilson on or near the Work Site numerous times with the hazards in plain view and that with reasonable diligence Wilson could have known of the violative conditions.

58. CSHO Hendrix recommended the alleged violations in Citation 02 Items 001a and 001b based on Respondent having actual knowledge; CSHO Hendrix testified that his basis for actual knowledge was that Wilson knew the pole had been struck by a vehicle earlier in the week.

59. Complainant did not allege that any employee of Respondent was exposed to any alleged violative condition cited in the Original Citation.

60. Wilson did regular daily inspections of on-going construction work, evidencing such inspections with written reports.

61. Based on the Wilson's inspection reports, when Wilson saw violations of safety and health standards he took action, or had action taken, to correct the violations.

62. The time during which Wilson passed by the Worksite on route to other locations at Laurel Walk was brief, and the time at which Wilson was at the 5 Outdoor Locations was a total of only about 12 to 17 minutes.

63. Respondent had no willful, serious or repeat citations during the 3 years prior to the Inspection.

64. The safety history of Dula was reviewed prior to Respondent contracting with Dula.

65. On recent inspections by Wilson prior to the Inspection, Wilson had noted that Dula was doing a good job, scaffolding good, PPE worn; there had been no issues with Dula except on one occasion which was approximately 5 weeks earlier when Wilson gave a verbal to tie off.

66. CSHO Hendrix testified that Wilson did good inspections.

67. CSHO Hendrix testified that Respondent's safety program was one of the better safety programs he had seen.

68. Wilson had worked at Laurel Walk for approximately 2 years and was aware of the scale of the residential development, the nature of the construction work being performed, the scheduling of the work, and the construction practices of the contractors.

69. OSHC Hendrix and Wilson were both creditable witnesses. At the time of the Hearing: (i) CSHO Hendrix continued to be employed by the North Carolina Department of Labor; and (ii) Wilson was no longer employed by Respondent but had been working for D R Horton for approximately one year.

70. The Stipulations are incorporated by reference as Findings of Fact to the extent necessary to give effect to the provisions of this Order.

## 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. To establish that the violation was 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).

Complainant has the burden of establishing each element by a preponderance of the evidence. *Commission 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 cannot be sustained.

### The Multi-employer Worksite Doctrine

The multi-employer worksite doctrine was first enumerated by the North Carolina Review Commission in *Commissioner of Labor v. Romeo Guest Associates, Inc.*, OSHANC 96-3513, Slip Op., (RB 1998) and was later confirmed in *Commissioner of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 28 (2005) (review denied 359 N.C. 629 (2005)). It states that a general contractor’s duty under N.C.G.S. 95-129(2) to comply with “occupational safety and health standards or regulations” extends to employees of subcontractors while they are on the jobsite. However, this is a reasonable duty and not one of strict liability. “...the general contractor is only liable for those ‘violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.’ ... In addition, the general contractor cannot ‘anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations created by others.’ ... It is only responsible for those hazards that it could reasonable have detected because of its supervisory capacity. The general contractor is required to make reasonable efforts to anticipate hazards to subcontractor’s employees and reasonable efforts to inspect the jobsite to detect violations that its subcontractors may create.” *Commissioner of Labor v. Romeo Guest Associates, Inc.*, OSHANC 96-3513, Slip Op., (RB 1998) (internal citations omitted).

Under the North Carolina Department of Labor Occupational Safety and Health Section Field Information System CPL 2-0.124 (Multi-Employer Worksite Policy) (herein referred to as "MEWP") an employer "who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them" is referred to as a "controlling employer". "Control can be established ...by the exercise of control in practice." MEWP Section X(E)(1)

MEWP X(E)(2) specifically provides: "A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees."

It is improper to rely "on exposing employer precedent as the benchmark for how reasonable diligence or care is assessed for a controlling employer whose own employees are not exposed." Suncor Energy (U.S.A.) Inc., No. 13-0900, 2019 WL 654129, at \*6 (OSHRC Feb. 1, 2019)

Factors used in evaluating reasonable care under the multi-employer worksite policy generally require periodic inspections of the worksite, implementation of an effective system for correcting hazards and effective enforcement of a safety and health compliance program, although the standard is lower than what is required of an employer protecting its own employees. Controlling employers are not required to inspect for hazards as frequently as is required of its subcontractors.

Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include the scale of the project, the nature and pace of the work, and the controlling employer's knowledge about the safety history and safety practices of the subcontractor it has retained.

#### Citation 01

#### Complainant's Basis for Constructive Knowledge

In this case, the Work Site was a multi-employer worksite and Respondent was a controlling employer; none of its own employees were exposed to any alleged violative condition. According to the testimony of CSHO Hendrix, Complainant issued Citation 01 based on Respondent having constructive knowledge (and not actual knowledge) of the violative conditions of each of the cited Items 1 through 5(b).

Generally, constructive knowledge is established by applying a reasonable care standard. However, application of the reasonable care standard is not uniform or static. The analysis to establish the 'reasonable care standard' differs depending on whether (i) the employer is being held liable for exposing its own employees, or (ii) the employer, under the multi-employer worksite doctrine, is a 'controlling employer' whose own employees are not exposed.



## I--Should Have Known

Complainant asserts that it established constructive knowledge by Respondent because Respondent 'should have known' of the violations because it was the controlling employer and knew that JSC Siding was installing siding on the two-story house on Lot 79. According to Complainant the circumstances of having a crew at work installing siding is sufficient to put Wilson on notice of several potential violations.<sup>3</sup>

In this case, adherence to this method of establishing constructive knowledge would be tantamount to imposing strict liability on Respondent based on having a crew installing siding. However, strict liability is not imposed on a controlling employer who neither creates the violative conditions and exposes employees to those conditions.

## II -- Open and Obvious

Complainant also asserts that it established constructive knowledge by Respondent because the conditions were open and obvious.

With respect to the violative conditions being 'open and obvious' a preponderance of the evidence did not show that the violative conditions were within the line-of-sight of Wilson. Wilson was at the 5 Outdoor Locations for a total of approximately 12 to 17 minutes or was walking quickly by Lot 79. Wilson testified that the employees who were to install the siding were on the ground when he walked by Lot 79 on one occasion and that Lot 79 was to his back or side when he walked by. Because of the difference in elevation of the roof lines there was obstruction to the line-of-sight of the work being performed by the workers on Lot 79.

While the violative conditions may have been 'open and obvious' from the location of CSHO Hendrix it was not established by a preponderance of evidence that they were 'open and obvious' from the location of Wilson.

## III ---Reasonable Diligence in Preventing or Detecting

Complainant also asserts that it established constructive knowledge by Respondent because Respondent failed to exercise reasonable diligence in preventing or detecting the violative conditions.

Whether Respondent failed to exercise reasonable diligence in preventing or detecting the violative conditions can be made using factors set out in the MEWP and applicable case law --- the nature of the work, the scale of the project, and the safety history and experience of the contractor involved.

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<sup>3</sup> Item 001 -- lack of eye protection while using a pneumatic nail gun (Ex C-1c,7-9 and video); Item 002 -- fall arrest system for scaffold (Ex C-1c.11); Item 003 -- scaffold poles not secured (Ex C-1c.14-18; Item 004 -- personal fall arrest system not properly rigged (Ex C-1c.5-6); Item 005a and Item 005b -- ladder problems (Ex C-1c.1,4,10,12,24,25)

The nature and scale of the work was routine installation of siding on a two-story house on a single residential lot. Respondent had contracted the work to Dula. Wilson conducted good routine inspections of the on-going work and knew that Dula had not recently been found to have safety issues. Respondent had a 'great' safety and health program and had a good safety history. Accordingly, under the circumstances of this case, it was reasonable for Wilson to not constantly watch the workers and to rely on its subcontractor to perform work safely and to follow Respondent's safety and health program.

### Recent Decisions

Two residential construction cases holding that the controlling employer was liable for violations by its subcontractor based on constructive knowledge were recently affirmed by the North Carolina Occupational Safety and Health Review Commission: *Commissioner of Labor of the State of North Carolina v Meritage Homes of the Carolinas, Inc.*, (Review Commission Order filed June 10, 2021 OSHNC 2018-5995) *on appeal to Mecklenburg Superior Court* and *Commissioner of Labor of the State of North Carolina v Lennar Carolinas, LLC*, (Review Commission Order filed October 4, 2021 NCOSH 2018-6039) *on appeal to Mecklenburg Superior Court*. In both of these cases citations were upheld against the controlling (who was not a creating or exposing) employer when subcontractor's employees were exposed to hazards.

Relevant finding of fact in Lennar are summarized as follows: (i) all of the work being performed was "visible from Wrangell Loop"; (ii) the controlling employer's construction manager/superintendent, for a period of about 14 minutes, was walking down Wrangell Loop toward the lots where the work was being performed; (iii) at least one of the work sites was visible from where the construction manager/superintendent got into his parked car; (iv) the houses being constructed were close to the street such that the activities were clearly visible to the naked eye from the street; (v) the violations occurred during a time when respondent's responsible employee was in a position to personally observe them if he had just looked at the construction going on under his nose; and (vi) the respondent emphasizes safety on its jobsites and has a good safety record, it conducts safety inspections in its subdivisions and it takes punitive action against subcontractors for violations of safety policies.

Relevant findings of fact in Meritage are summarized as follows: (i) the controlling employer's Site Superintendent walked down the drive toward the house where siding work was being performed; he also walked by the house where the man was installing siding on the front of the house; (ii) a photograph shows the superintendent facing toward the house in a position where he either saw or could have seen the man at work without fall protection; and (iii) the respondent emphasizes safety on its jobsites and has a good safety record.

The decisions in Lennar and Meritage are based on the violative conditions being clearly visible to the employer's on-site supervisor (i.e. being open and obvious).

### Distinction From Lennar and Meritage

This case is distinguishable from Lennar and Meritage in that in each of those cases there was a finding of fact that the violative working conditions was in fact visible to the controlling

employer's superintendent or could have been visible if the superintendent had looked. In this case it was not established by a preponderance of evidence that the alleged violative conditions were in the line-of-sight of Wilson or that Wilson failed to make sufficient observations of the work site.

Analysis of the relevant factors to determine if the general contractor had fulfilled its obligation of reasonable care as a controlling employer in this case leads to a different conclusion than the one reached in Lennar and Meritage:

\* Respondent had a safety and health program that was superior to that of many general contractors as evidenced by CSHO Hendrix's testimony that Respondent had a 'great' program and that Respondent's program was 'better than that of most employers I have seen'. Respondent's program was of such quality that CSHO Hendrix decided that only a focused inspection would be conducted. The Lennar and Meritage decisions do not indicate that the general contractor has a superior safety program or that the inspection in those cases could have qualified as a 'focused' inspection.

\* The size of the Work Site which was subject to the inspection by CSHO Hendrix was only one lot (Lot 79) and was not the entire development. Lot 79 was part of a larger residential development, but there was no testimony at the Hearing that there was active construction at that time on any other lots. Apparently the only subcontractor working was the siding crew on Lot 79; in fact, CSHO Hendrix described the Work Site being inspected by him as being Lot 79. In Lennar and Meritage the inspection site was much larger encompassing several active construction projects with a number of subcontractors on site.

\* During the time period from Wilson's arrival at Laurel Walk t at about 7:30 a.m. until approximately 12:08 p.m. Wilson had not entered Lot 79 (the site of CSHO Hendrix's inspection). CSHO Hendrix took numerous photographs of violative conditions occurring at Lot 79. However, during that time period Wilson, as the Builder for Laurel Walk, was performing job responsibilities, other than construction supervision, relative to the overall development, including meeting with county inspectors, seeking permits, conducting walk-through with prospective buyers, and troubleshooting design issues. Respondent did not have to have a construction supervisor at the Work Site in order for the subcontractor to perform its work – the subcontractor worked without Respondent's construction supervisor being present; the subcontractor was to have a competent person present on its own work crew. When Wilson entered Lot 79 he observed a safety issue and he immediately stopped the men from working on the roof and directed them to come down to the ground. It was at that time that CSHO Hendrix entered the Lot 79 Work Site and announced himself and the purpose of his visit. In Lennar and Meritage the superintendent representing the controlling employer was present at the worksite during the time the OSHA inspector was taking pictures and observing the site; apparently the superintendent was "busy" on the work site with his non-construction supervision activities to the detriment of his obligation to provide construction supervision. Further, there is no indication that the superintendent in Lennar and Meritage ever observed any violative conditions or issued a stop-work order.

\* Wilson did daily safety inspections and prepared written reports. CSHO Hendrix testified that Wilson did good inspections and his reports detailed those inspections. In Lennar the findings of fact show that the respondent emphasizes safety on its jobsites and has a good safety record, it conducts safety inspections in its subdivisions and it takes punitive action against subcontractors for violations of safety policies. In Meritage the findings of fact show that the respondent emphasizes safety on its jobsites and has a good safety record. However, in these cases there was no indication concerning the frequency and/or quality of inspections and the manner of reporting inspections.

#### Citation 02

Item 001(a) Citation 02 Item 001a sets forth an alleged violation of 29 CFR 1926.403(b)(1) based on Respondent not ensuring that the temporary electrical power pole was free from recognized hazards that are likely to cause death or serious physical harm in that the pole had been struck and was leaning at an approximately 45 degree angle separating the conduit from the electrical panel; workers were using the temporary service to power their tools. However, the exposure was classified as 'nonserious' in that the condition created the possibility of an accident not likely to result in death or serious physical harm. No penalty was proposed.

Accordingly, a violation was not shown by Complainant since the standard itself requires that the hazard be one that is likely to cause death or serious physical harm.

Item 001(b) Citation 02, Item 001b sets forth an alleged violation of 29 CFR 1926.405(b)(1) based on the power pole which had been struck and was leaning at an approximately 45 degree angle with the electrical conductors entering the electrical box not being protected from abrasion. The violation was classified as nonserious and no penalty was proposed. The violation was alleged based on Respondent having actual knowledge of the condition; however CSHO Hendrix testified that he did not know that Wilson actually knew that the electrical conductors entering the electric box were not protected from abrasion. Further there was no evidence that Wilson was close enough to the pole to see the unprotected electrical conductors. There was no other evidence presented to establish knowledge by Respondent. Accordingly Complainant did not establish the necessary elements to establish a prima facie violation of 29 CFR 1926.405(b)(1) .

#### 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. The Work Site was a multi-employer work site subject to the Multi-employer Worksite Policy (CP 2-0.124).

6. Respondent was a "controlling employer" under the terms of the Multi-employer Worksite Policy but it was neither a "creating employer" nor an "exposing employer".

7. With respect to Citation 01 Item 001 Complainant proved by a preponderance of evidence that 1926 CFR 1926.102(a)(1) applied, that the terms of the standard were violated, that one or more employees of JSC Siding were exposed to the hazard covered by the standard, and that the hazard created the possibility of an accident the substantially probable result of which could be death or serious bodily injury. However, Complainant did not prove by a preponderance of evidence that Respondent had knowledge of the violation.

8. With respect to Citation 01 Item 002 Complainant proved by a preponderance of evidence that 1926 CFR 1926.451(g)(1)(vii) applied, that the terms of the standard were violated, that one or more employees of JSC Siding were exposed to the hazard covered by the standard, and that the hazard created the possibility of an accident the substantially probable result of which could be death or serious bodily injury. However, Complainant did not prove by a preponderance of evidence that Respondent had knowledge of the violation.

9. With respect to Citation 01 Item 003 Complainant proved by a preponderance of evidence that 1926 CFR 1926.452(j)(2) applied, that the terms of the standard were violated, that one or more employees of JSC Siding were exposed to the hazard covered by the standard, and that the hazard created the possibility of an accident the substantially probable result of which could be death or serious bodily injury. However, Complainant did not prove by a preponderance of evidence that Respondent had knowledge of the violation.

10. With respect to Citation 01 Item 004 Complainant proved by a preponderance of evidence that 1926 CFR 1926.502(d)(16)(iii) applied, that the terms of the standard were violated, that one or more employees of JSC Siding were exposed to the hazard covered by the standard, and that the hazard created the possibility of an accident the substantially probable result of which could be death or serious bodily injury. However, Complainant did not prove by a preponderance of evidence that Respondent had knowledge of the violation.

11. With respect to Citation 01 Item 005a Complainant proved by a preponderance of evidence that 1926 CFR 1926.1053(b)(4) applied, that the terms of the standard were violated, that one or more employees of JSC Siding were exposed to the hazard covered by the standard, and that the hazard created the possibility of an accident the substantially

probable result of which could be death or serious bodily injury. However, Complainant did not prove by a preponderance of evidence that Respondent had knowledge of the violation.

12. With respect to Citation 01 Item 005b Complainant proved by a preponderance of evidence that 1926 CFR 1926.1053(b)(6) applied, that the terms of the standard were violated, that one or more employees of JSC Siding were exposed to the hazard covered by the standard, and that the hazard created the possibility of an accident the substantially probable result of which could be death or serious bodily injury. However, Complainant did not prove by a preponderance of evidence that Respondent had knowledge of the violation.

13. With respect to Citation 02 Item 001a alleging a violation of 29 CFR 1926.403(b)(1) Complainant did not carry its burden of proof that the terms of the standard applied since the standard expressly states that the hazard has to be one which is "likely to cause death or serious physical harm to employees"; this violation was classified as 'NonSerious'. Further, Complainant did not prove by a preponderance of evidence that Respondent had knowledge of the violation.

14. With respect to Citation 02 Item 001b Complainant proved by a preponderance of evidence that 1926 CFR 1926.405(b)(1) applied, that the terms of the standard were violated, that one or more employees of JSC Siding were exposed to the hazard covered by the standard, that the hazard created the possibility of an accident not likely to result in death or serious physical harm but which would have a direct and immediate relationship to the safety and health of one or more employees. However, Complainant did not prove by a preponderance of evidence that Respondent had knowledge of the violation.

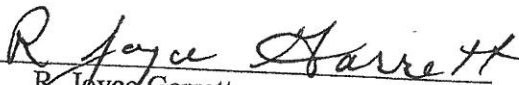
### ORDER

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

1. Citation 01 Item 001 in violation of 29 CFR 1926.102(a)(1) is VACATED.
2. Citation 01 Item 002 in violation of 29 CFR 1926.451(g)(1)(vii) is VACATED.
3. Citation 01 Item 003 in violation of 29 CFR 1926.452(j)(2) is VACATED.
4. Citation 01 Item 004 in violation of 29 CFR 1926.502(d)(16)(iii) is VACATED.
5. Citation 01 Item 005a in violation of 29 CFR 1926.1053(b)(4) is VACATED.
6. Citation 01 Item 005b in violation of 29 CFR 1926.1053(b)(6) is VACATED.
7. Citation 02 Item 001a in violation of 29 CFR 1926.403(b)(1) is VACATED.

8. Citation 02 Item 001b in violation of 29 CFR 1926.405(b)(1) is VACATED.

This 20th day of December, 2021.

  
R. Joyce Garrett  
Administrative Law Judge

Schedule 1  
STIPULATIONS

Number	Stipulation
1	The Hearing in this matter shall be conducted via the video conferencing platform known as "Lifesize";
2	The presence of a court reporter during the Hearing is waived;
3	The Hearing's audio and video will be recorded through Lifesize (the "Recording");
4	The Recording will be the official record of the Hearing;
5	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);
6	The Administrative Law Judge shall control when the Hearing is on and off the record;
7	The Hearing will be deemed to have taken place in Raleigh, North Carolina;
8	Neither party objects to R. Joyce Garrett, Administrative Law Judge, conducting the Hearing
9	Pursuant to N.C.G.S. §95-135, the Review Commission has jurisdiction over the parties and subject matter of this action.
10	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.
11	Respondent is an "employer" within the meaning of N.C.G.S. § 95-127(10);
12	Respondent denies that it had employees who were either exposed to, or in any way, created or were responsible for any of the purported hazards referenced in the Citation issued to Respondent in this matter.
13	Respondent is a North Carolina limited liability company, duly organized and existing under the laws of the State of North Carolina. It is active and current and maintains a place of business at 2857 Westport Road, Charlotte, in Mecklenburg County, North Carolina.
14	On or about June 28, 2019, Compliance Safety and Health Officer (CSHO) Ted Hendrix, employed by the North Carolina Department of Labor ("NC DOL"), initiated an inspection (the "Inspection") of a work site at 117 Stowe Road in Belmont, Gaston County, North Carolina ("Work Site").
15	Gaston County is included in the Construction Special Emphasis Project as provided for in OPN 123T.
16	Respondent entered into an agreement (the "Dula Contract") with Dula Construction ("Dula").
17	Pursuant to the Dula Contract, Dula was to provide materials and labor for installing exterior siding.
18	Dula subcontracted with JSC Siding ("JSC Siding") to install the siding.
19	Daniel Wilson ("Wilson") was Respondent's builder.



Number	Stipulation
20	Daniel Wilson did not object to CSHO Hendrix conducting the Inspection.
21	On July 17, 2019, NC DOL issued a Citation and Notification of Penalty to Respondent alleging a Serious violation of six standards, and a Citation and Notification of Penalty to Respondent alleging a NonSerious violation of two standards (collectively the "Eastwood Citation").
22	Respondent submitted a timely Notice of Contest, dated August 28, 2019.
23	On or about October 7, 2019, NC DOL received "Employer's/Respondent's Statement of Position" dated October 7, 2019, which requested formal pleadings be served.
24	Respondent denies the allegations contained in the Eastwood Citation and objects to the proposed penalty and abatement dates.

CERTIFICATE OF SERVICE

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

JOHN W ORMOND III  
BROKS PIERCE  
PO BOX 1800  
RALEIGH NC 27602

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

STACEY PHIPPS  
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](mailto:carla.rose@labor.nc.gov).

THIS THE 21 DAY OF December 2021.



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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