

NOV 19 2021

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

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, COMPLAINANT, v. JAMES WALDEN DBA JW ROOFING & ASSOCIATES and its successors RESPONDENT. DOCKET NO.: OSHANC 2019-6177 INSPECTION NUMBER: 318161346 CSHO ID: L1173 ORDER

THIS CAUSE came on for hearing and was heard before the undersigned, Reagan H. Weaver, Hearing Examiner for the North Carolina Occupational Safety and Health Review Commission, August 3, 2021 at 10:00 a.m., via the Lifesize teleconferencing platform, pursuant to a Notice of Hearing. Sage A. Boyd, Assistant Attorney General, North Carolina Department of Justice, appeared for Complainant. James Walden, Representative for Respondent, appeared for Respondent. No affected employee of Respondent, or its representative, attended to have a say in, or participate as a party in, the Hearing.

The matter was continued to November 19, 2021 at 10:00 a.m., via the Lifesize teleconferencing platform, pursuant to a Notice of Hearing. Sage A. Boyd, Assistant Attorney General, North Carolina Department of Justice, appeared for Complainant. Daniel P. O'Shea, Attorney with Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., appeared for Respondent. No affected employee of Respondent, or its representative, attended to have a say in, or participate as a party in, the Hearing.

At the time of the hearing, the parties agreed upon and consented to the following stipulations:

STIPULATIONS

- 1. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance 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").
2. The Review Commission has jurisdiction over the parties and the subject matter of this action.
3. Respondent in this matter is James Walden DBA JW Roofing & Associates. James Walden is a sole proprietor doing business as JW Roofing & Associates. JW Roofing &

Associates is not registered with the North Carolina Office of the Secretary of State. James Walden filed a Certificate of Assumed Name or Partnership with the Gaston County Register of Deeds Office dated December 19, 2008, which states that the name under which the business is to be conducted was James Walden DBA JW Roofing & Associates. Respondent maintains a place of business in Gastonia, North Carolina. Respondent is an "employer" within the meaning of N.C.G.S. § 95-127(11); and maintains "employees" within the meaning of N.C.G.S. § 95-127(10). Respondent is in the business of roofing construction.

4. On and between March 28, 2019 and March 29, 2019, Mr. Ted Hendrix, Compliance Safety and Health Officer (CSHO) with the Occupational Safety and Health Division ("OSH Division") of the North Carolina Department of Labor (NCDOL), conducted an inspection of the Respondent's work site at 609 E. Trade Street, Dallas, North Carolina (in Gaston County) pursuant to the OSH Division's Special Emphasis Program for Construction after observing serious hazards from a public right of way.
5. As a result of the inspection, Complainant issued the following citations carrying the following proposed abatement dates and penalties on August 29, 2019:

**CITATION NUMBER ONE (Willful Serious)**

<u>Item No</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	29 CFR 1926.501(b)(10); <i>in the alternative, 29 CFR 1926.501(b)(1)</i>	Immediately Upon Receipt	\$28,000.00

**CITATION NUMBER TWO (Serious)**

<u>Item No</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	29 CFR 1926.100(a)	Immediately Upon Receipt	\$1,200.00
2	29 CFR 1926.102(a)(1)	Immediately Upon Receipt	\$1,200.00
3	29 CFR 1926.503(a)(1)	Immediately Upon Receipt	\$2,800.00
4	29 CFR 1926.1053(b)(1)	Corrected During Inspection	\$2,800.00

6. The Respondent submitted a timely Notice of Contest, dated March 1, 2019.
7. A hearing in this matter was scheduled pursuant to the Rules of Procedure of the Occupational Safety and Health Review Commission of North Carolina ("the Rules").
8. Complainant and Respondent waived the making of a transcript of the proceeding before the undersigned, and neither objected, either procedurally or otherwise, to this Hearing and the entry of this Order.
9. Respondent posted the original citation and the Hearing Order as required by the Rules. Neither Complainant nor Respondent has received notification from any affected employee that such employee, or his or her representative, wishes to have a say in, or

participate as a party in, this matter, or has any objections in connection with this matter, including without limitation objection to the reasonableness of any abatement period.

10. Respondent confirms that the violations alleged in the Original Citation have been abated.
11. The parties agree to bear their own attorney's fees (if any), costs and other expenses that have been incurred in connection with any stage of these proceedings up to and including the filing of this Order.
12. Provided the respective Motions below of each party are granted, Complainant and Respondent agree that:
  - (a) there are no other matters that remain to be decided, and that other than a ruling with respect to the Motions, no outstanding issues remain to be resolved by an evidentiary hearing of this matter;
  - (b) this Order is a full and final resolution of the claim set out in the underlying Original Citation;
  - (c) the modification of any portion of the Original Citation by Complainant shall not be deemed to be an admission by Complainant that any such portion was alleged without merit;
  - (d) none of the agreements, statements, stipulations and actions taken by Respondent shall be deemed an admission by the Respondent of any of the allegations contained in the Original Citation or as a waiver of defense, provided however, that in any subsequent proceeding with respect to matters covered by this Order brought directly under the Act by Complainant, this Order shall have the full force and effect of a final order;
  - (e) the agreements, statements, stipulations and actions herein by Complainant and by Respondent are solely for the purpose of resolving this matter economically and amicably without further litigation and shall not be used for any other purposes except for proceedings and matters arising under the Act and Article 21, Chapter 95 of the North Carolina General Statutes;
  - (f) the penalty for each item designated in the Original Citation has been calculated in accordance with the standard Field Operations Manual procedure giving consideration by Complainant to standard mitigating factors and to specific factors applicable to Respondent; and
  - (g) there has been no employee objection to the reasonableness of any abatement period.
13. Respondent agrees to continue its best efforts to comply with the requirements of the Act.
14. Respondent further agrees that within ninety (90) calendar days of the date of this Final Order, Mr. James Walden or other management representative for Respondent, shall complete an OSHA 10-Hour Training Course for Construction.

15. Respondent agrees to pay the new proposed total penalty of \$13,200.00 in twenty-four (24) equal monthly installments of \$550.00 each with the first payment due February 1, 2022. All subsequent payments shall be due and payable on the first business day of each month following payment of the first installment. In no event shall the payment term extend beyond a consecutive twenty-four (24) month period, unless agreed upon by Complainant. In the event that the Respondent does not pay each monthly installment as agreed upon, all remaining installments become immediately due and payable, and the Commissioner retains the right to institute collection proceedings as allowed by law. Respondent agrees to pay attorneys' fees to Complainant in the event that the Complainant has to institute collection proceedings to collect the debt. Payment is to be by check payable to North Carolina Department of Labor, OSHA Division (Identifying Inspection No. **318161346**) and mailed to North Carolina Department of Labor Financial Services Division, ATTN: Collections Division, 1101 Mail Service Center Raleigh, North Carolina 27699-1101.

### MOTIONS

1. Complainant moves to make the following amendments to the Original Citation ("Complainant's Motion"):

- (a) Reduce the penalty for Citation One, Item 1 from \$28,000.00 to \$9,200.00;
- (b) Reduce the penalty for Citation Two, Item 1 from \$1,200.00 to \$600.00;
- (c) Reduce the penalty for Citation Two, Item 2 from \$1,200.00 to \$600.00;
- (d) Reduce the penalty for Citation Two, Item 3 from \$2,800.00 to \$1,400.00; and
- (e) Reduce the penalty for Citation Two, Item 4 from \$2,800.00 to \$1,400.00.

Except as expressly set forth above in Complainant's Motion, the Original Citation shall remain unmodified or amended.

Respondent did not object to Complainant's Motion.

2. Respondent requested that, upon the granting of Complainant's Motion, the Undersigned consider its Motion to Withdraw Respondent's Notice of Contest to the Original Citation.

Complainant did not object to Respondent's Motion.

### FINDINGS OF FACT

Based on the stipulations at the time of the Hearing and as memorialized herein, the Undersigned makes the following:

1. Complainant, Commissioner of Labor of the State of North Carolina, is an agency of the State charged by law with and enforcement of the provisions of the Act.

2. Respondent is subject to the provisions of the Act and jurisdiction of the Safety and Health Review Commission of North Carolina.
3. This Court has jurisdiction over the parties and the subject matter of this action.
4. Neither party has any objection, procedural or otherwise, to this Hearing Conference.
5. The stipulations are incorporated by reference as Findings of Fact to the extent necessary to give effect to the provisions of this Order.

### CONCLUSIONS OF LAW

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.

#### **NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:**

1. The Complainant's Motion is hereby **GRANTED**; and
2. The Respondent's Motion is hereby **GRANTED**, and Respondent shall pay the penalty of \$13,200.00 in the manner set forth herein.

This the 19<sup>th</sup> day of November, 2021.

Reagan H. Weaver  
Reagan H. Weaver (Nov 19, 2021 13:19 EST)  
REAGAN H. WEAVER  
Hearing Examiner

**CONSENTED TO:**

JOSHUA H. STEIN  
Attorney General

*Sage A. Boyd*

Sage A. Boyd (Nov 19, 2021 12:02 EST)

Sage A. Boyd  
Assistant Attorney General  
North Carolina Department of Justice  
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ATTORNEYS FOR COMPLAINANT

*Daniel P. O'Shea*

Daniel P. O'Shea (Nov 19, 2021 12:24 EST)

Daniel P. O'Shea  
Gray, Layton, Kersh, Solomon, Furr &  
Smith, P.A.  
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Gastonia, NC 28053-2636  
doshea@gastonlegal.com  
Telephone No. (704) 865-4400

ATTORNEY FOR RESPONDENT



CERTIFICATE OF SERVICE

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

DANIEL P O'SHEA  
GRAY LAYTON KERSH SOLOMON  
FURR & SMITH PA  
PO BOX 2636  
GASTONIA NC 28053-2636

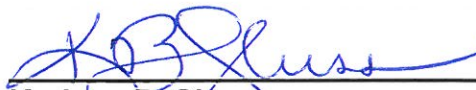
SAGE A BOYD  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH, NC 27602-0629

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

By depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 22 DAY OF November 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