

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

FILED

FEB - 3 2021

COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)
)
COMPLAINANT,)
)
v.)
)
)
KMS ROOFING/SHEET METAL, LLC)
and its successors,)
RESPONDENT.)

FINAL ORDER

**NC Occupational & Safety
Review Commission**

OSHANC NO.: 2019-6180
INSPECTION NO.'s: 318172475
CSHO ID: A3277

THIS MATTER came on for hearing and was heard remotely before the undersigned on November 4, 2021. The Complainant was represented by Stacey A. Phipps, Assistant Attorney General, North Carolina Department of Labor. Respondent was represented by J. Michael Thomas, Esq. Complainant's witnesses were Compliance Safety and Health Officer (CSHO), Mike Saye, and Kevin Wilson, owner of KMS Roofing/Sheet Metal, LLC, hereafter referred to as Respondent or KMS. Both parties listed as a witness, Shane Bailey, former employee of Respondent, and Complainant served a subpoena on someone at his presumed address, but Mr. Bailey did not attend. Respondent's witness was Mr. Wilson.

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

ISSUE PRESENTED

Closing arguments of counsel for both parties isolated the issue for determination — the credibility of the assertion of Respondent's owner that the repair of the roof in question was a moonlighting job of the former employee, Mr. Bailey, and not a KMS job. Thus, the issue is whether Complainant met its burden of proof to show that the violation of OSHA regulations it documented was attributable to the Respondent.

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.501(b)(11) provides as follows:

"Steep roofs". Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels was not protected from falling by guardrail systems with toe boards, safety net systems, or personal fall arrest systems.

29 CFR 1926.503(a)(1) provides as follows:

“Training Program”. The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

FINDINGS OF FACT

1. Complainant, Commissioner of Labor of the State of North Carolina (hereafter Complainant or Commissioner), is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §95-126 et seq., the Occupational Safety and Health Act of North Carolina (the Act) as well as the regulations adopted pursuant thereto.
2. Respondent, KMS Roofing/Sheet Metal, LLC, (hereafter Respondent or KMS), was at all times relevant to this case, in the business of providing roofing services.
3. Respondent was an employer within the meaning of N.C. Gen. Stat. §95-127(11) and Shane Bailey, hereafter Bailey, was an employee of Respondent within the meaning of §95-127(10).
4. Respondent, through its counsel, conceded that but for not proving this job belonged to KMS, Complainant had proved its case for establishing the liability for the citations and the penalties.
5. Respondent’s owner, Kevin Wilson, testified under oath to the following facts that are found to be credible:
 - a. He was on vacation at the beach the week of the inspection.
 - b. He “doesn’t work anybody when I’m not there.”
 - c. He is personally present on every job.
 - d. No work had been left for Mr. Bailey to perform while he, Wilson, was gone.
 - e. Approximately two years before this inspection, KMS had done work for the Assured Storage business. At that time, KMS repaired roof seams on the storage facility.
 - f. Above the Assured Storage office there was a residence with a tenant.
 - g. KMS does not customarily do residential repair. It focuses on commercial buildings. When Wilson receives a request for residential work he refers the business to his employees who are welcome to do the work on their own time.
 - h. The work that Bailey was observed doing with his helper by the two compliance officers was work that was obtained by Bailey as a result of the tenant of the residential unit hiring Bailey to fix a leak. Bailey agreed to do the work personally for the tenant while Wilson was on vacation.
 - i. Assured Storage asked KMS to tell them what KMS would have charged to do the work. In order to prepare an estimate, Wilson’s wife generated an invoice on the KMS computer, and the invoice was communicated to Assured Storage.

- j. KMS was not paid for the work in question.
 - k. Bailey and his girlfriend/wife were having some difficulties at the time of Mr. Wilson's vacation, so Wilson gave Bailey permission to use the company truck for his transportation.
 - l. Wilson has known Bailey since Bailey's childhood. Wilson coached Bailey's soccer team when Bailey was 8-10 years old.
 - m. Wilson has a specific procedure requiring a prospective customer sign a proposal or contract and pay 50% down before KMS starts work. He had received no such proposal or deposit from Assured Storage.
 - n. Wilson was the only company official who had authority to enter into contracts on behalf of the business.
6. Wilson's wife did not testify.
 7. Neither party moved to enforce Complainant's subpoena on Shane Bailey.
 8. The tenant who secured Bailey's services did not testify.
 9. When CSHO Saye asked the Assured Storage office person who hired the workers to do the roof repair, the response was that the corporate office of Assured Storage had hired the company to do the work.
 10. No other documentary evidence other than the invoice described above was offered to prove that Respondent was hired to conduct the work cited. No contract of employment or evidence of a contract of employment between Assured Storage and KMS was entered into evidence, nor was any evidence offered to show that Assured Storage paid a deposit in advance of the work done to KMS. No evidence of payment by Assured Storage to KMS was offered.
 11. No employee of Assured Storage testified.
 12. Only one of the two compliance officers who conducted the inspection testified at the hearing.
 13. Bailey signed the OSHA Form 59 as the "Employer Representative".
 14. While CSHO Saye testified that he was "pretty certain" that he had emailed Wilson — because he needed more information about the company and about training of employees—no documentation of emails sent was offered.
 15. Wilson explained that he had, while working on the roof seams in the Assured Storage facility about two years prior to the inspection in this case, looked at a leak in the building where Assured Storage's office was located—the same combination office and residence which was the subject of this inspection.

16. Wilson's inspection of the leak occurred while he was on site doing contracted commercial work for the business and did not conflict with the KMS policy of not doing residential work.
17. Respondent limited its defense to the single issue of who was hired to do the work which generated the inspection and citation. Respondent did not contest that a prior citation had been issued against Respondent for a similar violation within three years.
18. Respondent did not contest the fact that Bailey signed the OSHA 59 nor the fact that he used a KMS truck.
19. Wilson testified by phone rather than by video in the virtual hearing.

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions of the Act.
3. Complainant failed to prove by a preponderance of the evidence that Respondent committed violations of 29 CFR 1926.501(b)(11) and/or 29CFR 1926.503(a)(3).

DISCUSSION

This hearing officer has never had a "moonlighting" defense presented in any case he has ever heard. Further, searches of both the state and national databases provide no precedent for such a defense ever having been argued. Precedent would have been useful to review, but this case rides entirely on the credibility of Respondent's defense, so the usefulness of precedent might have been limited.

From Complainant's point of view, it proved serious violations of two regulations that were similar to prior violations. Because of the similarity, the violations were deemed "repeat" and the penalties were doubled. Respondent presented significant evidence as follows: 1) proof of all the elements to establish violations of both Items from the Citation as conceded by Respondent's counsel but for its claimed defense; 2) the truck being used by the employees who were on the roof belonged to this Respondent; 3) one of the employees, Bailey, spoke to the inspectors as though he was an authorized agent of KMS; 4) Bailey signed the OSHA 59 form on the blank identified as "Employer Representative" and at the top of the one page form appeared "KMS Roofing" in the blank for "Employer Name"; 5) the Assured Storage person in the office said that the corporate office had hired KMS; and finally, 6) in looking at the records found in their investigation, the inspectors found a KMS "Invoice" to Assured Storage for a repair that appeared to be the repair that the inspectors observed being done on the day of the inspection.

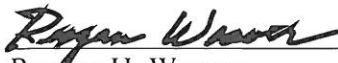
Were it not for Respondent's moonlighting defense, the decision of this case would be simple.

From Respondent's point of view, its defense was meritorious because of the following factors: 1) KMS is a small business. At the time of the inspection in question, it had just one full-time employee besides the owner—the son of the owner—and a part-time employee, Shane Bailey; 2) the owner of the business, Kevin Wilson, follows procedures that were not challenged—that he “doesn't work anybody when [he's] not there” and he was at the beach on vacation the week of the inspection; 3) he didn't do work for customers of his business without a signed contract and 50% downpayment up front, neither of which exists for the work in question; 3) Wilson is personally present on every job of KMS's; 4) no work was left for Bailey to do for KMS while Wilson was on vacation; 5) KMS did not do residential repair and the repair being done on the day of the inspection was to a tenant property above the office of the Assured Storage business that would have constituted residential work in conflict with the KMS policy; 6) Bailey had permission to use the KMS truck for his personal transportation while Wilson was absent; 7) the intent justifying the generation of the invoice from KMS to Assured Storage was explained.

While Complainant presented a clear, cogent case for the imposition of the citations and penalties in this case, the evidence supporting the moonlighting defense offered by the Respondent was slightly stronger than the evidence from the Complainant as to who committed the violations. Both sides might have benefitted from additional witnesses, and it is impossible to know what impact additional evidence would have had on the outcome. The regrettable conclusion is that Bailey has escaped responsibility for violating safety regulations.

Based on the foregoing Findings of Fact and Conclusions of Law and considering the Discussion, IT IS ORDERED that the violations imposed on Respondent are DISMISSED.

This the 3 day of December, 2021.



Reagan H. Weaver

Administrative Law Judge

North Carolina Occupational Safety and Health Review Commission

CERTIFICATE OF SERVICE

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

J MICHAEL THOMAS
ATTORNEY AT LAW
301 S ELM ST STE 301
GREENSBORO NC 27401

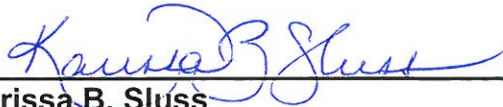
STACEY PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

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.

THIS THE 7 DAY OF December 2021.



Karissa B. Sluss
Docket and Office Administrator
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