

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

FILED

MAR 29 2022

COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)
))
COMPLAINANT,)
))
v.)
))
LENNAR CAROLINAS, LLC)
and its successors,)
))
RESPONDENT.)

ORDER

NC Occupational & Safety
Review Commission

OSHANC NO: 2019-6219

INSPECTION NO.: 318170172

CSHO ID: M3155

This matter was duly noticed and came on for hearing before the undersigned on February 17 and 18, 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.

At the hearing the following Exhibits were admitted: Complainant’s Exhibits 1, 2, 3.1-3.13, 3.14-3.21, 3.22-3.30, 3.31-3.34, 4.1-4.4, 4.6-4.13, 5, 6 and 7; and Respondent’s Exhibits 2-6, 7, 8, 18A (BATES 95-99), 18B (Bates 111-113), 18C (BATES 114), 22, 35, 36 and 38.

During the hearing, the following witnesses testified under oath: Carl Burgette, N.C. OSH Compliance Safety and Health Officer; Steve Hampson, Respondent’s Area Construction Manager; Phillip Chidester, Respondent’s former Construction Manager; Mark Vuksanaj, Respondent’s former Construction Manager; William C. Jones, III, owner of W.C. Jones Construction, Inc.; Ana Delacruz Perez, Respondent’s Construction Expediter and former Construction Manager trainee; Derek Dembkoski, Respondent’s Construction Manager; and William (Locke) Landino, Respondent’s Vice President of Construction.

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 notice of contest challenging a serious citation issued by the Complainant to Respondent on September 10, 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 June 2019 Respondent was the general contractor building new single-family homes in the Millbridge subdivision of Waxhaw, N.C. (“Millbridge”), in Union County, and on June 17, 2019, had 37 or 38 homes under construction in Millbridge (R Ex. 6, BATES 306, 309),

7. In June 2019 Union 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 June 2019 Millbridge 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. Since approximately June 2013 Respondent has contracted with W.C. Jones Construction, Inc. (“W.C. Jones”) to provide framing work on Respondent’s projects. Under that contract, Respondent had the right to require that W.C. Jones maintain competent and sufficient supervision and employees on site during all times that it was performing its work; and required W.C. Jones to comply with the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.* Under the contract Respondent expressly retained authority to stop the work, remedy an unsafe condition, or require that W.C. Jones or its subcontractors immediately remedy an unsafe condition.

10. On June 17, 2019 Respondent had assigned W.C. Jones to perform the framing work on the multi-story home being constructed on Lot 1119 of Millbridge. W.C. Jones, in turn, subcontracted with a third party, Ramirez Evan Construction, to do the actual framing work.

11. Respondent had general supervisory authority over the construction work performed in Millbridge, and more particularly on Lot 1119 of Millbridge, including the authority to stop work and correct safety and health violations or require that its subcontractors correct them, and Respondent’s employees on site knew that they had that authority.

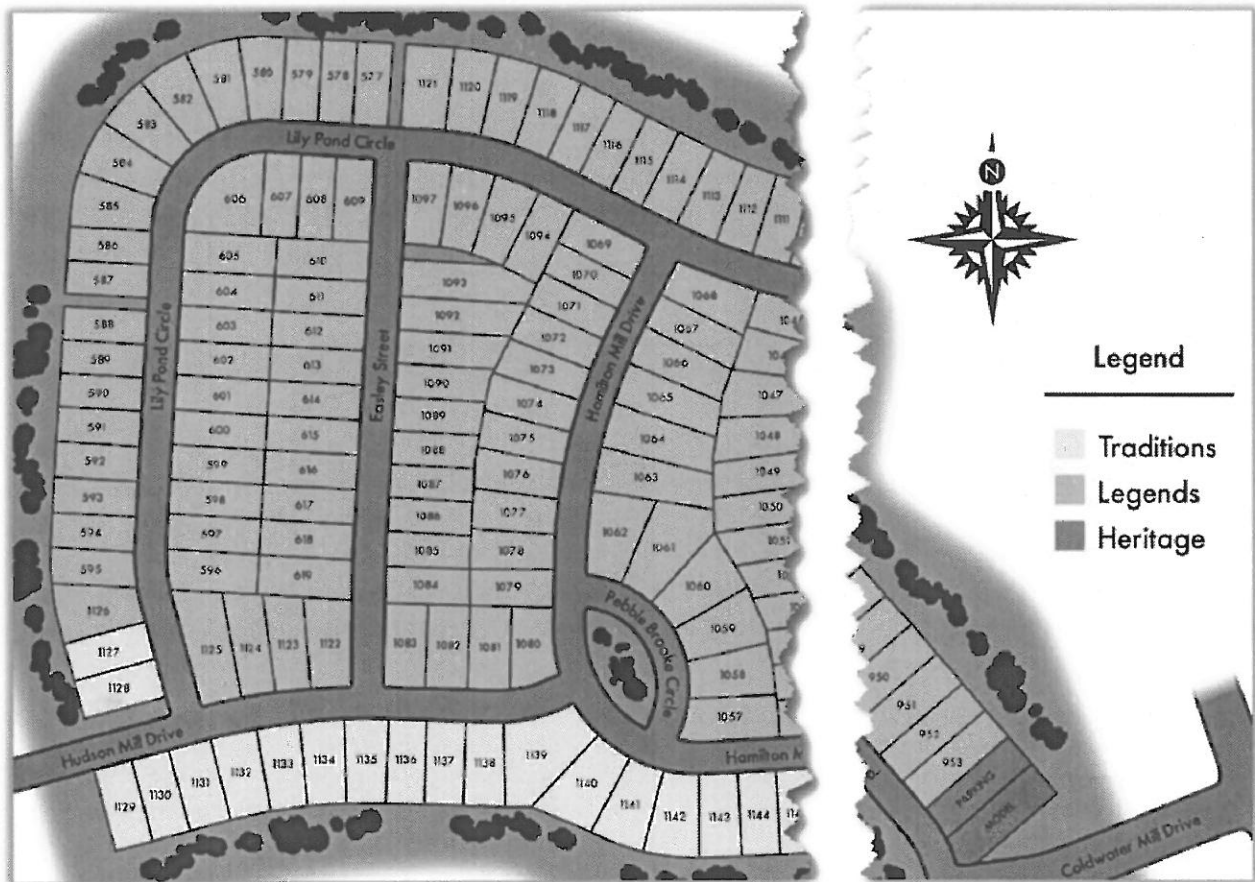
12. Respondent was the controlling employer on Lot 1119 of Millbridge, within the meaning of Complainant’s multi-employer citation policy, CPL 2-01.124.

13. At approximately mid-morning on June 17, 2019, the Complainant’s Compliance Safety Officers (CSHOs) Carl Burgette and Chris Ray were traveling on a public right-of-way along the northern boundary of Millbridge when they saw individuals working on an upper level of a construction without fall protection. CSHO Burgette (who was driving) stopped the vehicle, and CSHO Ray then took numerous photos of this construction; these photos confirmed that five individuals were working on the upper level of a construction and were not protected by a guardrail system, safety net system, or personal fall arrest systems (hereinafter cumulatively referred to as

“fall protection”), and at least two of those individuals were working very close to the unprotected/leading edge.

14. The CSHOs then traveled from their location on the public-right of way, around to the west edge of the development, entering Millbridge on Hudson Mill Drive.

15. During the hearing, Respondent’s map of Millbridge (R Exh. 35) was admitted for illustrative purposes and is helpful to understanding the location and movements of the various actors. The map showed the following, in relevant part:



16. Upon entering Millbridge on Hudson Mill Drive, the CSHOs took an immediate left onto Lily Pond Circle, and traveled along Lily Pond Circle until they came around the northwest corner of Lily Pond Circle at which point they could see the site of the previously observed activity -- Lot 1119 -- ahead of them. The CSHOs again observed three individuals working near the unprotected/leading edge of the construction without fall protection. CSHO Burgette stopped the vehicle before they reached Lot 1119 and CSHO Ray took photos to document their observations (C Exh. 3.14 - 3.19). They then continued east along Lily Pond Circle until they were parallel with the construction on Lot 1119 where they took an additional photo (C Exh. 3.20), then continued east and took another photo (C EXH 3.21) before turning right onto Hamilton Mill Drive, traveling to approximately Lot 1073, where they parked to contact their supervisor about

opening an investigation, and to discuss locating the general contractor. While they were parked along Hamilton Mill Drive, they saw and took photos of two individuals at approximately Lot 1062, who they believed might be employees of the general contractor, based on their matching blue shirts and white hardhats. (C Exh. 3.22-3.23)

17. The CSHOs then left Hamilton Mill Drive and parked their car along Lily Pond Circle at approximately Lot 1111, facing west toward the corner of Hamilton Mill Drive/Lily Pond Circle and Lot 1119. While parked there, the CSHOs took an additional photo of Lot 1119 (C Exh. 3.24) and then saw a blue truck come up Hamilton Mill Drive and turn left onto Lily Pond Circle, heading toward Lot 1119. (C Exh. 3.25) It appeared to CSHO Burgette that the same two blue-shirted individuals they previously saw on Hamilton Mill Drive were in the truck, and CSHO Burgette expected that, if the two individuals were representatives of the general contractor, they would stop at Lot 1119 to correct the fall protection violation, at which point the CSHOs could speak with them. However, the truck did not stop at Lot 1119 (C Exh. 3.26-3.28) and instead continued down Lily Pond Circle to approximately Lot 581, where it parked and the two previously identified blue-shirted individuals got out of the vehicle and entered another building (C Exh. 3.30-3.34). The CSHOs followed the two blue-shirted individuals down Lily Pond Circle, and as they came to Lot 1119 they took another photo to document what was visible from that vantage point (C Exh. 3.29)

18. The entire timeframe from when the CSHOs first observed the violative condition on Lot 1119 until the blue-shirted individuals parked at around Lot 581 on Lily Pond Circle was approximately 23 minutes.

19. The testimony and exhibits establish that both CSHO Burgette and CSHO Ray had an unobstructed street-level view of the second level of Lot 1119, and the individuals working on that second level, as they travelled east on Lily Pond Circle from approximately Lot 582 to the corner of Hamilton Mill Drive (C Exh. 3.14-3.21) and as they travelled west on Lily Pond Circle from approximately Lot 1114 to Lot 1119 (C Exh. 3.27, 3.29). While CSHO Burgette was driving this route, he could see from his driver's seat, without the aid of a telephoto lens, that there were workers without fall protection on the second level of the Lot 1119 construction.

20. The Complainant's photographs establish that while the two blue-shirted individuals were traveling from the corner of Hamilton Mill Drive/Lily Pond Circle to approximately Lot 581 on Lily Pond Circle, at least one, and possibly three, worker(s) on the second level of the Lot 1119 construction were visible from street level and within their line of sight (C Exh. 3.27, 3.29).

21. The violative condition and hazard at Lot 1119 was open and obvious from the vantage point of the two blue-shirted individuals when they traveled from the corner of Hamilton Mill Drive/Lily Pond Circle to approximately Lot 581 of Lily Pond Circle.

22. After the two blue-shirted individuals failed to stop at Lot 1119, the CSHOs obtained permission from their supervisor to open the inspection, so when the two blue-shirted individuals came out of the building, the CSHOs introduced themselves, explained why they were there, and the two individuals confirmed that Respondent was the general contractor of Millbridge, and they were Mark Vuksanaj and Ana Delacruz Perez, Construction Managers (or construction manager trainees) working for Respondent.

23. On June 17, 2019, both Mr. Vuksanaj and Ms. Perez were recently hired Construction Manager trainees, but each of them had completed Respondent's Safety Orientation – Injury &

Illness Prevention Program (IIPP), and each of them knew that if they saw a safety violation or hazard on a worksite, they had the authority and duty to immediately take corrective action.

24. At the time of hearing, Mr. Vuksanaj had worked in construction “his whole life”, and in homebuilding for almost eight years. In 2018, prior to his employment with Respondent, Mr. Vuksanaj completed OSHA’s 10-hour course, which included a section on fall protection. In June 2019 Ms. Perez did not have prior experience working on a construction site, but was also aware of OSHA requirements for personal protective equipment and fall protection.

25. When CSHO Burgette explained to Mr. Vuksanaj and Ms. Perez the lack of fall protection the CSHOs had observed on Lot 1119 and asked them why they didn’t stop at Lot 1119 and address the hazard, Mr. Vuksanaj looked down Lily Pond Circle to Lot 1119, and then stated that it wasn’t their job, they were doing [punch list] inspections. However, both Mr. Vuksanaj and Ms. Perez admitted to the CSHOs that they were responsible for the safety of workers on the worksite.

26. During the opening conference and investigation, the CSHOs obtained Respondent’s consent to enter the worksite, determined that Respondent’s subcontractor for the framing work was W.C. Jones, and that the workers exposed to the hazard were employees of W.C. Jones’ subcontractor, Ramirez Evan Construction.

27. During their inspection, the CSHOs measured the height of the second level of the construction fronting Lily Pond Circle, from the ground to the unprotected/leading edge of the second level where employees were working, and determined that the distance was 11’8” at the garage opening and 12’9” at the front entrance, and the surface below the unprotected/leading edge was compacted earth and construction materials.

28. There was a substantial probability that death or serious physical harm (including concussion, broken bones, or internal injuries) would result if an employee fell from the unprotected/leading edge of the Lot 1119 construction to the compacted earth and/or construction materials below.

29. Through observation and interview, the CSHOs determined that eight employees of W.C. Jones’ subcontractor were exposed to the hazard for eight hours per day, for several days,¹ and several of those employees were at the point of danger for the hazard (at the unprotected/ leading edge of the second level).

30. During the inspection, personal fall protection equipment (harnesses, safety lines, anchors) was discovered on the ground in front of Lot 1119 and in the back of a truck.

31. During the hearing, Respondent presented testimony and exhibits which Respondent contended showed its concern for safety issues, including:

- a. Respondent’s 219-page Injury & Illness Prevention Program (“IIPP”) (R. EXH 2) covering various policies and procedures, which was electronically available to all of its

¹ The parties disputed whether the exposure was five days or 1-2 days, but it ultimately does not matter as either calculation nevertheless places the Respondent in the “greater” probability category. See Complainant’s Field Operations Manual, chapter VI at p. 7, Appendix A-1.

employees, and addressed Respondent's policies regarding safety, assignment of responsibilities, communication, workplace hazards, and its "code of safe work practices." Among Respondent's express policies were:

- i. Respondent's statement that prevention of accidents is "an integral part of its corporate culture," and "The prevention of accidents by Communicating, Acting, obtaining Results and Empathizing ("CARE") is a major objective of the Company," and "The active and sincere cooperation of all Associates in implementing CARE is imperative," so that "all Associates are expected to be familiar with and follow company safety guidelines," and "Accident prevent must be made a part of the daily routine" (R. EXH. 2, pp. 17-18);
 - ii. "Dangerous conditions will be corrected immediately, or brought to the immediate attention of safety personnel for correction," (R. EXH 2, p. 23);
 - iii. Respondent expected its associates to abide by its Code of Safe Work Practices (including observing and obeying all application regulations for safe conduct and taking such action as is necessary to obtain compliance), immediately report an unsafe or hazardous condition, immediately correct all observed hazards, and keep all workplaces free of hazards (R. EXH. 2, pp. 37, 40, 64, 135);
 - iv. Respondent required "constant surveillance for safety hazards", and immediate notification of its trade partner of a safety violation (R. EXH 2, p. 42);
 - v. Respondent provided a progressive disciplinary process for its trade partners who violate Respondent's Safety Policy or local, state or federal regulations, which may include verbal and written warnings, fines, dismissal from the worksite, training, or termination of the trade partner's contract. (R. EXH 2, p. 43-45).
- b. Documentation showing that from March 22, 2019 through September 26, 2019, one or more of Respondent's construction managers at Millbridge conducted weekly "tailgate meetings" during which various pre-determined safety topics were covered via a pre-set script (R Ex. 5);
 - c. Testimony that Respondent's Construction Managers performed safety inspections at Millbridge once a week by going to a construction site, walking around the perimeter of the construction, and noting any violations;
 - d. Documentation showing that from April 10, 2019 through October 31, 2019, Respondent's Construction Managers created weekly Construction Safety Inspection Reports which documented OSHA violations by its subcontractors during the preceding week, including the following OSHA violations of W.C. Jones or its subcontractor(s):
 - i. 4/09/19 – personal protective equipment violation (R. Exh. 6, BATES p. 279);
 - ii. 8/16/19 – fall protection violation (R. Exh. 6, BATES p. 336)
 - iii. 8/22/19 – fall protection violation (R. Exh. 6, BATES p. 336)

- iv. 8/26/19 – fall protection violation (R. Exh. 6, BATES 340)
 - v. 8/30/19 – personal protective equipment violation (R. Exh. 6, BATES 343)
 - vi. 9/09/19 – personal protective equipment violation (R. Exh. 6, BATES 346)
 - vii. 9/09/19 – ladders/open sided floors (no safety rail) (R. Exh. 6 BATES 346)
 - viii. 9/12/19 – personal protective equipment violation (R. Exh. 6, BATES 346);
 - ix. 10/01/19 – personal protective equipment violation (R. Exh. 6, BATES 355);
 - x. 10/21/19 – personal protective equipment violation (R. Exh. 6, BATES 365);
 - xi. 10/24/19 – fall protection violation (R. Exh. 6, BATES 365).
- e. Testimony that on May 9, 2019, Respondent conducted a “national stand-down for fall protection,” where Respondent stopped all work on its worksites and delivered prepared content to subcontractor representatives who were present. One or two representatives of W.C. Jones attended the stand-down event at Millbridge (R EXH. 4, p. 1).
 - f. Documentation reflecting safety inspections completed by W.C. Jones on April 19, May 1, May 9, May 20, May 23, May 28, June 13, and June 18, 2019 (EXH 38).

32. However, Respondent’s evidence regarding its safety programs is undermined by the following:

- a. Respondent’s tailgate meetings included only whichever Construction Manager happened to be there (usually only Derek Demboski), and lasted only as long as it took for the Construction Manager(s) to read the pre-set script – a period that ranged from less than one minute (R. Exh. 5, BATES 266 (electrical safety-protection (GCFIS)) to two hours and 26 minutes (R. Exh. 5, BATES 257 (first aid & medical-bloodborne pathogens)), with the most common timeframe being 2-4 minutes.
- b. Respondent’s Construction Manager, Derek Demboski, testified that during the weekly safety inspections they did not enter the building under construction to inspect, they did not inspect when it was raining, and he considered construction (not safety) to be his #1 job. (Hearing, 5/18/19 at 4:20);
- c. Respondent’s weekly Construction Safety Inspection Reports documented only three violations by any subcontractor from April 1, 2019 to August 16, 2019 (R EXH 6, BATES 273, 279, 324), indicating either that Respondent’s inspections or documentation during this timeframe were shoddy/superficial, or that its subcontractors were extraordinarily² compliant during that period;

² The undersigned finds this level of OSH compliance extremely unlikely in view of the multiple violations by Respondent’s subcontractors from August 16, 2019 through October 25, 2019 (R EXH 6, BATES 336-368).

- d. Respondent's weekly Construction Safety Inspection Reports did not document the violation at Lot 1119 on June 17, 2019 or cite W.C. Jones for that violation (R. Exh. 6, BATES 309), and they do not show that Respondent assessed any sanction for that violation or additional or increased sanctions for W.C. Jones' subsequent OSH violations (R. EXH 6, BATES 336, 340, 343, 346, 355, 365).
- e. W.C. Jones' records reflected only sporadic inspections, often with more than a week between each inspection,³ and its president, Mr. Jones, testified that W.C. Jones' representatives were only on-site once a week and inspected a worksite at whatever stage of the construction the crew was in at that time;
- f. None of W.C. Jones' records reflected an inspection of Lot 1119 or of W.C. Jones' subcontractor, Ramirez Evan Construction;
- g. W.C. Jones ostensibly had a safety program, but there is no evidence that this safety program was communicated to W.C. Jones' subcontractors (or their employees) and Mr. Jones expressly testified that W.C. Jones did not require its subcontractors to adhere to the requirements of W.C. Jones' safety program;
- h. There is no evidence of the content of Respondent's script for the national stand-down event on May 9, 2019, or how long the meeting lasted, or that any representative of W.C. Jones' subcontractor (Ramirez Evan Construction) attended or was required to attend, and Respondent's Construction Manager, Derek Demboski, testified that the reason for the event was to alert its subcontractors to the importance of fall protection and that Respondent was "going to start enforcing it constantly." (Hearing, 2/18/22 at 4:06);
- i. Only approximately five (5) weeks after Respondent's national stand-down event, two of Respondent's personnel drove right past an open and obvious fall hazard without stopping and, according to Respondent, without noticing;
- j. On June 17, 2019, Respondent knew it had received two prior citations from the Complainant arising from alleged OSH violations by W.C. Jones or W.C. Jones' subcontractor(s),⁴ and yet there is no evidence that Respondent engaged in more frequent inspections of W.C. Jones' worksites, modified its safety program to more effectively identify and correct hazards on W.C. Jones' worksites, or applied a graduated system of enforcement and follow-up inspections to enforce W.C. Jones' compliance with safety and health requirements. Instead, the evidence indicates that W.C. Jones' violations continued

³ Of course, it is possible that these were the only dates on which W.C. Jones' subcontractors were working on Respondent's worksite, except that W.C. Jones' subcontractors were clearly working on Lot 1119 on June 17, 2019, and neither W.C. Jones' nor Respondent's exhibits show any inspection of that Lot at any point.

⁴ OSHA citations are publicly posted at <https://www.osha.gov/pls/imis/establishment.html>. That website indicates that Complainant inspected Respondent worksites on May 22, 2018 and April 9, 2019, and shortly after those inspections issued citations to Respondent for multiple serious violations, including violation of 29 C.F.R. § 1926.501(b)(13) (fall protection). The website also reflects citations to W.C. Jones arising out of these same inspections, for serious violations of 29 C.F.R. § 1926.20(b)(2) (failure to frequently and regularly inspect) and § 1926.501(b)(13)(fall protection).

and, according to Respondent's evidence, even increased after June 17, 2019.

33. 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 proposing a penalty of \$7000.

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

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

Discussion

North Carolina employers are required to provide a workplace free of recognized hazards that are likely to cause death or serious injury or physical harm to employees, N.C.Gen.Stat. § 95-129(1). An employer will be liable for a serious violation unless the employer 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 the following elements by a preponderance of the evidence: (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 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 Millbridge. *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 challenge the Complainant's showing that the standard applied to this worksite, 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 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. Respondent has not addressed its constructive knowledge where the hazard is open and obvious, however, and that is where its argument fails.

Respondent's Constructive Knowledge

1. Open and Obvious Condition

As stated above, constructive knowledge may be based upon an open and obvious condition and is established by evidence that the cited condition was readily apparent to anyone who looked, and the employer's representative was within close enough proximity that he/she should have seen it. *Hamilton Fixture, supra* (constructive knowledge established on evidence that supervisor who just walked into the work area was 10 feet away and looking toward the violative conduct). See also *Meritage Homes, supra* (employer's supervisor standing in street in front of construction had constructive knowledge of open and obvious violative condition, even if he didn't see it because he was distracted by other activities); *In re 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.").

Here, the violation was open and obvious. If Mr. Vuksanaj and Ms. Perez did not see the violation from their vantage point as they turned from Hamilton Mill Drive onto Lily Pond Circle (which the undersigned finds highly unlikely if they were truly exercising the caution Respondent asserts), then they certainly had ample *opportunity* to observe it, and with the exercise of even minimal diligence would have observed it, if they had simply looked. Their purported failure to pay attention to their surroundings does not change the fact that the violative condition on Lot 1119 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)). Cf. also *Horst Constr. d/b/a Horst Grp., Inc.*, No. 15-1482, 2016 OSAHRC LEXIS 41 (6/14/16)(CSHO's observations that a supervisor was standing in the area where employees were working in plain view was sufficient to find actual knowledge, even where employer disputed knowledge).

2. Trainee Status

Respondent vigorously asserts that Mr. Vuksanaj and Ms. Perez were only trainees. However, neither the statutes nor the regulations distinguish between new and experienced representatives of an employer, and it is well-established that actual or constructive knowledge of any employee with delegated authority can be imputed to the cited employer, even if that delegation is temporary. See *Tim Graboski Roofing, Inc.*, OSHRC Docket 14-0263, 2015 OSAHRC LEXIS 9 at *28 (3/2/2015)(crew chief knowledge imputed to employer); *A.P. O'Horo Co.*, OSHRC Docket 85-369, 1991 OSAHRC LEXIS 7 at *4, *8-9 (1/31/91) (knowledge of laborer designated as working

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.

foreman imputed to employer); *Paul Betty d/b/a Betty Brothers*, OSHRC Docket 76-4271, 1981 OSAHRC LEXIS 404 at *10-11 (2/27/1981)(knowledge of plasterer functioning as supervisor at time of inspection was imputed to employer). “It is the substance of the delegation of authority that is controlling, not the formal title of the employee having that authority; an employee who is empowered to direct that corrective measures be taken is a supervisory employee.” *Dover Elevator Co.*, No. OSHRC Docket 91-862, 1993 OSAHRC LEXIS 111 at *21-22 (July 16, 1993) (knowledge of mechanic imputed to employer). Here Respondent presented evidence that both Mr. Vuksanaj and Ms. Perez were already trained on safety issues including fall protection requirements, Mr. Vuksanaj had substantial prior experience on construction sites, Respondent expected its employees to immediately take corrective action when they saw safety violations, and both Mr. Vuksanaj and Ms. Perez had the authority and a duty to immediately stop and correct an unsafe condition, and knew that they had that authority and duty. Accordingly, their status as trainees is irrelevant and their actual or constructive knowledge is imputed to Respondent.

2. *Knowledge Re Lot 1119*

In its Post-Hearing Brief Respondent surprisingly asserted there was no evidence that Mr. Vuksanaj and Ms. Perez knew that Respondent was the general contractor for the construction on Lot 1119, arguing there “were multiple builders building houses in the large Millbridge Subdivision and ... Respondent was the builder for only some of the houses,” pointing to the testimony of Area Construction Manager Steve Hampson:

Q: Can you – if I could – could you explain a little bit about, give a little bit of background on the Millbridge community?

A: Of Millbridge? We started in Millbridge – I can’t tell you the – we’ve been over there several years. It’s quite a big community. There’s been several builders within that community. Been going on since, I believe, 2010 or 2011. We entered that community, to guess, it’s probably about – maybe about five years ago, five-and-a-half years ago and we are in our last phases of build-out in the community right now.

2/17/2022 Transcript pp. 172-73. This testimony is unpersuasive of Respondent’s point, however, since it only describes the overall history of the development, including a roughly six-year span preceding Respondent’s presence. The testimony does not indicate that in June 2019 there were other general contractors on the site reflected in the Complainant’s photographs or Respondent’s Exh. 35, nor was it so understood by the undersigned during the hearing. Moreover, Respondent’s argument ignores CSHO Burgette’s testimony that both Mr. Vuksanaj and Ms. Perez acknowledged they were responsible for the job site in question, Respondent’s Exhibit 35 identified all of the homes in that area as “Lennar” homes, and Complainant’s Exhibit 3.24⁶ showed each home under construction along Lily Pond Circle with bright green “Lennar” house wrap – a view that would have been obvious to both Mr. Vuksanaj and Ms. Perez as they traveled west from the corner of Hamilton Mill Road, down Lily Pond Circle. There is no evidence that either Mr. Vuksanaj or Ms. Perez had any doubt – on June 17, 2019, or during the hearing -- that

⁶ This house wrap is also shown in Complainant’s Exhibits 3.14-3.19 (visible from where the trainees eventually parked on Lily Pond Circle) and in Complainant’s Exhibits 3.27, 3.29.

Respondent was the general contractor on Lot 1119, or that their authority to address unsafe conditions extended to the hazard on Lot 1119.

The Complainant has established each of the four elements of its case.

Isolated/Unpreventable Employee Misconduct

In its Post-Hearing Brief, Respondent asserted the affirmative defense of isolated/unpreventable employee misconduct, which requires the Respondent⁷ to 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 Lot 1119, or that fall protection requirements were effectively enforced. Instead, the evidence suggests the opposite:

- Respondent knew that fall protection violations were a pre-existing and persistent problem with its framing subcontractor, W.C. Jones, but there was no evidence of heightened monitoring of the worksite for safety and health hazards;
- Respondent’s stated goal in having the May 9, 2019 national stand-down event was to alert its subcontractors that it was going to “*start enforcing fall protection constantly*” (italics added),
- Although W.C. Jones had a safety plan, it did not require its subcontractors to follow it,
- There was no evidence that W.C. Jones’ subcontractor, Ramirez Evan Construction, had any safety plan at all, or any rules regarding fall protection, or enforced any fall protection rules,
- None of the workers on the second level of the Lot 1119 construction were wearing available fall protection equipment,
- The lack of fall protection persisted for a substantial, continuous period of time, including and preceding the CSHO’s arrival on the scene,

⁷ Because the Complainant does not rely on the inadequacy of the Respondent’s safety program to establish constructive knowledge, the Respondent has the burden of proof on this issue. *New River Elec. Corp. v. OSHRC*, 2022 U.S.App. LEXI 2938 at *16-19 (2/1/2022).

- The failure to use fall protection was open and obvious from the public right-of-way.

Contrary to the Respondent's argument, this evidence establishes that the framing workers either did not know or did not care about using fall protection, did not fear any material repercussion for not using fall protection, and in fact, no material repercussion occurred as a result of their failure to use fall protection. *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.

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 the citation, and this violation was a serious violation of the standard.

Accordingly, it is hereby **ORDERED**:

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 29th day of March, 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: 2022.03.29 09:22:20 -0400

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

APPENDIX A - JOINT STIPULATIONS:

1. Respondent is engaged in the construction business.
2. Specifically, Respondent is in the business of residential construction and was the general contractor involved in this case.
3. Respondent was the general contractor at the site involved in building new single-family homes in a subdivision called Millbridge.
4. Respondent contracted with W.C. Jones Construction, Inc. (first tier framing subcontractor) to perform framing activities on the residential structure at the site.
5. W.C. Jones Construction, Inc. (first tier framing subcontractor) contracted with Ramirez Evan Construction, Inc. (second tier framing subcontractor at the site) to perform the framing activities on the residential structure at the site.
6. The worksite was a multi-employer work-site.
7. As a result of the inspection, one Serious citation was issued to Respondent on September 10, 2019.
8. **Citation Number One, Item 1** alleged one instance of serious violations of 29 CFR 1926.501(b)(13).
9. 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.
10. Citation One, Item 1 alleged:
 - a) Job site – where subcontractor’s employees were working on the subfloor of a newly constructed two story residential structure without the use of fall protection, exposing them to a fall hazard of 12 feet 9 inches to compact earth.
11. The citation carried a proposed penalty of \$7,000.00.
12. The citation was classified as Serious.
13. 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 on this date served a copy of the foregoing ORDER OF SETTLEMENT CONFERENCE upon:

JULIE A PACE
MESSNER REEVES LLP
7250 N 16TH ST STE 410
PHOENIX AZ 95020

By depositing a copy of same in the United States Mail, Certified Mail, return receipt requested, at Raleigh, North Carolina, and upon:


SAGE BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of 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 email to carla.rose@labor.nc.gov .

THIS THE 30 DAY OF March 2022.



Karissa B. Sluss
Docket and Office Administrator
NC OSH Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
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TEL.: (919) 733-3589