

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

COMMISSIONER OF LABOR FOR	)	DOCKET NO.: OSHANC 2019-6243
THE STATE OF NORTH CAROLINA,	)	INSPECTION NO.: 318179264
	)	CSHO ID.: N4007
COMPLAINANT,	)	
	)	
v.	)	
	)	
DYKHUIS DRILLING CORPORATION,	)	<u>STIPULATION</u>
DBA DIAMOND DRILLING AND	)	<u>AND NOTICE OF</u>
SAWING COMPANY,	)	<u>SETTLEMENT</u>
<i>and its successors,</i>	)	FILED
	)	
RESPONDENT.	)	JUL 18 2022

NOW COME the parties in the above-captioned action, pursuant to Rule .0701 of the Rules of Procedure adopted by the North Carolina Occupational Safety and Health Review Commission, and respectfully show unto the Hearing Examiner as follows:

FACTS

1. Respondent is incorporated under the laws of Colorado and authorized to do business in North Carolina. It maintains a registered office in Raleigh, North Carolina.
2. On September 18, 2019, a complaint was received regarding Respondent's worksite located at I-40W Mile Marker 328 in Benson, Johnston County, North Carolina, alleging that employees at the site were dry-cutting concrete amidst clouds of dust.
3. The site was a multi-employer site with Penhall Company as the general contractor (under the authority of the North Carolina Department of Transportation) (NCDOT) and Respondent as a sub-contractor thereof.
4. The project underway at the site was rehabilitation and resealing of concrete joints on the highway for several miles.
5. On September 24, 2019, Mia Pearson, Compliance Safety and Health Officer (CSHO), employed by the North Carolina Department of Labor, inspected the site.

6. The inspection was initiated pursuant to OPN 135 Special Emphasis Program for Exposures to Health Hazards, and OPN 123T, which lists Johnston County as included in the Special Emphasis Program (SEP).
7. CSHO Pearson provided credentials to Martin Mandato, Assistant Project Manager of Gannett Fleming (another subcontractor of NCDOT at this site) who contacted Gerald Johnson, Senior Superintendent for Respondent.
8. Johnson participated in the opening conference and consented to the inspection.
9. Johnson accompanied CSHO Pearson during the walkthrough.
10. Officer Pearson properly entered onto Respondent's site and properly conducted the partial inspection.
11. On September 24, 2019, Johnson reviewed and signed the OSHA 59 form for Respondent.
12. Unless otherwise noted below, all conditions described in these allegations existed at the time of Officer Pearson's inspection.
13. As a result of the inspection, one Serious citation with eleven sub-parts and one Nonserious citation with one subpart were issued on December 17, 2019, carrying the following proposed abatement dates and penalties:

<u>Item No</u>	<u>Standard</u>	<u>Abate Date</u>	<u>Penalty</u>
<b>Citation One (Serious)</b>			
001a	1910.134(d)(1)(i)	cdi	\$ 3,500.00
001b	1910.134(d)(1)(ii)	cdi	grouped
002	1910.134(f)(2)	cdi	\$ 3,500.00
003	1910.1200(e)(1)	2/7/2020	\$ 3,500.00
004a	1926.1153(d)(1)	2/7/2020	\$ 3,500.00
004b	1926.1153(c)(1)	cdi	grouped
004c	1926.1153(c)(2)(ii)	immed	grouped
004d	1926.1153(d)(2)(i)	2/7/2020	grouped
005a	1926.1153(g)(1)(i)	2/7/2020	\$ 3,500.00
005b	1926.1153(g)(1)(ii)	immed	grouped
006	1926.1153(g)(4)	immed	<u>\$ 3,500.00</u>
<b>Subtotal</b>			<b>\$ 21,000.00</b>
<b>Citation Two (NS)</b>			
001	1910.134(m)(1)	immed	<u>\$ 600.00</u>
<b>Subtotal</b>			<b>\$ 600.00</b>
<b>TOTAL</b>			<b>\$ 21,600.00</b>

14. For the alleged violations, the Complainant calculated the proposed penalties and proposed abatement dates according to the procedures set forth in the Complainant's North Carolina Operations Manual. Pursuant to Chapter VI, section B of the North Carolina Operations Manual, Complainant applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty, as appropriate: 40% credit for size, 0-10% credit for good faith, and 10% credit for history.

15. Respondent submitted a Notice of Contest, dated February 12, 2020.

16. On or about March 9, 2020, Complainant received "Employer's/Respondent's Statement of Position," dated February 25, 2020, (cover letter dated March 4, 2020) which requested that formal pleadings be served.

17. The parties having reached a Settlement Agreement now seek approval of said Agreement by the Hearing Examiner.

## STIPULATIONS

Effective upon approval of this Stipulation and Notice of Settlement, the parties to this action hereby agree and stipulate to the following settlement of the matters at issue herein:

1. Respondent agrees that the violations alleged in the Citation and Notification of Penalty, as amended, have been abated, and agrees to continue to use its best efforts to comply with the requirements of the Occupational Safety and Health Act of North Carolina (hereinafter referred to as the "Act").
2. Complainant agrees to make the following amendments to the Citation:
  - (a) Delete Citation 1, Items 001a and 001b and the penalty associated therewith.
  - (b) Delete Citation 1, Item 002 and the penalty associated therewith.
  - (c) Delete Citation 1, Item 003 and the penalty associated therewith.
  - (d) Retain Citation 1, Items 004a 004b, 004c and 004d as grouped, reduce the total penalty from \$3,500.00 to \$2,275.00, and amend the AVD for Citation 1, Item 004a to read: "On September 20, 2020, one or more employees were cutting concrete using drivable saws but no exposure sampling had been conducted to determine whether any employee was exposed to an airborne concentration of respirable crystalline silica in excess of 50 ug/m<sup>3</sup>, calculated as an 8-hour TWA."
  - (e) Group Citation 1 Items 005a and 005b with Citation 1 Item 006, reduce the total penalty from \$7,000.00 to \$2,275.00, and re-classify items 005a, 005b and 006 as grouped to non-serious.
  - (f) Reduce the penalty for Citation 2, Item 001 from \$600.00 to \$390.00.
3. Respondent agrees to maintain a written respiratory protection program and maintain records of employee training, employee fit tests and medical evaluation clearance forms.
4. Respondent agrees to ensure that the correct respirator is selected for the task employees are performing.

5. Respondent agrees to ensure that any employee performing a task listed in Table 1 of 29 C.F.R. 1910.134, the employer will fully implement the engineering controls, work practices and respiratory protection specified for the task.

6. Respondent agrees that for any task not listed in Table 1 of 29 C.F.R. 1910.134, the employer will develop and implement a written silica exposure control plan and perform air sampling to determine employee exposure to crystalline silica and maintain records of that sampling.

7. Respondent agrees to conduct quarterly inspections of worksites, to include that appropriate respirators are made available for possible silica exposure and to document the same. Such documents shall be maintained for one year and available to NIOSH upon request.

8. The parties agree to bear their own attorney's fees, costs and other expenses that have been incurred in connection with any stage of these proceedings up to and including the filing of this Stipulation and Notice of Settlement.

9. Upon approval of this Stipulation and Notice of Settlement by the Hearing Examiner, the Respondent agrees to pay the proposed penalty of \$4,940.00 within ten (10) days following the receipt of the Order approving the Stipulation and Notice of Settlement.

10. The parties agree that this Stipulation and Notice of Settlement is a full and final settlement of the claims set out in the underlying Citation and Notification of Penalty, and none of the foregoing agreements, statements, stipulations and actions taken by the Respondent shall be deemed an admission by the Respondent of any of the allegations contained in the Citation and Notification of Penalty or waiver of defenses; provided, however, that in any subsequent proceeding with respect to matters covered by this Stipulation and Notice of Settlement brought directly under the Act by Complainant, this Agreement shall have the full force and effect of a final order. The agreements, statements, stipulations and actions herein are made solely for the purpose of settling this matter economically and amicably without further litigation and shall not

be used for any other purpose except for proceedings and matters arising under the Occupational Safety and Health Act and Article 21, Chapter 95 of the North Carolina General Statutes.

11. The parties agree that there are no other matters that remain to be decided, and there has been no employee objection to the reasonableness of any abatement period.

**WHEREFORE**, the parties to this action hereby respectfully request approval of this Stipulation and Notice of Settlement.

This the 18th day of July, 2022.

**APPROVED BY:**

**Christopher Moore**

Digitally signed by Christopher Moore  
Date: 2022.07.18 13:09:17 -04'00'

Chris Moore  
District Supervisor  
Occupational Safety and Health Division

JOSHUA H. STEIN  
Attorney General

**Stacey A Phipps**

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FOR RESPONDENT



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

<b>COMMISSIONER OF LABOR FOR</b>	)	<b>DOCKET NO.: OSHANC 2019-6243</b>
<b>THE STATE OF NORTH CAROLINA,</b>	)	<b>INSPECTION NO.: 318179264</b>
	)	<b>CSHO ID.: N4007</b>
<b>COMPLAINANT,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>DYKHUIS DRILLING CORPORATION,</b>	)	<b><u>CONSENT ORDER</u></b>
<b>DBA DIAMOND DRILLING AND</b>	)	<b>FILED</b>
<b>SAWING COMPANY,</b>	)	
<i>and its successors,</i>	)	<b>JUL 18 2022</b>
	)	
<b>RESPONDENT.</b>	)	

This cause comes on before the undersigned Hearing Examiner (the Court) and being heard upon consent of the parties hereto, upon consideration of the Stipulation and Notice of Settlement submitted by the parties (the Agreement), the Court makes the following:

**FINDINGS OF FACT**

1. That the Agreement is reasonable and supported by the underlying facts.
2. That no outstanding issues remain to be resolved by a hearing of this matter.

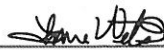
**CONCLUSIONS OF LAW**

1. This Court has jurisdiction over the parties to this action and over the subject matter.
2. That the Agreement is consistent with the purpose and objectives of the Occupational Safety and Health Act of North Carolina (The Act), and complies with Rule .0701 of the Rules of Procedure of the North Carolina Occupational Safety and Health Review Commission.

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

1. That the Agreement is approved;
2. That both parties are hereby required to comply with the terms and conditions stipulated in the agreement.

This the 18th day of July, 2022.



Laura Wetsch (Jul 18, 2022 14:48 EDT)

LAURA WETSCH  
Hearing Examiner

BY CONSENT:

JOSHUA H. STEIN  
Attorney General

**Stacey A  
Phipps**

Digitally signed by Stacey A. Phipps  
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FOR RESPONDENT



CERTIFICATE OF SERVICE

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

MICHAEL D MCKNIGHT  
OGLETREE DEAKINS  
8529 SIX FORKS RD STE 600  
RALEIGH NC 27616

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 20 DAY OF July 2022.

  
\_\_\_\_\_  
Karissa B. Sluss  
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