

**BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA**

FILED

MAR - 8 2023

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

NC OSH Review Commission

COMPLAINANT - RESPONDENT,

DOCKET NO. OSHANC 2020-6219
OSHA INSPECTION NO. 318170172

v.

LENNAR CAROLINAS, LLC
and its successors

ORDER OF THE COMMISSIONERS

RESPONDENT - PETIONER.

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 7th day of October 2022, via remote online courtroom, by Paul E. Smith, Chairman, William Rowe, and Terrence Dewberry, members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Sage Boyd, Assistant Attorney General; North Carolina Department of Justice, Raleigh, North Carolina

Respondent: David Selden: Gammage & Burnham, PLC, Phoenix AZ

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission AFFIRMS the Order of Hearing Examiner Laura Wetsch.

ISSUES PRESENTED

WHETHER THE EMPLOYER LENNAR, AS THE GENERAL CONTRACTOR, COMMITTED A SERIOUS VIOLATION OF 29 CFR 1926.501 (b)(13), BY FAILING TO CORRECT A HAZARD TO WHICH THE EMPLOYEE OF A SECOND TIER SUBCONTRACTOR WAS EXPOSED?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.501 (b)(13) Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels was not protected by guardrail systems, safety net system, or personal fall arrest system, nor was the employee provided with an alternative fall protection measure under another provision of paragraph 1926.501(b).

FINDINGS OF FACT

1. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10) and is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
3. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
4. On February 17 and 18, 2022, a remote hearing was held before the Honorable Laura Wetsch.
5. On March 29, 2022, Hearing Examiner Laura Wetsch filed an Order finding that the provisions of 29 CFR 1926.501 (b)(13), had been violated and issuing a penalty of \$7,000.00.
6. On April 28, 2022, Respondent timely petitioned the Review Board for a review of the decision of the Hearing Examiner.
7. An Order granting review was filed on May 9, 2022.
8. The oral arguments were heard by the full Commission on October 7, 2022
9. The Review Commission adopts the Hearing Examiner's findings of facts.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.
2. The Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The Complainant met its burden of proving by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.501 (b)(13).
5. The Commission AFFIRMS the Order of Hearing Examiner Laura Wetsch.

DISCUSSION

As General Contractor, Lennar was subject to the multi-employer doctrine as set forth in *Commissioner of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 609 S.E.2d 407 (2005). Under the multi-employer doctrine, “an employer who controls or creates a worksite safety hazard may be held liable under the Occupational Safety and Health Act even if the employees exposed to the hazard are employed solely by another employer.” *Id.* at 23, 609 S.E.2d at 413. “[T]he duty is a reasonable duty and the general contractor is only liable for violations that its subcontractor may create if it could reasonably have been expected to detect the violation by inspecting the job site.” *Id.* at 28, 609 S.E.2d at 415. One way to establish liability under the multi-employer doctrine is to show that the controlling employer had actual or constructive knowledge of the violative condition and failed to take corrective action. Constructive knowledge can be shown by proving that the violative condition was so open and obvious that it should have been detected by the general contractor. *See, e.g., Allred v. Cap. Area Soccer*

League, Inc., 194 N.C. App. 280, 288, 669 S.E.2d 777, 782 (2008) (recognizing that a party has constructive knowledge of a danger if it is “so open and obvious that it should have been known”).

In this case, Lennar was the controlling employer of the worksite and the employees exposed were the employees of a second-tier subcontractor. It is undisputed that Lennar employees Mark Vuksanaj and Ana Delacruz Perez, Construction Managers, were on the jobsite while the violations were occurring. Both Mark Vuksanaj and Ana Delacruz Perez testified at the hearing. These two employees were observed traveling by truck toward and past the jobsite, lot 1119, while the second-tier subcontractor’s employees were exposed to serious fall hazards near the front edge of the house exceeding six feet without fall protection. These two Lennar employees did not stop to address the hazards. The structure on lot 1119 was a two-story home under construction. The first floor was completely framed and the second level did not have walls on the back of the structure. There were no guardrails. Compliance officers Carl Burgette and Chris Ray observed eight employees of the second-tier subcontractor working at or near the leading edge of the second level without the use of fall protection.

Mark Vuksanaj and Ana Delecruz Pereze were both new employees and were working on the jobsite without direct supervision. They had both received training from Lennar and reviewed policies on identifying serious hazards, including fall hazards, and addressing hazards observed on job sites. They had both received a two-day training involving OSHA standards from Lennar and had access to the company Injury Illness & Prevention Program. Mr. Vuksasaj had also completed an OSHA 10-hour Construction Course in 2018. Both employees were employed as Construction Managers and were assigned to be on the jobsite.

The violative conditions in question were easily visible to the Compliance Officers from the public right of way before they got out of the vehicle to open their inspection. Lennar employees Mark Vuksanaj and Ana Delecruz Pereze may or may not have seen the violations, but in the exercise of reasonable diligence they plainly should have and should have taken steps to abate the risk. That is all that is required to hold Lennar accountable under the multi-employer doctrine. *See Weekley Homes*, 169 N.C. App. at 28, 609 S.E.2d at 415 (citing, *inter alia*, *Universal Constr. Co. v. Occupational Safety & Health Review Comm'n*, 182 F.3d 726, 732 (10th Cir. 1999) (finding a controlling employer responsible where its “field manager was present at the worksite . . . and in a position to observe the violations, but did not correct the violations or direct [the subcontractor] to correct the violations, despite the field manager’s authority to do so”).

Lennar argues it should not be held liable because Mark Vuksanaj and Ana Delecruz Pereze were “new” employees, because Vuksanaj was driving, and because Delecruz Pereze was working on her phone. But this does not excuse their responsibility to the employees endangered by the safety violations. Vuksanaj and Delecruz Pereze were employed as Construction Managers, had undergone training, had been sent to the jobsite to work, and had the authority to correct the violative conditions. The violations were open and obvious, involved multiple workers, and were plainly visible from the public right of way. In the exercise of reasonable diligence, they should have identified and corrected the violations.

Lennar also asserts that on the day in question, Vuksanaj and Delecruz Pereze were not on site to perform safety inspections, and that Lennar conducted separate, weekly safety inspections to ensure subcontractors’ OSHA compliance. The fact that Lennar conducted additional safety inspections does not eliminate the Construction Managers’ duty to identify and

remediate open and obvious safety violations. But even if it could, the record does not contain evidence demonstrating that it would be reasonable for Lennar to have such confidence in the safety practices of W.C. Jones and its subcontractors that a weekly safety check-in would be sufficient to ensure OSHA compliance. To the contrary, W.C. Jones had been cited with an OSHA violation just two months before this citation. And here, not long after the citation for lack of fall protection was issued, Lennar's weekly inspections began identifying numerous significant safety violations affecting the subcontractor's employees. As identified by the hearing examiner, this included numerous violations regarding personal protective equipment and fall protection.

Lennar also notes various other preventative measures it has taken, such as weekly safety tailgate meetings and a national stand-down for fall protection that occurred shortly before the violations at issue. The existence of preventative measures also would not eliminate the Construction Managers' duty to identify and remediate open and obvious safety violations. Regardless, the majority of these additional preventative measures did little to ensure that the employees of subcontractors and second-tier contractors complied with OSHA standards. For example, there is no indication the weekly tailgate meetings included employees of second-tier contractors, and there is no evidence that W.C. Jones's employees participated in the national stand-down for fall protection. Preventative measures that are not designed to reach a subcontractor's employees have little relevance when determining whether a controlling employer should be found responsible for the subcontractor's OSHA violations.

At its core, this case is straightforward. W.C. Jones and its subcontractor began framing the second story of a home on Monday, June 16. The next day, a CSHO saw that the workers were doing so without fall protection. The unsafe condition was open, obvious, affected multiple

workers, and was plainly visible from the road running directly in front of the home. Two Lennar construction managers were on site that day, each of whom had the authority to correct the violation. The two managers went so far as to drive directly in front of the home without noticing or remedying the violation. Under such circumstances, Lennar is responsible for the violation as the controlling employer.

"If an employer is allowed to 'contract' away his responsibility in providing a safe workplace, the effectiveness of the safety standards employed by the legislative Act would be drastically diminished." *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 34, 426 S.E.2d 282, 287 (1993). As General Contractor, Lennar had a duty of reasonable care. Lennar did not meet that duty.


ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's March 29, 2022, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. Respondent abated the violations during the inspection and is now ordered to pay the assessed penalty of \$7,000.00 within 30 days of the filing date of this Order.

This Mar 8, 2023

Paul E. Smith
Paul E. Smith (Mar 8, 2023 13:28 EST)

PAUL E. SMITH, CHAIRMAN


Terrence Dewberry (Mar 8, 2023 09:45 EST)

TERRENCE DEWBERRY, MEMBER

William D. Rowe
Bill Rowe (Mar 8, 2023 09:52 EST)

WILLIAM D. ROWE, MEMBER

CERTIFICATE OF SERVICE

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

DAVID A. SELDEN
JULIE PACE
MESSNER REEVES LLP
7250 N. 16TH ST.
SUITE 410
PHOENIX, AZ 85020

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

DENIS JACOBSON
TUGGLE DUGGINS PA
100 N. GREEN ST
SUITE 6000
GREENSBORO, NC 27401

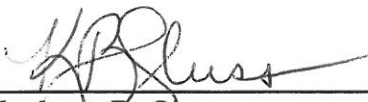
SAGE BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

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 email to carla.rose@labor.nc.gov

THIS THE 10 DAY OF March 2023.



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
NCOSHRC@labor.nc.gov

BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA

FILED

MAR - 8 2023

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

NC OSH Review Commission

COMPLAINANT - RESPONDENT,

DOCKET NO. OSHANC 2020-6219
OSHA INSPECTION NO. 318170172

v.

LENNAR CAROLINAS, LLC
and its successors

ORDER OF THE COMMISSIONERS

RESPONDENT - PETIONER.

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 7th day of October 2022, via remote online courtroom, by Paul E. Smith, Chairman, William Rowe, and Terrence Dewberry, members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Sage Boyd, Assistant Attorney General; North Carolina Department of Justice, Raleigh, North Carolina

Respondent: David Selden: Gammage & Burnham, PLC, Phoenix AZ

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission AFFIRMS the Order of Hearing Examiner Laura Wetsch.

ISSUES PRESENTED

WHETHER THE EMPLOYER LENNAR, AS THE GENERAL CONTRACTOR, COMMITTED A SERIOUS VIOLATION OF 29 CFR 1926.501 (b)(13), BY FAILING TO CORRECT A HAZARD TO WHICH THE EMPLOYEE OF A SECOND TIER SUBCONTRACTOR WAS EXPOSED?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.501 (b)(13) Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels was not protected by guardrail systems, safety net system, or personal fall arrest system, nor was the employee provided with an alternative fall protection measure under another provision of paragraph 1926.501(b).

FINDINGS OF FACT

1. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10) and is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
3. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
4. On February 17 and 18, 2022, a remote hearing was held before the Honorable Laura Wetsch.
5. On March 29, 2022, Hearing Examiner Laura Wetsch filed an Order finding that the provisions of 29 CFR 1926.501 (b)(13), had been violated and issuing a penalty of \$7,000.00.
6. On April 28, 2022, Respondent timely petitioned the Review Board for a review of the decision of the Hearing Examiner.
7. An Order granting review was filed on May 9, 2022.
8. The oral arguments were heard by the full Commission on October 7, 2022
9. The Review Commission adopts the Hearing Examiner's findings of facts.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.
2. The Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The Complainant met its burden of proving by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.501 (b)(13).
5. The Commission AFFIRMS the Order of Hearing Examiner Laura Wetsch.

DISCUSSION

As General Contractor, Lennar was subject to the multi-employer doctrine as set forth in *Commissioner of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 609 S.E.2d 407 (2005). Under the multi-employer doctrine, “an employer who controls or creates a worksite safety hazard may be held liable under the Occupational Safety and Health Act even if the employees exposed to the hazard are employed solely by another employer.” *Id.* at 23, 609 S.E.2d at 413. “[T]he duty is a reasonable duty and the general contractor is only liable for violations that its subcontractor may create if it could reasonably have been expected to detect the violation by inspecting the job site.” *Id.* at 28, 609 S.E.2d at 415. One way to establish liability under the multi-employer doctrine is to show that the controlling employer had actual or constructive knowledge of the violative condition and failed to take corrective action. Constructive knowledge can be shown by proving that the violative condition was so open and obvious that it should have been detected by the general contractor. *See, e.g., Allred v. Cap. Area Soccer*

League, Inc., 194 N.C. App. 280, 288, 669 S.E.2d 777, 782 (2008) (recognizing that a party has constructive knowledge of a danger if it is “so open and obvious that it should have been known”).

In this case, Lennar was the controlling employer of the worksite and the employees exposed were the employees of a second-tier subcontractor. It is undisputed that Lennar employees Mark Vuksanaj and Ana Delacruz Perez, Construction Managers, were on the jobsite while the violations were occurring. Both Mark Vuksanaj and Ana Delacruz Perez testified at the hearing. These two employees were observed traveling by truck toward and past the jobsite, lot 1119, while the second-tier subcontractor’s employees were exposed to serious fall hazards near the front edge of the house exceeding six feet without fall protection. These two Lennar employees did not stop to address the hazards. The structure on lot 1119 was a two-story home under construction. The first floor was completely framed and the second level did not have walls on the back of the structure. There were no guardrails. Compliance officers Carl Burgette and Chris Ray observed eight employees of the second-tier subcontractor working at or near the leading edge of the second level without the use of fall protection.

Mark Vuksanaj and Ana Delecruz Pereze were both new employees and were working on the jobsite without direct supervision. They had both received training from Lennar and reviewed policies on identifying serious hazards, including fall hazards, and addressing hazards observed on job sites. They had both received a two-day training involving OSHA standards from Lennar and had access to the company Injury Illness & Prevention Program. Mr. Vuksasaj had also completed an OSHA 10-hour Construction Course in 2018. Both employees were employed as Construction Managers and were assigned to be on the jobsite.

The violative conditions in question were easily visible to the Compliance Officers from the public right of way before they got out of the vehicle to open their inspection. Lennar employees Mark Vuksanaj and Ana Delecruz Pereze may or may not have seen the violations, but in the exercise of reasonable diligence they plainly should have and should have taken steps to abate the risk. That is all that is required to hold Lennar accountable under the multi-employer doctrine. *See Weekley Homes*, 169 N.C. App. at 28, 609 S.E.2d at 415 (citing, *inter alia*, *Universal Constr. Co. v. Occupational Safety & Health Review Comm'n*, 182 F.3d 726, 732 (10th Cir. 1999) (finding a controlling employer responsible where its “field manager was present at the worksite . . . and in a position to observe the violations, but did not correct the violations or direct [the subcontractor] to correct the violations, despite the field manager’s authority to do so”).

Lennar argues it should not be held liable because Mark Vuksanaj and Ana Delecruz Pereze were “new” employees, because Vuksanaj was driving, and because Delecruz Pereze was working on her phone. But this does not excuse their responsibility to the employees endangered by the safety violations. Vuksanaj and Delecruz Pereze were employed as Construction Managers, had undergone training, had been sent to the jobsite to work, and had the authority to correct the violative conditions. The violations were open and obvious, involved multiple workers, and were plainly visible from the public right of way. In the exercise of reasonable diligence, they should have identified and corrected the violations.

Lennar also asserts that on the day in question, Vuksanaj and Delecruz Pereze were not on site to perform safety inspections, and that Lennar conducted separate, weekly safety inspections to ensure subcontractors’ OSHA compliance. The fact that Lennar conducted additional safety inspections does not eliminate the Construction Managers’ duty to identify and

remediate open and obvious safety violations. But even if it could, the record does not contain evidence demonstrating that it would be reasonable for Lennar to have such confidence in the safety practices of W.C. Jones and its subcontractors that a weekly safety check-in would be sufficient to ensure OSHA compliance. To the contrary, W.C. Jones had been cited with an OSHA violation just two months before this citation. And here, not long after the citation for lack of fall protection was issued, Lennar's weekly inspections began identifying numerous significant safety violations affecting the subcontractor's employees. As identified by the hearing examiner, this included numerous violations regarding personal protective equipment and fall protection.

Lennar also notes various other preventative measures it has taken, such as weekly safety tailgate meetings and a national stand-down for fall protection that occurred shortly before the violations at issue. The existence of preventative measures also would not eliminate the Construction Managers' duty to identify and remediate open and obvious safety violations. Regardless, the majority of these additional preventative measures did little to ensure that the employees of subcontractors and second-tier contractors complied with OSHA standards. For example, there is no indication the weekly tailgate meetings included employees of second-tier contractors, and there is no evidence that W.C. Jones's employees participated in the national stand-down for fall protection. Preventative measures that are not designed to reach a subcontractor's employees have little relevance when determining whether a controlling employer should be found responsible for the subcontractor's OSHA violations.

At its core, this case is straightforward. W.C. Jones and its subcontractor began framing the second story of a home on Monday, June 16. The next day, a CSHO saw that the workers were doing so without fall protection. The unsafe condition was open, obvious, affected multiple

workers, and was plainly visible from the road running directly in front of the home. Two Lennar construction managers were on site that day, each of whom had the authority to correct the violation. The two managers went so far as to drive directly in front of the home without noticing or remedying the violation. Under such circumstances, Lennar is responsible for the violation as the controlling employer.

"If an employer is allowed to 'contract' away his responsibility in providing a safe workplace, the effectiveness of the safety standards employed by the legislative Act would be drastically diminished." *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 34, 426 S.E.2d 282, 287 (1993). As General Contractor, Lennar had a duty of reasonable care. Lennar did not meet that duty.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's March 29, 2022, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. Respondent abated the violations during the inspection and is now ordered to pay the assessed penalty of \$7,000.00 within 30 days of the filing date of this Order.

This Mar 8, 2023

Paul E. Smith

Paul E. Smith (Mar 8, 2023 13:28 EST)

PAUL E. SMITH, CHAIRMAN

Terrence Dewberry
Terrence Dewberry (Mar 8, 2023 09:45 EST)

TERRENCE DEWBERRY, MEMBER

William D. Rowe
Bill Rowe (Mar 8, 2023 09:52 EST)

WILLIAM D. ROWE, MEMBER

CERTIFICATE OF SERVICE

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

DAVID A. SELDEN
JULIE PACE
MESSNER REEVES LLP
7250 N. 16TH ST.
SUITE 410
PHOENIX, AZ 85020

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

DENIS JACOBSON
TUGGLE DUGGINS PA
100 N. GREEN ST
SUITE 6000
GREENSBORO, NC 27401

SAGE BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O 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 email to carla.rose@labor.nc.gov

THIS THE 10 DAY OF March 2023.



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
NCOSHRC@labor.nc.gov