

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

FILED
 OCT 11 2023
 NC OSH Review Commission

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA)	DOCKET NO: 2020 - 6273
)	
)	INSPECTION
Complainant,)	NO: 318183431
)	
v.)	CSHO ID: 04121
N.C. DEPARTMENT OF PUBLIC SAFETY-- CENTRAL ENGINEERING DIVISION and its successors)	
)	<u>AMENDED FINAL ORDER</u>
)	
Respondent.)	

The Final Order in this matter dated effective the 21st day of September, 2023 and filed on September 25, 2023, is hereby amended to correct a typographical error on page 4 in paragraph 6 (the reference to “Item 001” being corrected to “Item 003”).

THIS CAUSE coming on pursuant to the Order of Pre-Hearing Conference (“Hearing Order”) on September 21, 2023 at 10:30 a.m. via the Lifesize teleconferencing platform. Jonathan D. Jones, Assistant Attorney General, and Rory Agan, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, appeared as counsel for the Complainant. Thomas L. Crosby, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, appeared as counsel for Respondent.

Pursuant to the Hearing Order a pre-hearing conference (the “Hearing”) was held for the purpose of considering matters which would simplify the issues and expedite the proceedings in the above referenced case. No affected employee of Respondent, or its representative, attended to have a say in, or participate as a party in, the Hearing. At the Hearing Complainant and Respondent notified the Undersigned that the parties wish to agree upon certain stipulations (“Stipulations”) and to make certain motions (“Motions”).

This Hearing was not an evidentiary hearing and the specific facts and circumstances relevant to the Inspection (hereinafter defined) and the Original Citation (hereinafter defined) were not introduced of record, and are not included in this Final Order.

As a result of this Hearing, Complainant and Respondent request that the Stipulations and Motions be made part of the Hearing record and that the Undersigned issue a Final Order. The Stipulations and Motions are as follows:

STIPULATIONS

1. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter "the Act"). The Review Commission has jurisdiction over the parties and the subject matter to this action.
2. Respondent is a North Carolina agency, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina and maintains a place of business in North Carolina. Respondent is in the business of capital program management and physical plant operations. Respondent is an "employer" within the meaning of N.C.G.S. Section 95-127(11); all of Respondent's employees referred to in this matter are "employees" within the meaning of N.C.G.S. Section 95-127(10).
3. During the period of November 14, 2019 and March 13, 2020, Compliance Safety and Health Supervisor, Lafayette Atkinson, and Compliance Safety and Health Officer in training Ira Griffith, employed by the North Carolina Department of Labor, inspected Respondent's worksite located at 330 Division Drive, Wilmington, North Carolina (the "Inspection"). Heath Hollowel, general construction manager, Shawn Williams, operation manager, and Anthony Annivale, safety consultant, consented to the Inspection.
4. As a result of the Inspection on March 13, 2020, Complainant issued a Citation and Notification of Penalty, carrying the following proposed abatement dates and penalties (herein referred to as the "Original Citation"):

CITATION 01 (Serious)

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1926.62(d)(1)(i)	Immediately Upon Receipt	\$ 1,200.00
002	29 CFR 1926.1101(k)(3)(i)	Immediately Upon Receipt	\$ 4,000.00
003	29 CFR 1910.1200(e)(1)	4/30/2020	\$ 4,000.00

5. Respondent submitted a timely Notice of Contest dated April 24, 2020. On or about June 1, 2020 Complainant received "Employer's/Respondent's Statement of Position" which requested that formal pleadings be served. A Complaint was filed July 16, 2020 and an Answer was filed October 6, 2020.

6. The Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of North Carolina (the "Rules").
7. Complainant and Respondent waived the making of a transcript of the Hearing, and neither had any objection, either procedural or otherwise, to this Hearing and both parties consent to the conduct of this Hearing by the Undersigned and to entry of this Final Order.
8. Respondent posted the Original Citation and the Hearing Order as required by the Rules. Neither Complainant nor Respondent have received notification from any affected employee that such employee, or its representative, wishes to have a say in, or participate as a party in, this matter, or has any objections in connection with this matter including without limitation objection to the reasonableness of any abatement period.
9. Respondent confirms that the violations alleged in the Original Citation have been abated. Respondent and Complainant confirm that there has been no employee, or employee representative, objection to the reasonableness of any abatement period.
10. The parties agree that upon granting of Complainant's Motion the penalty for each Item designated in the Original Citation as amended pursuant to Complainant's Motion has been calculated in accordance with the standard Field Operations Manual procedure and giving consideration by Complainant to standard mitigating factors and to specific factors applicable to Respondent.

11. (a) Respondent agrees to pay the penalty of \$ 18, 400.00 assessed in this matter within 30 days of the date of this Final Order.

Payment is to be by check payable to the North Carolina Department of Labor, OSH Division (identifying Inspection No. 318183431) and mailed to North Carolina Department of Labor Financial Services Division, ATTN: Collections Division, 1101 Mail Service Center, Raleigh, North Carolina 27699-1101.

(b) Complainant agrees, simultaneously with the entry of this Order, that it will withdraw (i) Citation and Notification of Penalty, Citation 01 Item 001, Item 002, and Item 003 together with (ii) Citation and Notification of Penalty, Citation 02 Item 001 issued in the matter of the Commissioner of Labor for the State of North Carolina, Complainant, v NC Dept of Public Safety New Hanover Correctional and its successors, Respondent, Docket No. 2020-6275.

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

13. Complainant and Respondent agree that provided the respective Motions of each party are granted there are no other matters that remain to be decided, and that other than a ruling with respect to the Motions no outstanding issues remain to be resolved by an evidentiary hearing of this matter. The parties agree that this Final Order is a full and final resolution of the claims set out in the underlying Original Citation, as amended pursuant to Complainant's Motion. The parties further agree that (i) the modification of any portion of the Original Citation by

Complainant shall not be deemed to be an admission by Complainant that any such portion was alleged without merit, and (ii) none of the foregoing agreements, statements, stipulations and actions taken by Respondent shall be deemed an admission by the Respondent of any of the allegations contained in the Original Citation as amended or waiver of defenses; provided however that in any subsequent proceeding with respect to matters covered by this Final Order brought directly under the Act by Complainant, this Final Order shall have the full force and effect of a final order. The agreements, statements, stipulations and actions herein by Complainant and by Respondent are solely for the purpose of resolving this matter economically and amicably without litigation and shall not be used for any other purpose except for proceedings and matters arising under the Act and Article 21, Chapter 95 of the North Carolina General Statutes.

MOTIONS

Complainant moved to do the following (“Complainant’s Motion”):

1. Modify Citation 01 Item 001 by the addition of the following after instance (a):
“b) New Hanover Correctional Center, Operations building – where construction activities, including the sandblasting of the exterior walls of the building constructed before 1980 had coatings that contained lead paint, were performed without first conducting a lead survey on this section of the building.”
2. Modify Citation 01 Item 002 by the addition of the following after instance (a):
“b) New Hanover Correctional Center, Operations building – where construction activities, including the sandblasting of the exterior walls of the building constructed before 1980 had coatings that contained Asbestos, were performed without first conducting an Asbestos survey on this section of the building.”
3. Modify Citation 01 Item 003 by the addition of the following after instance (a):
“b) New Hanover Correctional Center – no written hazardous communication program had been developed or implemented for employees who were exposed to asbestos, silica, and lead produced by the sandblasting of coating materials on the exterior walls of the Operations building.”
4. Modify the Proposed Penalty of Citation 01 Item 001 from \$1,200.00 to \$2,400.
5. Modify the Proposed Penalty of Citation 01 Item 002 from \$4,000.00 to \$8,000.
6. Modify the Proposed Penalty of Citation 01 Item 003 from \$4,000.00 to \$8,000.
7. Change the Type of Violation in Citation 01 Item 001 from “Serious” to “NonSerious”.
8. Change the Type of Violation in Citation 01 Item 002 from “Serious” to “NonSerious”.
9. Change the Type of Violation in Citation 01 Item 003 from “Serious” to “NonSerious”.

Except as set forth in this motion, the Original Citation shall remain unmodified or amended.

Respondent did not object to Complainant's Motion.

Respondent requested that upon the granting of Complainant's Motion that the Undersigned consider the following motion by the Respondent ("Respondent's Motion"):

to withdraw Respondent's Notice of Contest to the Original Citation as amended pursuant to Complainant's Motion set forth above.

Complainant did not object to Respondent's Motion.

FINDINGS OF FACT

Based on the Stipulations at the time of the Hearing and the record, the Undersigned makes the following Findings of Fact:

1. This Court has jurisdiction over the parties and the subject matter of this Hearing.
2. Respondent is subject to the provisions of the Act and jurisdiction of the Safety and Health Review Commission of North Carolina.
3. Neither party has any procedural objection to this Hearing.
4. Complainant, Commissioner of Labor of the State of North Carolina, is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Act.
5. The Stipulations are incorporated by reference as Findings of Fact to the extent necessary to give effect to the provisions of this Order.

CONCLUSIONS OF LAW

The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

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

1. That Complainant's Motion is hereby **GRANTED**; and
2. That Respondent's Motion is hereby **GRANTED**.

Effective the 21st day of September 2023.

R. Joyce Garrett
R. Joyce Garrett (Oct 10, 2023 19:06 EDT)

R. Joyce Garrett
Hearing Examiner

CONSENTED TO:

COMPLAINANT

Jonathan Jones
Jonathan Jones (Oct 10, 2023 15:43 EDT)

Jonathan D. Jones, Assistant Attorney General
Attorney for Complainant

Rory Agan
Rory Agan (Oct 10, 2023 15:15 EDT)

Rory Agan, Special Deputy Attorney General
Attorney for Complainant

RESPONDENT

Thomas L. Crosby
Thomas L. Crosby (Oct 10, 2023 15:05 EDT)

Thomas L. Crosby, Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF SERVICE

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

THOMAS L. CROSBY
N.C. DEPARTMENT OF JUSTICE
PUBLIC SAFETY SECTION
PO BOX 629
RALEIGH, NC 27602-0629

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

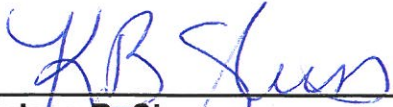
JONATHAN JONES
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid, at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

By email to carla.rose@labor.nc.gov.

THIS THE 13 DAY OF October 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

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2. Respondent is a North Carolina agency, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina and maintains a place of business in North Carolina. Respondent is in the business of capital program management and physical plant operations. Respondent is an “employer” within the meaning of N.C.G.S. Section 95-127(11); all of Respondent’s employees referred to in this matter are “employees” within the meaning of N.C.G.S. Section 95-127(10).
3. During the period of November 14, 2019 and March 13, 2020, Compliance Safety and Health Supervisor, Lafayette Atkinson, and Compliance Safety and Health Officer in training Ira Griffith, employed by the North Carolina Department of Labor, inspected Respondent’s worksite located at 330 Division Drive, Wilmington, North Carolina (the “Inspection”). Heath Hollowel, general construction manager, Shawn Williams, operation manager, and Anthony Annivale, safety consultant, consented to the Inspection.
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9. Respondent confirms that the violations alleged in the Original Citation have been abated. Respondent and Complainant confirm that there has been no employee, or employee representative, objection to the reasonableness of any abatement period.

10. The parties agree that upon granting of Complainant's Motion the penalty for each Item designated in the Original Citation as amended pursuant to Complainant's Motion has been calculated in accordance with the standard Field Operations Manual procedure and giving consideration by Complainant to standard mitigating factors and to specific factors applicable to Respondent.

11. (a) Respondent agrees to pay the penalty of \$ 18, 400.00 assessed in this matter within 30 days of the date of this Final Order.

Payment is to be by check payable to the North Carolina Department of Labor, OSH Division (identifying Inspection No. 318183431) and mailed to North Carolina Department of Labor Financial Services Division, ATTN: Collections Division, 1101 Mail Service Center, Raleigh, North Carolina 27699-1101.

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

13. Complainant and Respondent agree that provided the respective Motions of each party are granted there are no other matters that remain to be decided, and that other than a ruling with respect to the Motions no outstanding issues remain to be resolved by an evidentiary hearing of this matter. The parties agree that this Final Order is a full and final resolution of the claims set out in the underlying Original Citation, as amended pursuant to Complainant's Motion. The parties further agree that (i) the modification of any portion of the Original Citation by

Complainant shall not be deemed to be an admission by Complainant that any such portion was alleged without merit, and (ii) none of the foregoing agreements, statements, stipulations and actions taken by Respondent shall be deemed an admission by the Respondent of any of the allegations contained in the Original Citation as amended or waiver of defenses; provided however that in any subsequent proceeding with respect to matters covered by this Final Order brought directly under the Act by Complainant, this Final Order shall have the full force and effect of a final order. The agreements, statements, stipulations and actions herein by Complainant and by Respondent are solely for the purpose of resolving this matter economically and amicably without litigation and shall not be used for any other purpose except for proceedings and matters arising under the Act and Article 21, Chapter 95 of the North Carolina General Statutes.

MOTIONS

Complainant moved to do the following (“Complainant’s Motion”):

1. Modify Citation 01 Item 001 by the addition of the following after instance (a):
“b) New Hanover Correctional Center, Operations building – where construction activities, including the sandblasting of the exterior walls of the building constructed before 1980 had coatings that contained lead paint, were performed without first conducting a lead survey on this section of the building.”
2. Modify Citation 01 Item 002 by the addition of the following after instance (a):
“b) New Hanover Correctional Center, Operations building – where construction activities, including the sandblasting of the exterior walls of the building constructed before 1980 had coatings that contained Asbestos, were performed without first conducting an Asbestos survey on this section of the building.”
3. Modify Citation 01 Item 003 by the addition of the following after instance (a):
“b) New Hanover Correctional Center – no written hazardous communication program had been developed or implemented for employees who were exposed to asbestos, silica, and lead produced by the sandblasting of coating materials on the exterior walls of the Operations building.”
4. Modify the Proposed Penalty of Citation 01 Item 001 from \$1,200.00 to \$2,400.
5. Modify the Proposed Penalty of Citation 01 Item 002 from \$4,000.00 to \$8,000.
6. Modify the Proposed Penalty of Citation 01 Item 003 from \$4,000.00 to \$8,000.
7. Change the Type of Violation in Citation 01 Item 001 from “Serious” to “NonSerious”.
8. Change the Type of Violation in Citation 01 Item 002 from “Serious” to “NonSerious”.
9. Change the Type of Violation in Citation 01 Item 003 from “Serious” to “NonSerious”.

Except as set forth in this motion, the Original Citation shall remain unmodified or amended.

Respondent did not object to Complainant's Motion.

Respondent requested that upon the granting of Complainant's Motion that the Undersigned consider the following motion by the Respondent ("Respondent's Motion"):

to withdraw Respondent's Notice of Contest to the Original Citation as amended pursuant to Complainant's Motion set forth above.

Complainant did not object to Respondent's Motion.

FINDINGS OF FACT

Based on the Stipulations at the time of the Hearing and the record, the Undersigned makes the following Findings of Fact:

1. This Court has jurisdiction over the parties and the subject matter of this Hearing.
2. Respondent is subject to the provisions of the Act and jurisdiction of the Safety and Health Review Commission of North Carolina.
3. Neither party has any procedural objection to this Hearing.
4. Complainant, Commissioner of Labor of the State of North Carolina, is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Act.
5. The Stipulations are incorporated by reference as Findings of Fact to the extent necessary to give effect to the provisions of this Order.

CONCLUSIONS OF LAW

The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

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

1. That Complainant's Motion is hereby **GRANTED**; and
2. That Respondent's Motion is hereby **GRANTED**.

Effective the 21st day of September 2023.

R. Joyce Garrett
R. Joyce Garrett (Oct 10, 2023 19:06 EDT)

R. Joyce Garrett
Hearing Examiner

CONSENTED TO:

COMPLAINANT

Jonathan Jones

Jonathan Jones (Oct 10, 2023 15:43 EDT)

Jonathan D. Jones, Assistant Attorney General
Attorney for Complainant

Rory Agan

Rory Agan (Oct 10, 2023 15:15 EDT)

Rory Agan, Special Deputy Attorney General
Attorney for Complainant

RESPONDENT

Thomas L. Crosby

Thomas L. Crosby (Oct 10, 2023 15:05 EDT)

Thomas L. Crosby, Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF SERVICE

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

THOMAS L. CROSBY
N.C. DEPARTMENT OF JUSTICE
PUBLIC SAFETY SECTION
PO BOX 629
RALEIGH, NC 27602-0629

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

JONATHAN JONES
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid, at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

By email to carla.rose@labor.nc.gov.

THIS THE 13 DAY OF October 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