

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

**COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA**

Complainant,

v.

**SITE DEVELOPMENT CORPORATION
*and its successors***

Respondent.

) **DOCKET NO: 2020-6296**
)
) **INSPECTION**
) **NO: 318189404**
)
) **CSHO ID: U6109**
)
)
) **FINAL ORDER**

FILED

AUG 30 2022

NC Occupational & Safety
Review Commission

THIS CAUSE came on for hearing and was heard before the undersigned Laura J. Wetsch, Hearing Examiner for the North Carolina Occupational Safety and Health Review Commission, on August 30, 2022 pursuant to a Notice of Hearing. Rory Agan, Assistant Attorney General, North Carolina Department of Justice, appeared for the Complainant. Allen West, Attorney with Hamilton Stephens Steele & Martin, PLLC, Charlotte, North Carolina, appeared for the Respondent. No affected employee of Respondent, or its representative, attended to have a say in, or participate as a party in, the Hearing.

At the time of the Hearing the parties agreed upon and consented to the following Stipulations.

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 corporation, 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 Cliffside, North Carolina. Respondent is in the business of site development. Respondent is an "employer" as defined by N.C.G.S. Section 95-127(11) and it maintains employees as defined by N.C.G.S. Section 95-127(10).

3. Starting February 12, 2020, Denese Ballew, an Occupational Safety and Health Compliance Officer with the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at 66 South Painter Road in Cullowhee, North Carolina (the "Inspection").

4. As a result of the Inspection, on May 5, 2020, Complainant issued the following Citation and Notification of Penalty (herein collectively referred to as the "Original Citation"):

Citation	Item	Standard	Type	Penalty
1	1	1926.652(a)(1)	Serious-Willful	\$42,000.00
2	1	1926.651(c)(2)	Serious	\$4,200.00
2	2	1926.651(j)(2)	Serious	\$4,200.00
2	3	1926.651(k)(1)	Serious	\$4,200.00

5. Respondent submitted a timely Notice of Contest.

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 agreed that the Hearing in this matter shall be conducted via the video conferencing platform known as "Lifesize", the presence of a court reporter during the Hearing is waived, the Hearing's audio and video will be recorded through Lifesize (the "Recording"), the Recording will be the official record of the Hearing, and the Hearing will be deemed to have taken place in Raleigh, North Carolina. Complainant and Respondent have no 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 Notice of Hearing 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 as amended pursuant to Complainant's Motion have been abated.

10. 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 Final Order.

11. Complainant and Respondent agree that provided the respective Motions of each party are granted (a) 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; (b) this Order is a full and final resolution of the claim set out in the underlying Original Citation, as amended pursuant to Complainant's Motion; (c) 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, (d) none of the 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 Order brought directly under the Act by Complainant, this Order shall have the full force and effect of a final order; (e) 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 further 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; (f) 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; and (g) there has been no employee objection to the reasonableness of any abatement period.

12. Respondent agrees to:

- a. Conduct daily inspections of excavations, the adjacent areas, and protective systems by a competent person (as required under 1926.651(k)(1)) and document the same in writing. The inspection record shall include the maximum trench depth, the specific protective system(s) in use for the day, and the name of the person conducting the inspection. The records shall be maintained for a period of six months and made available to OSH Division personnel upon request. This procedure shall remain in place for a period of three years or until released by NCDOL.
- b. Respondent will pay the penalty of \$42,000.00 assessed in this matter in 24 equal payments of \$1750.00 beginning October 3, 2022 and continuing thereafter on the first Monday of every month or until the balance reaches zero (payment is to be by check payable to North Carolina Department of Labor, OSHA Division (identifying Inspection No. 318189404)) and mailed to North Carolina Department of Labor, NC Department of Labor Budget & Management Division, Attn: Collections Division, 1101 Mail Service Center, Raleigh, North Carolina 27699-1101. Respondent agrees that if two payments are missed without prior

approval from NCDOL Budget Office the penalty may be accelerated at NCDOL's sole discretion and the full balance becomes due immediately.

MOTIONS

Complainant moved to do the following ("Complainant's Motion"):

- a. Reclassify and regroup the citations and associated penalties as follows for a new total balance of all penalties of \$42,000.00.

Citation	Item	Standard	Type	Penalty
1	1a	1926.652(a)(1)	Serious	\$42,000.00
1	1b	1926.651(c)(2)	Serious	Grouped
1	1c	1926.651(j)(2)	Serious	Grouped
1	1d	1926.651(k)(1)	Serious	Grouped

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"):

- a. 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 objection, procedural or otherwise, 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.

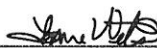
CONCLUSIONS OF LAW

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**; Respondent shall pay the penalty of \$42,000.00 in the manner set forth in the Stipulations.


This the 30th day of August, 2022.



Laura Wetsch (Aug 30, 2022 14:17 EDT)

Laura J. Wetsch
Hearing Examiner

CONSENTED TO:



Rory Agan (Aug 30, 2022 14:01 EDT)

Rory Agan
Assistant Attorney General
NCDOJ-Labor Section
114 W. Edenton Street
Raleigh, North Carolina 27603
Attorney for NCDOL



Allen West (Aug 30, 2022 13:47 EDT)

Allen L. West
Partner
Hamilton Stephens Steele & Martin, PLLC
525 N. Tryon Street, Suite 1400
Charlotte, North Carolina 28202
Attorney for Respondent

CERTIFICATE OF SERVICE

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

ALLEN L WEST
HAMILTON STEPHENS STEELE & MARTIN
525 N TRYON ST STE 1400
CHARLOTTE NC 28202

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

RORY AGAN
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

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

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

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

THIS THE 31 DAY OF August 2022.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
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NCOSHRC@labor.nc.gov