

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

COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)
)
COMPLAINANT,)
)
v.)
)
LGI HOMES-NC, LLC.)
and its successors,)
RESPONDENT.)

FILED

MAR 13 2023

NC OSH Review Commission

DECISION AND FINAL ORDER

OSHANC NO: 2020-6321

INSPECTION NO.: 318196847

THIS MATTER was duly noticed and came on for hearing before the undersigned on December 5th and 6th, 2022 via the Lifesize video platform. The Commissioner of Labor (“Complainant”) was represented by Stacy A. Phipps, Esq., Assistant Attorney General, North Carolina Department of Justice, Labor Section. LGI Homes-NC, LLC. (“Respondent”) was represented by Travis W. Vance, Esq. and Sharon Suh, Esq. Fisher Phillips, LLP.

STIPULATIONS

Prior to the hearing the parties stipulated to the facts set out in Appendix A, attached, which are incorporated herein by reference.

WITNESSES

The following witnesses testified at the hearing:

For the Complainant: Ted Hendrix, District Supervisor, N.C. Department of Labor
Robert Campbell, Customer Service Warranty Manager, LGI Homes
Matthew Denton, Regional Construction Manager, LGI Homes
Christopher Chase Johnson, Operations Manager, Champion Plumbing of the Carolinas

For the Respondent: Ted Hendrix, District Supervisor, N.C. Department of Labor
William Scott Sterling, Vice-president of Construction for the Carolinas, LGI Homes
Matthew Denton, Regional Construction Manager, LGI Homes

EXHIBITS

The following exhibits were admitted into evidence at the hearing:

For the Complainant: Exhibit C-1, The certified, unredacted Inspection File for Inspection 318196847, pp 1-98 and the photographs contained therein numbered DSCN 3392 sequentially to DSCN 3458 and six additional photographs identified as "Johnson Photos" and numbered one through six.

For the Respondent: R-2 Master Trade Agreement
R-3 R. Campbell Certificate of Completion, OSHA 10 hour Course (2/4/20)
R-4 R. Campbell Certificate of Completion, Excavation Safety in Construction
R-5 R. Campbell Certificate of Completion, OSHA 10 hour Course (6/5/21)
R-6 Docket No. 2020-6321, Champion Plumbing Inspection File
R-7 Email Re: Annual Meeting
R-10 Complainant RFA Responses

FINAL DECISION

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, judicially noticed information pursuant to N.C. Gen. Stat. §8C-1-201 and the entire record in this proceeding, the Undersigned makes Findings of Fact and Conclusions of Law. In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, biases, or any prejudice the witness may have. Further, the undersigned has carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Based upon the foregoing, the undersigned makes the following:

FINDINGS OF FACT

PARTIES

1. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina. N.C. Gen. Stat. § 95-126 et seq. ("the Act"). Stip. ii.
2. Respondent LGI Homes-NC, LLC is a North Carolina Corporation that is engaged in the residential construction business and, at all times relevant to this matter,

Respondent was an employer within the meaning of N.C. Gen. Stat. §95-127(11) and is subject to the provisions of the Act. Stip. iii; Compl. Ex. C-1, p 78.

WITNESSES

3. Ted Hendrix is a District Supervisor with the North Carolina Department of Labor, Occupational Safety and Health Division. Mr. Hendrix has been employed with the Department of Labor for approximately twelve years and at all times relevant to the incident giving rise to the instant contested matter, Mr. Hendrix was a Safety/Health Compliance Officer ("CSHO") whose duties included investigating workplace accidents and inspecting job sites for potential violations of the Act. T p 18:7-20.
4. Robert Campbell is a Customer Service Warranty Manager for Respondent. T p 128:11-12. His primary duties included meeting with homeowners to assist with getting defective warrantied items repaired. T pp 129:25-130:7. Mr. Campbell had completed a ten hour OSHA training course in February 2020. Compl. Ex. C-1, p 73.
5. Matthew Denton had been employed with Respondent for five and one-half years and at the time of the hearing held the position of Regional Construction Manager. At all times relevant to the incident giving rise to the instant contested matter, Matthew Denton was Respondent's Area Construction Manager and the supervisor to whom Robert Campbell reported. T p 181:2-13; 183:15-19.
6. Christopher Chase Johnson ("Chase Johnson" or "Johnson") is an operations manager for Champion Plumbing of the Carolinas ("Champion Plumbing"). T p 226:15 - 23.
7. William Scott Sterling ("Sterling") is Respondent's Vice-president of Construction for the Carolinas. T p 295:16-17.

EVENTS PRECIPITATING THE CITATION

8. On June 11, 2020 Respondent was the General Contractor on a jobsite for the construction of a single-family residence at 1005 Sapphire Drive in the Woodside at Mountain View subdivision in the Town of Ranlo, in Gaston County, North Carolina ("the site"). The structure was being built on the last remaining lot in the subdivision. T pp 20:7-24; 25:17-18; 31:2-5¹.
9. On June 11, 2020, Champion Plumbing was a subcontractor for Respondent, contracted to provide labor and materials for plumbing at the site. Resp. Ex. R-2. T pp 159:15-17; 302:10-24. 230:5-8.
10. Respondent had a Master Trade Agreement with Champion Plumbing which provided, *inter alia*:

¹ Citations to the Hearing Transcript are "T. p x"

a) Section 3. *LEGAL REQUIREMENTS*. Contractor [Champion Plumbing] warrants and represents that it is familiar with, and covenants to comply with, all laws, regulations and rulings of all federal, state, county and municipal jurisdictions and agencies applicable to this Agreement and to the Work, including, without limitation, dust control laws, storm water pollution prevention requirements, OSHA, state occupational safety and health laws

b) Section 3.4 *OSHA COMPLIANCE*. Contractor will comply with all provisions of the 1970 Occupational Safety and Health Act (OSHA) and all other applicable OSHA rules and regulations. This includes, but is not limited to: (1) compliance with OSHA's Hazard Communication Standard; (2) compliance with OSHA's Fall Protection in the Construction Industry; and (3) immediately notifying LGI orally and in writing of any job related injury to or death of any person employed by Contractor, or otherwise under the control of Contractor, in connection with the Work.

c) Section 6.4 *WITHHOLDING OF PAYMENT*. Without limitation of the other terms and conditions herein and to the extent permitted by law, LGI may refuse to pay Contractor (in whole or in part and at its sole and exclusive discretion) for any of the following reasons, and the amount withheld shall be the amount determined by LGI in its sole and exclusive discretion as may be necessary to cure or mitigate any default or breach under this Agreement or other non-compliance: . . . vii. Contractor's failure to comply with any provision of this Agreement;

d) LGI reserves the right to (a) inspect all Work to determine, in good faith, whether the Work has been satisfactorily completed, (b) control access to each LGI Work site, (c) schedule Work in a logical sequence or to avoid disturbances, and (d) stop Work for safety reasons or to ensure conformity of end product with the contracted-for results.

Resp. Ex. R-2.

11. On June 11, 2020, Gerardo Lucas, a subcontractor for Champion Plumbing, was attempting to locate the sewer tap for the Town of Ranlo in order to attach the sewer line from the under-construction residence at the site. T pp 23:4-10; 31:6-8; 159:21-22; Stip. vi. (See DSCN3422).
12. Respondent does not perform construction work involving locating or connecting sewer taps. Respondent does not perform any excavations at its construction sites and its employees do not assist subcontractors in excavation work. T p 302:3-16. In the eight years that Vice-president Sterling has worked for Respondent he has never seen one of Respondent's employees in an excavation trench. T p 303:24 - 304:4.
13. During April and May 2020, Robert Campbell worked at the Woodside at Mountain View subdivision on behalf of the Respondent where his duties included conducting Weekly Homebuilding Worksite Inspections and Trade Partner Violation Reports. Compl. Ex. C-1 pp 68-72; 82-90. T pp 130:16 - 133:8; 134:1-13.

14. Respondent's Weekly Homebuilding Worksite Inspection Form was a twenty item checklist of "Life Critical Safe Practices." The person completing the form is instructed to identify whether "any applicable practice" is or is not being performed by checking "Yes," "No," or "Not Applicable" next to the identified practice. Compl. Ex. C-1 pp 82-90.
15. When Mr. Campbell completed the forms for subcontractors at the Woodside at Mountain View subdivision, he would check "Not Applicable" for those items that were not part of the construction on the day of the inspection; he also noted at least two instances where subcontractors had not followed safe practices required for underground utilities. Compl. Ex. C-1, pp 82-90.
16. When Mr. Campbell completed these reports during April and May 2020, he signed the reports as "LGI Site Manager." Compl. Ex. C-1 pp 68-72; 82-90.
17. In one instance, Campbell applied a one hundred dollar "back charge" against a roofing company and applied a one hundred dollar penalty against another framing company for what he identified as its "second violation of the day." Compl. Ex. C-1, p 70, 72, respectively.
18. When Mr. Campbell completed the Weekly Homebuilding Worksite Inspection Forms for subcontractors at the Woodside at Mountain View subdivision he always identified that the safe practices for Item #18, Excavations were being followed, including whether an excavation was sloped, benched or shored if the excavation was greater than five feet. Compl. Ex. C-1, pp 82-90. T p 138:16-19; 139:5-8.
19. However, despite approximately two months reviewing subcontractors' work at the Woodside at Mountain View subdivision, Campbell's supervisors had never assigned Campbell to perform any work to assist with any excavation or assist a subcontractor by working in a trench. Campbell had never been known to enter a trench and his supervisors did not consider working in a trench to be a part of Campbell's job duties and had no expectation that Robert Campbell would enter a trench. See also, T p 307:11 - 22
20. On June 11, 2020, Mr. Campbell received a telephone call from a plumber at the 105 Sapphire Drive site and Respondent's Construction Manager, Jimmy Stiles, instructed Mr. Campbell to go to the site on his behalf. Mr. Campbell was aware that the work scheduled for that day at the site was connecting to the sewer tap. T pp 133:13-21; 146:6-10; 170:9-14; 191:15-20.
21. According to Respondent's Manager, Matthew Denton, while Jimmy Stiles was the Construction Manager for the Woodside at Mountain View subdivision, as the subdivision neared completion and Mr. Stiles was moving onto another project, Robert Campbell was "being the eyes and ears for Jimmy [Stiles] sometimes." T p 195:23 - 196:1.
22. On June 11, 2020, after receiving the aforementioned telephone call, Mr. Campbell left a meeting that included his supervisors to go to the site. Although he knew that connecting

the sewer tap was scheduled for that day, he had no knowledge that there was an open excavation at the site nor did he inform any of his supervisors of the open excavation after his arrival and before the OSHA inspection began. T p 159:3 - 11.

23. There was no evidence that Respondent's management would have expected Robert Campbell to encounter a trench greater than five feet when he got to the site on June 11, 2020.
 - a) Witnesses testified that the call which Campbell received and which prompted his visit to the site was not specific as to the problem encountered by the plumber(s). T pp 133:13-16.
 - b) There was no information provided to Respondent's managers regarding the existence of an excavation, the depth of a trench or the location of a spoils pile. T p 206:2-11; 2142-8.
 - c) Campbell's supervisor, Matthew Denton, testified that, in his experience, it was highly unlikely that a trench of greater than five feet would be needed to locate a sewer tap. T p 208:4-18.
 - d) Respondent's Vice-president Sterling testified that of the dozen or more sewer connections that he had directly supervised throughout his career, the average depth to connect to the sewer tap was two to three feet and it would rarely be great than that on a residential site because "sewer laterals," the pipe to which plumbers must connect on residential construction sites, come up out of the ground. T p 313:4-23.
 - e) Nothing about the Gaston County site would have created any different expectation. T pp 313:24 - 314:3.
24. On June 11, 2020 when Mr. Campbell arrived at the site he observed a trench that had been dug by Gerardo Lucas that was more than seven feet. Rec. 3:57:15 (T p 141:18-25); Compl. Ex. C-1, DSCN 3399. T pp 44:22 - 45:6; 68:5-6.
25. Respondent had not previously worked with Champion Plumbing's subcontractor Gerardo Lucas. T p 159:25-160:2.

INSPECTION AND CITATION ISSUED

26. On June 11, 2020 CSHO Hendrix entered the Woodside at Mountain View subdivision and observed that there was excavation work being performed at 105 Sapphire Drive. T pp 21:1; 21:14-23.
27. Mr. Hendrix observed Gerardo Lucas in the trench without any protective system. T p 55:11-12. Mr. Campbell also admitted to Hendrix that he (Campbell) had entered the trench to assist Mr. Lucas.

28. In his testimony, Campbell described as between seven and eight feet deep and agreed that there was not a trench box nor a ladder for egress. T pp 55:12-13; 152:22-153:19. (See also T p 199:5-12 (Testimony of Matthew Denton identifying Robert Campbell as being the individual photographed in the trench and testifying that Campbell admitted to his supervisor that he had been in the trench)).
29. A trench of more than five feet requires a protective system, which could include a trench box, shoring, benching or sloping of the excavation. T p 51:8-13. However, there was no protective system in place for the trench that CSHO Hendrix observed. T p 52:8-10
30. As a result of his observations, CSHO Hendrix opened an inspection of Respondent as well as of Champion Plumbing for violations at the worksite. Comp. Ex. C-1; Resp. Ex. R-6. T pp 33:16-17.
31. Hendrix observed that the soil at the excavation site was granular ("Type C"), which contains a lot of sand and has a greater propensity to collapse, as compared with other soil types containing more rock or clay and that the spoil pile from the excavation had been placed adjacent to the wall of the trench. T pp 52:14-24; 70:25-71:2.
32. In summary, CSHO Hendrix observed the following conditions at the site which he identified as violative of the Act:
- a) A worker in a seven foot, nine inch trench without a means of egress. T pp 68:3-4; 69:7-19; 122:11-123:15. Ex. C-1, DSCN 3402; 3404.
 - b) The excavator had left a spoil pile directly adjacent to the edge of the excavation. T pp 70:25-71:2. Ex. C-1, DSCN 3417, DSCN 3422.
 - c) An employee was working in a seven foot, nine inch trench without a protective system in place and where the trench had not been inspected by a competent person. T pp 72:6-73:4.
 - d) An employee was working in a seven foot, nine inch trench without protection from a cave-in. T p 73:20-22.
33. On August 5, 2020, Complainant issued a Citation and Notification of Penalty ("Citation") to Respondent. Respondent timely filed a Notice of Contest regarding the Citation and Notification of Penalty in which it contested all issues and matters relating to the Citations, including abatement dates and proposed penalties. Stips. ix; xi.
34. The following Citations and Proposed Penalties were at issue in this proceeding:

CITATION 1	STANDARD	VIOLATION	ABATEMENT	PROPOSED PENALTY
Item 001	29 CFR J 926.651(c)(2): A stairway, ladder, ramp or other safe means of	Serious - where an employee was working in a seven-	Corrected During Inspection	\$4,000.00

	egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees	foot, nine-inch-deep trench without a means of egress.		
Item 002	29 CFR 1926.651 (j)(2): Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations	Serious - where the spoil pile along the east side of the excavation was located directly adjacent to the edge of the excavation.	Corrected During Inspection	\$1,200.00
Item 003	29 CFR 1926.651(k)(1): Daily inspections of excavations, the adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions	Serious - where an employee was working in a seven-foot, nine-inch-deep trench where the protective systems had not been inspected by a competent person.	Corrected During Inspection	\$4,000.00
Item 004	29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(b) or (c)	Serious - where an employee was working in a seven-foot, nine-inch-deep trench without the use of an adequate protective system.	Corrected During Inspection	\$4,000.00

35. Champion Plumbing was cited for the same violations of the Act. T pp 33:20-22; 96:25-97:5. Resp. Ex. R-6.
36. Respondent had a history of working with its subcontractor Champion Plumbing and during that time had not encountered any serious safety concerns with Champion Plumbing. T pp 192:17-193:7. (See also, T p 229:19-22, Testimony of Chase Johnson, no recollection of ever having received a notice of violation during Champion Plumbing's prior history working for Respondent.)

37. Respondent presented evidence of its safety policies and procedures. Respondent's Vice-President Sterling testified that Respondent's safety plan included "a safety binder, a safety plan[,] that it did job inspections, held quarterly reviews of safety practices, and an annual safety meeting. Safety meetings include subcontractors as well as Respondent's employees and managers. At safety meetings prior violations are reviewed and during the annual meeting there is a review of "OSHA's top violations" and hazards to anticipate. Respondent requires that its jobsites be visited daily for inspection of possible safety concerns. T pp 297:24 - 299:17.
38. Other than Mr. Campbell himself, none of Respondent's other supervisory personnel were aware that Mr. Campbell had climbed into the trench until after the OSHA inspection had been completed. T p 198:3-8.
39. Other than Mr. Campbell, none of Respondent's supervisory personnel were aware of any violative conditions at the site prior to the completion of the OSHA inspection. T p 206:2-11.
40. Complainant alleged that Respondent should have known of the violation because Campbell was "assigned a hazardous task without appropriate training." Compl. Ex. C-1, p 51. However, no evidence produced at the hearing supported Complainant's allegation that a "hazardous task" was assigned to Campbell.
41. CSHO Hendrix testified that Denton's, not Campbell's, knowledge was imputed to LGI Homes in issuing each of the citation items. Tr. 106:3-24, 109:21-110:4, 110:10-111:6, 111:10-19.
42. There was insufficient evidence presented at this hearing to determine that Gerardo Lucas was an employee of Champion Plumbing or could be considered an employee of Champion Plumbing.

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012). 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.
2. Pursuant to N.C.G.S. §95-135, the Review Commission has jurisdiction over the parties and the subject matter to this action.

3. North Carolina has adopted the multi-employer doctrine for analyzing employer liability on construction worksites such as the site at issue in this matter. *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.
4. A controlling employer is one “who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them.” CPL 2-00.124, X(E).
5. An employer may also be liable if it is a correcting employer. A correcting employer is one who is engaged in a common undertaking on the same worksite as an exposing employer and who is responsible for correcting a hazard. CPL 2-00.124 X(D).
6. Respondent was a controlling employer as well as a correcting employer under Complainant’s multi-employer work site policy. CPL 2-00.124 *et. seq.*
 - a) A controlling employer is "reasonably . . . expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *New River Elec. Corp., v. OSHRC*, 25 F.4th 213, 219 (4th Cir. 2022) (internal quotations and citations omitted).
 - b) Respondent maintained supervisory control and authority over the worksite through its Master Trade Agreement which permitted it to levy penalties for noncompliance with safety requirements and permitted it to stop work for, among other reasons, noncompliance with safety requirements.
 - c) Respondent maintained supervisory control and authority of the worksite through its daily inspections, its Weekly Homebuilding Inspections and its Trade Partner Violation Reports which were designed to gain compliance with safety standards through notice and monetary fines, thereby correcting violations.
7. To establish an OSHA violation for which the Respondent as a controlling or correcting employer is liable, Complainant must prove "by a preponderance of the evidence (1) the applicability of the standard, (2) the employer's noncompliance with the terms of the standard, (3) employee access to the violative condition, and (4) the employer's actual or constructive knowledge of the violation" *N&N Contractors, Inc. v. Occupational Safety & Health Rev. Comm'n*, 255 F.3d 122, 125-26 (4th Cir. 2001).
8. With one exception the Complainant has met its burden to show the applicability of the standard, that the standard was violated on June 11, 2020 when Gerardo Lucas and Robert Campbell worked in a trench that was greater than five foot deep without a required protective system, and with a spoil pile containing Grade C soil adjacent to the open excavation.

9. However, Citation 1 Item 003 was issued pursuant to 29 CFR § 1926.651(k)(1). That regulation states: "Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems . . . **These inspections are only required when employee exposure can be reasonably anticipated.**" (Emphasis added). As explained below, employee exposure was not reasonably foreseeable by Respondent in this instance.
10. Although Complainant showed violations, the Act does not impose strict liability on employers for all of its employees' acts. *See W.G. Yates & Sons Constr. Co v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 606 (5th Cir. 2006). An employer is liable for an employee's serious violation of the Act only if the employer knew or through "the exercise of reasonable diligence" should have "know[n] of the presence of the violation." 29 U.S.C. § 666(k).
11. The Complainant did NOT meet its burden to show that the Respondent had actual or constructive knowledge of any violative conditions.
12. Complainant may prove that Respondent failed to exercise reasonable diligence to discern the presence of violative conditions in one of three ways. First, Complainant may show that the employer failed to implement specific risk prevention measures at the job site. Second, Complainant may show the employer's history of similar violations by employees. Third, Complainant may show that Respondent failed to use reasonable diligence to discover violations by demonstrating that it has an inadequate safety program or a history of lax enforcement of its work rules. *New River Elec. Corp., v. OSHRC*, 25 F.4th 213, 221 (4th Cir. 2022).
13. Complainant produced no evidence demonstrating that Respondent failed to implement specific risk prevention measures at its job site. The evidence presented at the hearing indicated that Respondent's Master Trade Agreement with Champion Plumbing required strict compliance with all OSHA requirements and also specifically required that Champion Plumbing provide to its employees and subcontractors "the protective clothing, equipment, training and safety devices necessary to ensure compliance with relevant Legal Requirements . . ." Resp. Ex. R-2, Secs. 3.1 and 3.4. In addition the Job Rules Addendum to the Agreement between Respondent and Champion Plumbing required Champion Plumbing and its subcontractors to "initiate, maintain, and supervise all safety precautions and programs, including conducting inspections to determine that safe working conditions . . . exist." *Id.*, at p 20.
14. Complainant produced no evidence demonstrating that Respondent had a history of similar violations. The evidence adduced at the hearing showed that there were no prior violations reported in Respondent's history with Champion Plumbing. The evidence also showed that Respondent had no prior experience with Gerardo Lucas. Furthermore, the evidence demonstrated that it was unlikely that Respondent would encounter such a violation, given the usual and customary nature of the plumbing work performed by Champion Plumbing for Respondent.

15. Complainant produced no evidence that Respondent's safety program was inadequate. The evidence presented at the hearing showed that Respondent had a comprehensive safety program that was comprised, in pertinent part, of regular and ongoing inspections and meetings that included subcontractors, discussions of discovered violations and foreseeable violations as indicated by OSHA surveys and that also included enforcement mechanisms which were utilized when appropriate.
16. Based on the foregoing, it was not foreseeable to Respondent that Champion Plumbing or Gerardo Lucas would violate the standards identified in the instant Citation.
17. Complainant's only contention that Respondent had knowledge of the violative conditions was reflected in its attempts to prove that Robert Campbell's knowledge of the trench could be imputed to his employer. Here, as well, Complainant failed to meet its burden to demonstrate Respondent's knowledge.
18. It is true that "a corporate employer can only act and acquire knowledge through [its] agents," and that, therefore, a finding of knowledge is often based on the imputed knowledge of a supervisory employee. *ComTran Grp., Inc. v. U.S. Dep't of Lab.*, 722 F.3d 1304, 1311-16 (11th. Cir. 2013) (surveying decisions of the Second, Third, Fourth, Fifth, Sixth and Tenth circuits).
19. Furthermore, it appears that on June 11, 2020 Robert Campbell was dispatched to the job site to act in a supervisory capacity. He had been trained over the prior two months' time to review the subcontractors' work, to identify violations, and to follow procedures aimed at ensuring that subcontractors were properly notified of violations and that violations were enforced. See, e.g, Compl. Ex. C-1 at pp 68-90, esp. pp 70, 72. In addition, as Respondent transitioned its work from this jobsite to another subdivision Respondent's Construction Manager relied upon Campbell as his "eyes and ears." Test. of Matthew Denton, T p 195:23 - 196:1. As Respondent correctly noted in its post-hearing briefing, "Whether someone is a supervisor depends primarily on the substance of his delegated authority, not his title." *TNT Crane & Rigging, Inc. v. OSHRC*, No 19-60745, 821 Fed. Appx 348, 353-354 (5th Cir. 2020).
20. However, there is an important exception to the general rule regarding the imputation of a supervisor's knowledge to the supervisor's employer and that exception is dispositive here. When a supervisory employee commits the violation, the employer loses its "eyes and ears" to detect and prevent misconduct. *New River Elec. Corp., v. OSHRC*, 25 F.4th 213, 220 (4th Cir. 2022). The Fourth Circuit has concluded that the imposition of liability upon an employer for a rogue supervisor, that is one whose conduct is "an isolated incident of unforeseeable or idiosyncratic behavior" is contrary to the purpose of the Act and any citation based solely upon that conduct should be set aside. *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401 (4th Cir. 1979). *Accord. New River Elec. Corp.*, at 221.
21. The evidence presented at hearing *overwhelmingly* established that Robert Campbell's conduct on June 11, 2020 was unforeseeable, idiosyncratic and contrary to the training that

he had received in the prior two months. See, Findings of Fact #s 18, 19, 23, 38, 39, and 40, incorporated herein by reference.

22. It is the Complainant's burden to prove foreseeability. *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401-403 (4th Cir. 1979).
23. Nor can Robert Campbell's unforeseeable, idiosyncratic conduct be used as a basis for imputing knowledge to Respondent of Gerardo Lucas' conduct merely because Campbell was acting in a supervisory capacity on that afternoon. Campbell's actions were rogue; they were designed to insulate Respondent from the violation and avoid providing knowledge to Respondent. Had Lucas and Campbell somehow been successful in locating the sewer tap through their efforts at using hand tools inside the trench, Respondent would have no knowledge of the violation. The preponderance of the evidence shows that: Respondent had no history with Lucas; Champion was not supervising their own subcontractor; and Respondent had no expectation that when Campbell got to the site he would do anything more than report what he found to his supervisor, Jimmy Stiles.
24. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171, 174, 54 N.C. App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844, 847, 10 N.C. App. 545, 549 (1971). Specific findings are not required on each piece of evidence presented. See *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993) (stating that the tribunal "need only find those facts which are material to the resolution of the dispute.")

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that Complainant's Citation 01, Items #1, #2, #3, and #4 in this matter are **DISMISSED**.

This the 13th day of March 2023.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner
maleon@leonlaw.org

APPENDIX A: PARTIES' STIPULATIONS

- i. The Commission has jurisdiction over this proceeding under N.C.G.S. § 95-135.
- ii. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Act, including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. §§ 95-133 *et seq.*
- iii. Respondent is an employer within the meaning of the Occupational Safety and Health Act of North Carolina, N.C.G.S. § 95-126 *et seq.*
- iv. On June 11, 2020, Respondent had contracted other parties to perform work on a residential building located at 1005 Sapphire Drive, Gastonia, NC 28054 (the "Worksite").
- v. On June 11, 2020, NC OSHA Compliance Safety and Health Officer Ted Hendrix ("CSHO Hendrix") conducted an unscheduled on-site inspection of the Worksite, Inspection 318196847.
- vi. On June 11, 2020, and during CSHO Hendrix's inspection, a subcontractor of Champion Plumbing of the Carolinas, LLC ("Champion Plumbing"), Gerardo Lucas, was on site.
- vii. On June 11, 2020, Matthew Denton, area construction manager for Respondent, signed the OSHA 59 form.
- viii. CSHO Hendrix returned to the worksite on June 12, 2020.
- ix. On August 5, 2020, Complainant issued a Citation and Notification of Penalty ("Citation") to Respondent.
- x. Respondent denies that it violated the standards identified in the Citations and denies that any penalty or abatement requirements should be assessed against it.
- xi. Respondent timely filed a Notice of Contest regarding the Citation and Notification of Penalty in which it contested all issues and matters relating to the Citations, including abatement dates and proposed penalties.

CERTIFICATE OF SERVICE

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

TRAVIS W. VANCE
FISHER & PHILLIPS
227 WEST TRADE ST.
SUITE 2020
CHARLOTTE, NC 28202

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


STACEY A. 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.

THIS THE 17 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