

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

FILED

JAN 26 2024

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

NC OSH Review Commission

COMPLAINANT - RESPONDENT,

DOCKET NO. OSHANC 2020-6322
OSHA INSPECTION NO. 318194313

v.

KMS ROOFING/SHEET METAL LLC
and its successors

ORDER OF THE COMMISSIONERS

RESPONDENT - PETIONER.

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 11:00 A.M. on the 20th day of October 2023, in the OAK Courtroom, Lee House, by Paul E. Smith, Chairman, William Rowe, and Terrence Dewberry, members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Stacey A. Phipps, Special Deputy Attorney General; North Carolina Department of Justice, Raleigh, North Carolina

Respondent: Jay M. Wilkerson; Conner Gwyn Schenck PLLC, Raleigh, North Carolina

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 in part and REVERSES in part the Order of Hearing Examiner Garrett.

ISSUES PRESENTED

WHETHER THE DEPARTMENT OF LABOR MET ITS BURDEN OF PROVING EMPLOYEE EXPOSURE TO THE CITED HAZARDS?

WHETHER THE DEPARTMENT OF LABOR MET ITS BURDEN OF PROVING CITATION 1 WAS PROPERLY DESIGNATED AS A WILLFUL SERIOUS VIOLATION?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.501(b)(10) requires that:

“each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system.”

29 CFR 1926.503(a)(1) requires that an employer:

“provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.”

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 October 6, 2022, a remote hearing was held before the Honorable Garrett.
5. On October 17, 2022, Hearing Examiner Garrett filed an Order affirming the two Willful Serious violations of 29 CFR 1926.501(b)(10) and 29 CFR 1926.503(a)(1) in Citation 1 and dismissing the Serious violation in Citation 2 and finding a penalty of \$100,000.00.
6. Filed on November 16, 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 November 17, 2022.
8. The oral arguments were heard by the full Commission on October 20, 2023.
9. The Review Commission adopts the Hearing Examiner's findings of facts 1-6 and 8-17.

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 willful violations of 29 CFR 1926.501(b)(10).
5. The Complainant did not meet its burden of proof in regard to 29 CFR 1926.503(a)(1).
6. The Commission AFFIRMS in part and REVERSES in part the Order of Hearing Examiner R. Joyce Garrett.

DISCUSSION

KMS first contends that the Complainant failed to prove employee exposure to the cited hazard, and that Complainant failed to establish that any violation was willful. We disagree. There was ample evidence before the hearing examiner to support the cited violation of 29 CFR

§ 1926.501(b)(10). There was also ample evidence to support the willful classification. The Review Commission will find a violation to be willful if “(1) employer knowledge of a violative condition, (2) employer knowledge of the standard, (3) a subsequent violation of the standard, and (4) the violation being committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Occupational Safety and Health Act.” *Associated Mech. Contractors v. Payne*, 342 N.C. 825, 834 (1996). The Review Commission will consider the second element, regarding knowledge, to be satisfied if the employer has violated the same standard or a similar standard. *City of Mt. Airy*, OSHANC # 91-2077; *ReMulch, Inc.*, OSHANC 2009-4912.

KMS had been cited several times for fall protection violations which supports a classification of “willful” for this violation. Kevin Wilson, the owner of KMS, was aware of the fall protection standards and was on the jobsite with his employees. In his testimony, Mr. Wilson stated that one of his employees was wearing a harness but admitted that the harness was not clipped to anything. (T p. 29) The penalty was correctly calculated with a gravity-based penalty of \$5,000 and a penalty multiplier of 10 because of the willful nature of the violation. We affirm the willful serious citation 1 item 1, 29 CFR § 1926.501 (b)(10), with a penalty of \$50,000.

However, we do have concerns about citation 1 item 2, which cited KMS for a willful serious violation of 29 CFR § 1926.503(a)(1), lack of a fall protection training program. Very little evidence was developed regarding the presence or absence of a fall protection training program. There is evidence the CSHO asked others to ask Mr. Wilson for information regarding such a program. However, there is no evidence the request was actually made, nor evidence regarding Mr. Wilson’s response. There is also no documentary evidence reflecting a written request for Mr. Wilson to produce records from his training program. In contrast, in his testimony, Mr. Wilson claimed that he did conduct an unspecified form of training on fall protection hazards. (T p. 60) On this record, we find there is not substantial evidence supporting the cited violation for a lack of fall protection training program. We therefore reverse the willful serious citation 1 item 2, 29 CFR § 1926.503(a)(1).

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's October 17, 2022, Order in this case be, and hereby is, **AFFIRMED** in part and

REVERSED in part, to the extent that is it not inconsistent with this opinion. Respondent is further **ORDERED** to abate the violations and to pay the accessed penalty of \$50,000.00 within 30 days of the filing date of this Order.

This January 26, 2024

Paul E. Smith

Paul E. Smith (Jan 26, 2024 13:56 EST)

PAUL E. SMITH, CHAIRMAN

TD

Terrence Dewberry (Jan 26, 2024 13:15 EST)

TERRENCE DEWBERRY, MEMBER

William D. Rowe

William Rowe (Jan 26, 2024 13:50 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:

JAY M WILKERSON
CONNER GWYN SCHENCK PLLC
3141 JOHN HUMPHRIES WYND STE 100
RALEIGH, NC 27612

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

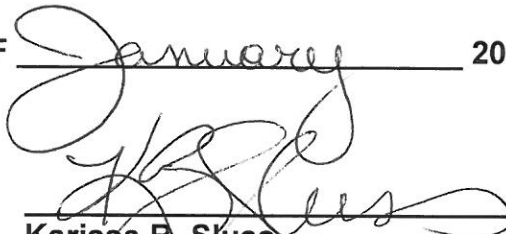
STACEY A. PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

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
carla.rose@labor.nc.gov

via email.

THIS THE 29 DAY OF January 2024.



Karissa B. Sluss
Docket Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
NCOSHRC@labor.nc.gov