

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

COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)
))
COMPLAINANT,)
))
v.)
))
LENNAR CAROLINAS LLC)
and its successors,)
RESPONDENT.)

FILED

MAY 18 2022

ORDER

OSHANC NO: 2020-6327
INSPECTION NO.: 318193869

*NC Occupational & Safety
Health Commission*

This matter came on for hearing before the undersigned on April 4, 2022, with Sage Boyd, Assistant Attorney General representing the Complainant, and David Selden representing the Respondent.

The following Exhibits were admitted into evidence: Complainant’s Exhibits 1, 1a, 6, 7a, 7b, 7c, 7d, 7e,¹ 8, 10 and 12; and Respondent’s Exhibits 2, 4, 14, and 15.

The following persons testified under oath: Mark Rasdall, Complainant’s Compliance Safety and Health Officer; Matt Chapin, Respondent’s Area Construction Manager; Bryan Sturm, Respondent’s Division Quality Manager; Dustin Millwood, Respondent’s Construction Manager; Tony Williams, Respondent’s Construction Manager (audio only); and Stephanie Coulter, a paralegal employed by Respondent’s counsel.

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

After considering the parties’ stipulations, the exhibits admitted at hearing, the testimony of witnesses, judicially noticed information pursuant to N.C.Gen.Stat. § 8C-1-201, the arguments of counsel and the applicable law, the undersigned makes the following findings of fact:

1. This case was initiated by Respondent’s notice of contest challenging a non-serious citation issued by the Complainant to Respondent to enforce the Occupational Safety and Health Act of North Carolina, N.C.Gen.Stat. § 95-126 *et seq.* (“the Act”).
2. The Complainant is responsible for enforcing the Act.

¹ Exhibit 7e was admitted with the understanding that the attachments would be submitted. However, it was established during the hearing that copies of the attachments in Exhibit 7e were included in Complainant’s Exhibit 6 making the requirement of further submissions unnecessary.

3. Respondent is a Delaware limited liability company and has been authorized to do business in North Carolina since July 2005. Respondent is active and current and maintains a place of business in North Carolina.

4. Respondent is a person engaged in the business of residential construction and has more than ten employees.

5. Respondent is an employer within the meaning of N.C.Gen.Stat. § 95-127(9), and is subject to the provisions of the Act.

6. On Wednesday, March 4, 2020, Mark Rasdall and Melissa Scally, Complainant's Compliance Safety and Health Officers (CSHOs) performed an inspection of the Respondent's worksite at 2925 Thirlestane Drive in Apex, NC, following a report of an accident on March 3, 2020, in which a worker was seriously injured.

7. Multiple representatives of the Respondent participated in the inspection:

- a. Dustin Millwood was the Construction Manager on site and was the CSHOs' first contact; Mr. Millwood did not testify at the hearing;
- b. Tony Williams was Respondent's Construction Manager at the time of the inspection and believed he was the second person to arrive on the scene; he testified at hearing that he recalled the CSHOs' request for the 2017-2020 OSHA 300 logs and 300A summaries, but did not recall any time frame or deadline for submittal;
- c. Bryan Sturm was Respondent's Division Quality Manager, and was across the street from the inspection site when the compliance officers arrived. He testified that he arrived at the inspection site after Dustin Millwood but before Tony Williams, and that the CSHOs did not say anything about a particular deadline for any document, but he could not recall what they documents they requested;
- d. Tony Martin was a senior Construction Manager for Respondent, and had to drive to Apex to join the inspection, arriving before Matt Chapin but after the participants discussed production of the OSHA 300 logs and 300A summaries; he was not "aware of" any timeframe for submission of those documents;
- e. Matt Chapin was the Respondent's Area Construction Manager and was in Wake Forest when Dustin Millwood and Tony Williams called to tell him that OSH representatives were on site in Apex, NC. He then drove from Wake Forest, NC to the worksite in Apex, NC, arriving sometime after the others were already on-site; Mr. Chapin admitted that the CSHOs requested Respondent's 2017-2020 OSHA 300 and 300A records during the inspection, but "[did] not recall" any specific time frame being mentioned while he was there.

8. Messrs. Williams, Sturm, Martin and Chapin were still employed by the Respondent at the time of the hearing.

9. During the opening and/or closing conference on March 4, 2020, the Complainant requested copies of the Respondent's 2017, 2018, 2019 and 2020 OSHA 300 logs, and the 2017, 2018 and 2019 OSHA 300A summaries.

10. During the inspection on Wednesday, March 4, 2020, Mr. Chapin sent multiple text messages keeping Respondent apprised of the status and the documents that the CSHOs had requested. Additionally, Mr. Sturm took notes on what documents were requested and gave them to Mr. Chapin; these text messages and notes were not offered as evidence at the hearing.

11. At 12:12pm on Wednesday, March 4, 2020, Mr. Chapin received the 2019 OSHA-300 and 300A records via email from Brian Schwindt, Respondent's Vice President of Construction. According to the contact information he provided in his email, Mr. Schwindt's office was in Morrisville, North Carolina.

12. The closing conference on this inspection began at approximately 1:06pm and concluded at approximately 1:36pm on March 4, 2020.

13. At 1:39pm on Wednesday, March 4, 2020, Mr. Chapin forwarded the 2019 OSHA 300 and OSHA 300A records he received from Mr. Schwindt to CSHO Scally, copying Mr. Schwindt on the transmission.

14. At 2:35pm on Wednesday, March 4, 2020, CSHO Scally acknowledged receipt of the 2019 OSHA 300 and OSHA 300A records, but reminded Mr. Chapin that, as they had discussed on site, the Complainant still needed these records for 2017, 2018 and 2020, as well as additional listed documents.

15. At 8:05pm on Monday evening, March 9, 2020, Mr. Chapin emailed CSHO Scally and CSHO Rasdall that he was told to tell the CSHOs that, "due to the injury," Respondent's outside counsel would be sending the remaining requested documents. Mr. Chapin did not identify or provide the contact information for outside counsel.

16. At 8:17am on Tuesday morning, March 10, 2020, CSHO Rasdall acknowledged receipt of Mr. Chapin's March 9, 2020 email, and stated, in pertinent part:

...On 3/4/2020 we opened an inspection with your company and requested several documents. Two of the documents requested were the OSHA 300 logs for 2017, 2018, 2019 and the OSHA 300As for 2017, 2018, 2019. Melissa and I advised you that there was a 4-hour time limit to provide these documents in accordance with 29 CFR 1904.40. The only document we received as of today is the OSHA 300 log for 2019. I fully understand that you want to run the other documents through your legal team but as discussed on site these documents had a specific time to provide to the government officials when requested.

As a result of failing to meet this time line, we are recommending a citation for your company for failing to meet the standards outlined in 1904.40.

....

17. At 2:20pm on Tuesday, March 10, 2020, Stephanie Coulter, a paralegal with Respondent's legal counsel's office, emailed to CSHO Rasdall a letter and all of the OSHA 300 and OSHA 300A records requested by Complainant, including a copy of the 2019 records previously transmitted.

18. The applicable regulation sets a mandatory four-hour production requirement:

When an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within four (4) business hours.

29 C.F.R. § 1904.40(a). Part 1904 requires employers to maintain OSHA 300 logs and OSHA 300A summaries.

19. All of the OSHA 300 logs and 300A summaries were due no later than four business hours after the end of the closing conference, or by approximately 9:36am on Thursday, March 5, 2020.

20. Consistent with his practice, during the opening and closing conferences on March 4, 2020, CSHO Rasdall informed the Respondent's representatives that the OSHA 300 logs and 300A summaries needed to be produced within four business hours.

21. CSHO Rasdall's testimony that he specified a four-hour deadline during the opening and closing conferences on March 4, 2020 was direct, unequivocal, and credible in light of the other evidence: CSHO Rasdall testified he always gave this deadline in every inspection he conducted, the Respondents' almost instantaneous production of the 2019 OSHA 300 and 300A documents is consistent with that deadline (Complainant's Exh. 7a); the CSHOs' emails referenced the March 4, 2020 discussions regarding the documents to be produced (Complainant's Exh. 7b) and the 4-hour deadline (Complainant's Exh. 7d); Dustin Millwood was apparently the only Respondent representative present for the entire period but did not testify; although the Respondent's witnesses testified to multiple text messages and notes that were created during this inspection to document what was needed (and potentially when or how quickly they would/could be produced), none of those text messages or notes were offered in evidence; and only one Respondent representative (who was not initially present at the scene) testified that no deadline was given, while the remaining representatives testified only that they did not recall, or were not aware of, a deadline.

22. CSHO Rasdall's credibility is not impacted by the fact that during the hearing it was discovered that CSHO Rasdall was referring to a document (Complainant's Exhibit 1A) which differed from Complainant's Exhibit 1,² to refresh his recollection:

- a. Complainant's Exhibit 1 and Complainant's Exhibit 1A do not materially differ except as to their organization, and all relevant information – particularly including the

² When this was discovered, the Complainant immediately transmitted those documents (Complainant's Exhibit 1A) to Respondent, Respondent was able to review the documents and examine CSHO Rasdall regarding the documents prior to the close of the hearing, and both Complainant's Exhibit 1 and 1A were admitted without objection and without any assertion of prejudice by Respondent.

documents relating to production of the OSHA 300 and 300A reports, and the reports themselves – are included in each Exhibit. *See* Complainant’s Exh. 1, pp. 42-52, 130-136; Exh. 1A, pp. 37-43, 69-82;

- b. CSHO Rasdall suffered an injury and was not present in the workplace to ensure that all documents/conversations were properly logged and retained in the file during his absence;
- c. There is no evidence that CSHO Rasdall was responsible for the reorganization of the file, or the omission/inclusion of non-relevant documents in either file, or that he even knew of those changes prior to his testimony in the hearing;
- d. The reorganization of the file materials and omission of non-relevant or duplicative documents (the CSHO’s casefile summary sheet, the 2019 OSHA-300 and 300A reports attached to Respondent’s March 4, 2020 email, counsel’s letter dated March 17, 2020) are not indicative of a lack of veracity or inability to accurately recall whether and when the OSHA 300 and 300A reports were requested, whether and when a 4-hour timeframe was identified, the Respondent’s immediate production of the 2019 records, the Respondent’s subsequent failure to timely produce the remaining records, or the communications relating to those events;
- e. Respondent did not offer any evidence of information relevant to the issues in the case that should have been included in Complainant’s Exhibit 1 or 1A but was not.

23. The Complainant’s purpose for obtaining the OSHA 300 logs and OSHA 300A summaries is to allow the Complainant to calculate the Respondent’s “DART” (Days Away, Restricted or Transferred) rate and perform an analysis that enables Complainant to identify safety issue trends, potential hazards, and areas where the Complainant could assist the employer with additional analysis and training.

24. After receipt of the Respondent’s OSHA 300 logs and 300A summaries, CSHO Rasdall entered the data in those forms and learned that the Respondent’s DART rate in 2017 was “great,” but “shot up to 2.2” in 2018, and then dropped again to .4 in 2019. This data allowed him to focus on what happened in 2018, what corrective actions the Respondent took to eliminate the hazards that caused the rate to go up, and what best practices Respondent could employ to eliminate injury and illnesses from its job sites.

25. The Complainant’s experience is that employers sometimes are untruthful regarding their records, which is often discovered when the employer submits inconsistent or contradictory OSHA 300 logs and 300A summaries. Additionally, OSHA 300 logs and 300A summaries are specific to a geographic region. As a result, the Complainant does not use OSHA 300 logs and 300A summaries submitted by an employer in other inspections to satisfy the employer’s § 1904.40(a) obligation in a different case.

26. There is no evidence in this case of any extenuating circumstance that prevented the Respondent from producing the requested OSHA 300 and 300A records within the regulation’s four-hour timeframe.

27. On August 18, 2020, the Complainant issued its citation for a non-serious violation of 29 C.F.R. § 1904.40(a), with a proposed penalty of \$900.

28. The Complainant calculated the proposed penalty by referring to Chapter 6 of its Field Operations Manual, identifying the violation as a nonserious regulatory recordkeeping and reporting violation, determining an unadjusted \$1000 penalty, and applying a 10% reduction for good faith due to the Respondent's safety and health program.

29. On September 9, 2020, the Respondent transmitted its Notice of Contest of this citation.

30. During the hearing the Respondent questioned CSHO Rasdall regarding emails which Mr. Rasdall admitted appeared to reflect that at 7:22pm on July 24, 2019, the Complainant requested 2016-2018 OSHA 300 and 300A records in connection with a different inspection in Respondent's Raleigh-Durham division, and the Respondent produced those records the next day. However, there was no testimony regarding the time at which the Respondent produced the records the next day, Mr. Rasdall did not have an independent recollection of these communications, could not confirm the accuracy and completeness of the communications without the underlying case file, could not authenticate the document used by the Respondent to question him (Respondent's proposed Exhibit 17), and Respondent did not offer the document as evidence.

31. Stephanie Coulter, a paralegal employed by Respondent's counsel, testified at the hearing regarding instances in other Respondent inspections when the Complainant requested Respondent's OSHA 300 and 300A records, she did not deliver those records within the four-hour timeframe, and the Respondent was not cited for the violation, specifically:

- a. On Friday, March 20, 2020, the Complainant requested Respondent's OSHA 300 and OSHA 300A records in connection with an inspection at Respondent's "Glen at Westhigh" project, and she did not submit them until Thursday, March 26, 2020;
- b. On Tuesday, July 21, 2020, the Complainant requested Respondent's OSHA 300 and OSHA 300A forms in connection with an inspection at Respondent's "Imagery" project, and she did not submit them until Monday, July 27, 2020;
- c. On Thursday, August 27, 2020, the Complaint requested Respondent's OSHA 300 and OSHA 300A forms in connection with an inspection at Respondent's "Bryton Trace" project, and she did not submit them until Tuesday, September 1, 2020; and
- d. On Tuesday, July 13, 2021, the Complainant requested Respondent's OSHA 300 and OSHA 300A forms in connection with an inspection at Respondent's "Meadowbrook" project, and she did not submit them until Monday, July 26, 2021.

32. Ms. Coulter's testimony regarding these four instances did not identify the CSHO involved, or the location of each inspection.

33. Ms. Coulter admitted that the Respondent sometimes submitted the OSHA 300 and 300A forms to the Complainant directly and independent of her and/or counsel (as they did in this

case, with respect to the 2019 records), and she did not know whether that had occurred in the four cases she described, or whether there were other extenuating circumstances that affected the deadline or the Complainant's enforcement of the deadline.

34. Ms. Coulter admitted that she knew the Respondent was required to produce Respondent's OSHA 300 and 300A records within four business hours of the CSHOs' request, but testified that this regulation was rarely enforced.

35. CSHO Rasdall testified that the Complainant consistently enforces the 4-hour rule of § 1904.40, the Complainant may occasionally extend the deadline due to extenuating circumstances (like a request late on a Friday, or other circumstances making it impossible for the employer to timely comply), but he has rarely had an instance when an employer did not timely produce the requested records.

36. A cursory review of publicly available records reveals multiple cases at the federal and state level where an employer was cited for violating the four-hour rule established in 29 C.F.R. § 1904.40:

- a. *Packers Sanitation Services, Inc.*, OSHRC Docket No. 17-1376, 2019 OSAHRC LEXIS 21 (2/11/19)(current 300 log not produced within 4 hours);
- b. *Pro-Spec Corp. d/b/a Pro-spec Painting*, OSHRC Docket Nos. 16-1746, 17-0125, 2018 OSAHRC LEXIS 36, *51 (8/22/18)(violation affirmed where employer asserted it timely sent records to wrong OSH office, but failed to provide proof of transmittal);
- c. *Twin Pines Constr., Inc.*, OSHRC Docket No. 12-1328, 2012 OSAHRC LEXIS 95 (10/23/2012)(affirming citation following default);
- d. *Garden Ridge, Store #46*, OSHRC Docket No. 10-1082, 2010 OSAHRC LEXIS 92 (11/19/2010)(employer violated easily understood and unambiguous standard when it produced OSHA 300 logs more than 24 hours after they were requested; CSHO's delay in holding the closing conference has no bearing on employer's violation);
- e. *StarTran, Inc. v. Chao*, OSHRC Docket No. 02-1140, aff'd (5th Cir. 8/11/2008) (unpub.),
- f. *Fastrack Erectors*, OSHRC Docket No. 04-0780, 2004 OSAHRC LEXIS 106 (11/19/2004)(failure to time produce OSHA 300 forms without excuse);
- g. *Martin C. Heck Brick Contracting Co.*, OSHRC Docket No. 04-0781, 2004 OSAHRC LEXIS 108 (12/2/04)(failure to understand request does not relieve employer of its obligation under the well-known standard, no acceptable explanation for failure)
- h. *Load Star Builders LLC*, AZ Inspection No. V4346-1468541 (3/06/20 inspection) (affirming citation for failure to provide OSHA 300 log within four hours of request), *referenced in AZ Ins. Notices and Bulletins, Minutes of Meeting of AZ Industrial Commission* (8/31/2020);

- i. *Agri-Packing Supply, Inc.*, Inspection B8139-1378422 (2/13/19), Minutes of Meeting of Industrial Commission, *referenced in AZ Ins. Notices and Bulletins* (7/25/19);
- j. *Peterson v. Wisconsin Central Ltd*, OAH 68-1901-33880, 2017 MN OAH LEXIS 15 (Minn. 1/18/17)(citation affirmed where employer failed to provide OSHA 300 logs, of alleged equivalent Federal Railroad Administration records, within 4-hour timeframe);
- k. *Commissioner of Labor v. FSC II, LLC d/b/a Fred Smith Co.*, OSHANC No. 2019-6213 (8/25/2020)(affirming citation but reducing penalty), *aff'd* (9-30-2021).

37. In *FSC II, LLC, supra*, the North Carolina Review Commission's decision affirming the hearing officer's decision explained at Slip Op. pp. 4-5:

...The obligation to produce OSHA 300A forms and 300 logs has a "direct and immediate relationship" to occupational safety and health. Timely production of these records gives officers a clear picture of any safety issues, and may aid them in focusing or expanding their investigation. It ensures that officers are able to promptly identify and investigate any other concerns that might arise based on their review of the records, which could have an immediate impact on employee safety. When an employer fails to provide the requested records, it can frustrate the Compliance Officer's ability to enforce OSHA regulations by hindering their ability to discern patterns or trends, and it could prevent them from identifying other safety concerns that may warrant further investigation. The four-hour requirement to produce documents allows the COSHO to look at documents close in time to the inspection to better evaluate what information is relevant to the current inspection, and to ensure that any additional safety concerns identified through a review of the records can be promptly investigated and abated. Moreover, timely produced records are a more reliable indicator of the Employer's record keeping process; Employers should keep their records contemporaneously, and should not need to have time to prepare their records for production. Violations of 29 C.F.R. § 1904.40(a) therefore have a direct and immediate relationship to occupational safety and health.

38. Even if CSHO Rasdall did not inform the Respondent's representatives of the four-hour deadline on March 4, 2020, as Respondent contends, the four-hour requirement is unambiguous, well established, and has been in place since at least 2002, *see* 66 Fed.Reg. 6122, 6134. Moreover, the person assigned to produce the records (Ms. Coulter) admitted she knew the regulation required production within four business hours.

39. Other than Ms. Coulter's testimony that §1904.40 was rarely enforced, the Respondent offered no explanation in March 2020, or at the hearing, for its delay in transmitting the OSHA 300 logs and 300A summaries, or its failure to meet the 4-hour deadline.

40. The Respondent's post-hearing brief (ironically, submitted after the deadline set by the undersigned) asserts the defense of equitable estoppel, citing several cases where a government

entity acted inconsistently with prior practice,³ and relying upon Ms. Coulter's testimony that the Complainant did not cite Respondent for its late submission of its OSHA 300 and 300A in four subsequent cases, as described above.⁴

41. The Respondent's post-hearing brief also argues that the Complainant's proposed penalty should be reduced, relying upon the hearing examiner's decision in *Commissioner of Labor of the State of North Carolina v. F.S.C. II, LLC, d/b/a Fred Smith Company*, OSHANC 29, 2019-6213 (8/25/2020).⁵

42. In *F.S.C. II* the hearing examiner found a number of facts that he concluded mitigated the Complainant's penalty calculation, including inconsistent directives and responses from the Complainant's CSHO, the employer's good faith belief that it had fifteen days to respond, its production of almost all records within that 15-day timeframe, the employer's timely filing of annual reports; the employer's historically strong relationship with the Complainant, and the employer's repeated expressions of concern for timing, and apologies for delays.

43. In this case there is no evidence that Respondent was striving to meet a specific deadline after the day of the inspection, or that the Respondent timely filed its annual records, or that the Respondent had a long-term positive relationship with the Complainant similar to Complainant's relationship with FSC; or that Respondent expressed concern for its delay or apologized at any point for not meeting the 4-hour deadline, including after it was informed that it had failed to meet the deadline and the CSHO would recommend a citation.

44. Instead, in this case there is evidence that the Respondent knew there was a 4-hour deadline; the Respondent never contemporaneously explained the delay or its failure to meet the deadline; the Respondent never apologized for its failure to meet the deadline; thereafter in at least four other inspections the Respondent's counsel failed to produce OSH 300 and 300A records within the 4-hour timeframe; and Respondent's sole explanation at hearing for its violation was that it did not believe the regulation would be enforced.

Based on the foregoing Findings of Fact, the undersigned makes the following:

³ The cases cited by Respondent are *U.S. v. Penn. Indust. Chem. Corp.*, 411 U.S. 655, 674-75 (1973) (traditional notions of fairness prevent agency from prosecuting violation of statute in contravention of its long-standing administrative interpretations, where company relied in good faith upon those interpretations); *Godley v. County of Pitt*, 306 N.C. 357 (1982) (in Workers Comp case, county could not deny it was plaintiff's employer after paying premiums based on inclusion of plaintiff under County's workers comp policy); *McNeely v. Walters*, 211 N.C. 112 (1937) (citing golden rule); *County of Wake v. N.C. DEHNR*, 155 N.C.App. 225 (2002) (town could not renege on its agreement with County over siting of landfill years after it approved the site and accepted payment); *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C.App. 85 (1985) (county could not continue to participate in benefits of regional planning commission and not pay its proportionate share for membership).

⁴ Respondent's post-hearing brief also argued multiple facts that are not in evidence (see Respondent's Brief at pp. 22-23), except as set forth in paragraphs 30 and 31 of this Order.

⁵ Respondent also cites *Fastrack Erectors*, OSHRC Docket No. 04-0780, 2004 OSAHRC LEXIS 106 (11/19/2004), but in that federal case no explanation was provided for the ALJ's imposition of a \$300 penalty versus the \$500 proposed by federal OSHA, so it does not assist the undersigned's analysis.


CONCLUSIONS OF LAW

1. 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. Respondent is subject to the provisions of the Act and the requirements of 29 C.F.R. Part 1904.
3. Complainant has proved by a preponderance of the evidence that Respondent violated 29 C.F.R. § 1904.40(a), as alleged in the Citation, and that this violation was a non-serious violation.
4. Respondent has failed to prove its affirmative defense of equitable estoppel by a preponderance of the evidence: Ms. Coulter's testimony was insufficient to establish that the Respondent violated § 1904.40 in the four instances she described, and even if it was sufficient, those alleged violations occurred after the Respondent's late submission in this case. A necessary element of Respondent's affirmative defense is reliance upon Complainant's prior conduct and, fundamentally, a party cannot rely upon conduct that has not yet occurred.
5. Complainant calculated the proposed penalty in accordance with the requirements of the Complainant's Field Operations Manual, chapter 6.
6. Unlike the employer in *FSC II*, Respondent's conduct evidences an unabashed disregard of its obligations under 29 C.F.R. § 1904.40. The evidence does not support reduction of the Complainant's proposed penalty.

Accordingly, it is hereby **ORDERED**:

Complainant's Citation alleging a violation of 29 C.F.R. § 1904.40(a) is **AFFIRMED** as a non-serious violation with a penalty of **\$900**, which penalty shall be paid within thirty days of the filing date of this Order.

This the 8th day of May, 2022.

By:  _____
Laura J. Wetsch
Hearing Examiner

Digitally signed by Laura J Wetsch
DN: cn=Laura J Wetsch, o=Winslow Wetsch,
PLLC, ou, email=lwetsch@winslow-
wetsch.com, c=US
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APPENDIX A – JOINT STIPULATIONS

The Complainant and Respondent agreed to the following stipulations:

1. Respondent, Lennar Carolinas, LLC, is an active and current Delaware limited liability company that maintains a registered agent address in Charlotte, North Carolina.
2. Respondent is engaged in the construction business.
3. Specifically, Respondent is in the business of residential construction and was the general contractor involved in building new single-family homes in this case.
4. Respondent was the general contractor at 2925 Thirlestane Drive in Apex, North Carolina located in a subdivision called Buckhorn Preserve.
5. Mr. Dustin Millwood, Construction Manager for Respondent, was the designated competent person for Respondent at the Buckhorn Preserve subdivision included the inspected site.
6. The residential structure at the site was a two-story single family home under construction.
7. The residential structure under construction at the site was located at 2925 Thirlestane Drive in Apex, North Carolina in Wake County, a special emphasis county including in the Construction Special Emphasis Program (SEP) in Operational Policy Notice (OPN) 123T.
8. Respondent contracted with Vista Contractors, Inc. (first tier framing subcontractor) to perform framing activities on the residential structure at the site.
9. Vista Contractors, Inc. (first tier framing subcontractor) contracted with Jose Ouidio Joya dba Jose Ouidio Joya (second tier framing subcontractor) to perform framing activities on the residential structure at the site.
10. The worksite was a multi-employer work-site.
11. On March 3, 2020, Respondent's second tier framing subcontractor, Jose Ouidio Joya dba Jose Ouidio Joya, reported an accident involving an employee of Jose Ouidio Joya dba Jose Ouidio Joya at the site to the NCOSH Complaint Desk, stated as follows on the accident referral report:

The employee was on a ladder approximately 10-14 feet in elevation, applying Tyvek wrap, when a strong wind cause [sic] a roof truss gable to fall. The roof truss gable struck the employee, causing him to fall to the ground below. The employee struck his face on the ground which caused his safety glasses to break and cut his face. The injuries to the employee are currently unknown. The employee was transported to Wake Medical.

Referral Report, Referral No. 203467329, referral date 03/03/2020.

12. Pursuant to the accident referral described above, on March 4, 2020, Mr. Mark Rasdall, a Compliance Safety and Health Officer, employed by the North Carolina Department of Labor (NCDOL) Occupational Safety and Health (OSH) Division, and Ms. Melissa Scally, a Compliance Safety and Health Officer in training, also employed by the NCDOL OSH Division, conducted an inspection of Respondent's worksite located at 2925 Thirlestane Drive in Apex, North Carolina.

13. On March 4, 2020, Mr. Mark Rasdall, a Compliance Safety and Health Officer, and Ms. Melissa Scally, a Compliance Safety and Health Officer in training, both employed by the North Carolina Department of Labor (NCDOL) Occupational Safety and Health (OSH) Division, properly entered onto the site pursuant to an accident referral.

14. On March 4, 2020, the Compliance Officers conducted an opening conference, presented credentials, and explained the purpose and scope of the inspection, and Respondent granted permission to conduct a partial inspection pursuant to the accident referral and any plain sight hazards observed. Mr. Matt Chapin, Area Construction Manager, informed the Compliance Officers that he would be their point of contact for Respondent regarding the inspection.

15. Compliance Officers, employed by the NCDOL OSH Division, are authorized government representatives in accordance with 29 CFR 1904.40(b)(iii).

16. Compliance Officer Rasdall and Compliance Officer Scally were authorized government representatives at the time of the inspection in accordance with 29 CFR 1904.40(b)(iii).

17. 29 CFR 1904.40(a) requires that, "[w]hen an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within four (4) business hours."

18. The "you" referred to in the standard means the employer in accordance with 29 CFR 1904.46.

19. The types of records or recordkeeping forms applicable under Part 1904 of the Code of Federal Regulations includes OSHA 300 (Log of Work-Related Injuries and Illnesses), 300A (Summary of Work-Related Injuries and Illnesses), 301 (Injury and Illness Incident Report) forms, or equivalent forms for recordable injuries and illnesses in accordance with 29 CFR 1904.29(a).

20. Respondent is an employer that is required to keep and maintain safety and health records (including OSHA 300 logs and 300A logs) due to the number of employees that Respondent employs (more than 10 employees) and the type of business that Respondent is in (construction) in accordance with 29 CFR 1904 Subpart B.

21. Respondent's primary National American Industry Classification System (NAICS) code is 236115, which is the code for new single-family housing construction.

22. Respondent is required to retain safety and health records for five years following the end of the calendar year that those records cover in accordance with 29 CFR 1904.33(a).

23. The NCDOL-OSH Field Operations Manual states:

Inspection of Records and Posting. Every inspection of an employer required to keep injury and illness records, will include an examination and verification of such records. Coverage of OSHA's injury and illness record keeping rule (29 CFR Part 1904) is defined by NAICS codes in 1904.2.

...

a. Records. The CSHO will comply with the records review procedures that follow for all inspections, programmed or unprogrammed, of employers required to keep the records in question.

...

i. Injury and Illness Records. CSHOs will review the current and the three most recent calendar years of the employer's injury and illness records.

NCDOL-OSH, FOM Chapt. III, pp 30-31.

24. During the inspection, the Compliance Officers requested copies of Respondent's OSHA 300 logs and 300A forms on March 4, 2020.

25. On March 4, 2020, at approximately 1:39 P.M., Mr. Matt Chapin forwarded an email from Mr. Brian Schwindt, Vice President of Construction for Respondent (that was addressed to Mr. Dustin Millwood, Mr. Tony Martin, and Mr. Matt Chapin with subject line "OSHA 300"), to Compliance Officer Scally (and copied Mr. Brian Schwindt with subject line "[External] OSHA 300/300A" that included an email attachment that contained a copy of Respondent's Raleigh, North Carolina OSHA 300 Log and 300A summary for the year 2019 only; the text of Mr. Chapin's email to the Compliance Officer stated, "Attached, please find the OSHA 300 and OSHA 300A for 2019 for Lennar in Raleigh."

26. On March 4, 2020, at approximately 2:35 P.M., Compliance Officer Scally responded via email to Mr. Matt Chapin (and copied Compliance Officer Rasdall and Mr. Brian Schwindt with subject line "RE: [External] OSHA 300/300A") acknowledging receipt of "the 2019 300 and 300A." Compliance Officer Scally further stated in the email "As discussed on site here are the additional documents we need . . . [.] That email is attached as *Exhibit A* and incorporated by reference as if fully set out and contained herein.

27. On March 9, 2020, at approximately 8:05 P.M., Mr. Matt Chapin responded via email to the Compliance Officers (and copied Mr. Brian Schwindt and Mr. Tony Martin with subject line "RE: [External] OSHA 300/300A") that Respondent's "outside counsel will be sending the remaining documentation . . . [.]"

28. On March 10, 2020, at approximately 8:17 A.M., Compliance Officer Rasdall responded via email to Mr. Matt Chapin's email (and copied Compliance Officer Scally with the subject line: "RE: [External] OSHA 300/300A) restating that the requested safety and health records were due within four business hours of the request made on March 4, 2020, and noting that as a result of failing to meet this timeline, a citation under 29 CFR 1904.40 would be recommended for issuance.

29. On March 10, 2020, at approximately 2:20 P.M., Ms. Stephanie Coulter, Paralegal, on behalf of Ms. Julie Pace, Legal Counsel for Respondent, from the firm Gammage & Burnham, in Phoenix, Arizona, provided the OSHA 300 Logs and 300A summaries for the years 2017, 2018, 2019, and current 2020 records to the Compliance Officers via email.

30. On June 26, 2020, a closing conference was conducted with Ms. Julie Pace, Legal Counsel for Respondent, and management representatives for Respondent; during that time, the OSHA 59 was reviewed and Legal Counsel signed on behalf of Respondent.

31. As a result of the inspection, one Non-Serious citation was issued to Respondent on August 18, 2020.

32. **Citation Number One, Item 1** alleged one non-serious violation of 29 CFR 1904.40(a).

33. The citation was classified as Non-Serious.

34. The citation carried a proposed penalty of \$900.00.

35. The date by which the violation must be abated was listed as "corrected during the inspection".

36. Respondent did not receive any other citations arising out of the inspection.

CERTIFICATE OF SERVICE

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

JULIE A. PACE & DAVID SELDEN
MESSNER REEVES, LLP
7250 NORTH 16TH ST STE 410
PHOENIX AZ, 85004 85020

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

DENIS JACOBSON
TUGGLE DUGGINS PA
400 BELLEMEADE ST.
SUITE800
GREENSBORO NC 27401

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

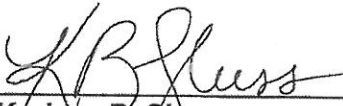
by depositing a copy of the same in the United States Mail, First Class;

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

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 20 DAY OF May 2022.

PAUL E. SMITH
CHAIRMAN



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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