

BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA

FILED

MAR 13 2023

NC OSH Review Commission

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,
COMPLAINANT - RESPONDENT,

DOCKET NO. OSHANC 2020-6327
OSHA INSPECTION NO. 318193869

v.

LENNAR CAROLINAS, LLC
and its successors

ORDER OF THE COMMISSIONERS

RESPONDENT - PETIONER.

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 17th day of February 2023, via remote online courtroom, by Paul E. Smith, Chairman, William Rowe, and Terrence Dewberry, members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Sage Boyd, Assistant Attorney General; North Carolina Department of Justice, Raleigh, North Carolina

Respondent: David Selden: Gammage & Burnham, PLC, Phoenix AZ

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 the Order of Hearing Examiner Laura Wetsch.

ISSUES PRESENTED

WHETHER THE HEARING EXAMINER CORRECTLY AFFIRMED THE VIOLATION OF 29 CFR 1904.40(a)?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1904.40(a) Providing Records to Government Officers

Basic 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.

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 April 4, 2022, a remote hearing was held before the Honorable Laura Wetsch.
5. On May 9, 2022, Hearing Examiner Laura Wetsch filed an Order finding that the provisions of 29 CFR 1904.40 (a) had been violated and issuing a penalty of \$900.00.
6. On June 13, 2022, Respondent timely petitioned the Review Commission for a review of the decision of the Hearing Examiner.
7. An Order granting review was filed on June 13, 2022.
8. The oral arguments were heard by the full Commission on February 17, 2023.
9. The Review Commission adopts the Hearing Examiner's findings of facts.

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 a serious violation of 29 CFR 1904.40 (a).
5. The Commission AFFIRMS the Order of Hearing Examiner Laura Wetsch.

DISCUSSION

The Compliance Officers requested the 2017, 2018, 2019, and 2020 OSHA 300 logs and 300A summaries at the time of inspection on March 4, 2020. Although the 2019 records were received just moments after the request, the 2017, 2018 and 2020 records were not received until March 10. The cited standard, 29 CFR 1904.40 (a) requires such documents to be provided within four hours. Timely response to this standard is important because it has a direct and immediate relationship to employee safety. The four-hour requirement to produce OSHA 300 logs and 300A summaries permits the CSHOs to examine documents close in time to the inspection. This allows them to better evaluate what information is relevant to the current inspection and may aid in focusing or expanding the investigation. Employers should keep their records contemporaneously; therefore, timely produced records are a more reliable indicator of the Employer's record keeping process. Violations of any standard that impede a CSHO's ability

to investigate are immediately related to occupational safety and health, regardless of what the investigation ultimately reveals.

Respondent urges that the Commissioner should be estopped from enforcing the four-hour time limit because it was rarely enforced. The Hearing Examiner properly rejected this argument for the reasons set forth below. The Commissioner has the discretion to enforce a standard even if it declined to do so on earlier occasions. Otherwise, “an agency like OSHA could preserve its future enforcement authority only by requiring its inspectors to cite every regulated party for every violation discovered during every inspection.” *Millard Refrigerated Servs., Inc. v. Sec’y of Lab.*, 718 F.3d 892, 898 (D.C. Cir. 2013). It is not our role to second guess the wisdom of the Commissioner’s decision to pursue a given violation.

Respondent argues that CSHOs did not notify employees of the four-hour requirement during the inspection, noting the factual dispute between testimony provided by those employees and the testifying CSHO. Under the whole record test, the Review Commission cannot replace the Hearing Examiner’s judgment “as between two reasonably conflicting views” even if it “could justifiably have reached a different result had the matter been before it de novo.” *Thompson v. Wake Cnty. Bd. of Ed.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). To the extent the CSHO was required to provide Respondent’s employees notice of the four-hour requirement in order for Respondent to be held responsible for the violation, the Hearing Examiner resolved the underlying factual dispute in favor of the Complainant. This factual finding was well supported by the record and easily survives our review.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's May 9, 2022, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. Respondent abated the violations during the inspection and is now ordered to pay the assessed penalty of \$900.00 within 30 days of the filing date of this Order.

This Mar 13, 2023.

Paul E. Smith

Paul E. Smith (Mar 13, 2023 12:28 EDT)

PAUL E. SMITH, CHAIRMAN

JD

Terrence Dewberry (Mar 10, 2023 20:03 EST)

TERRENCE DEWBERRY, MEMBER

William D. Rowe

Bill Rowe (Mar 10, 2023 21:04 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:

DAVID A. SELDEN
JULIE PACE
MESSNER REEVES LLP
7250 N. 16TH ST.
SUITE 410
PHOENIX, AZ 85020

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

DENIS JACOBSON
TUGGLE DUGGINS PA
100 N. GREEN ST
SUITE 6000
GREENSBORO, NC 27401

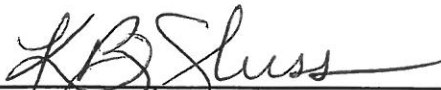
SAGE BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

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

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

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

THIS THE 17 DAY OF March 2023.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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