

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

COMMISSIONER OF LABOR OF THE)	DOCKET NO.: OSHANC 2020-6329
STATE OF NORTH CAROLINA)	INSPECTION NUMBER: 318185873
)	CSHO ID: Y3077
COMPLAINANT,)	
)	
v.)	
)	<u>ORDER</u>
DIVERSIFIED CONVEYORS INT’L, INC.)	
<i>and its successors,</i>)	
)	
RESPONDENT.)	

THIS CAUSE came on for hearing and was heard before the undersigned Hearing Examiner R. Joyce Garrett, Hearing Examiner for the North Carolina Occupational Safety and Health Review Commission, on June 21, 2023, at 10:00 A.M. pursuant to a Notice of Hearing. The Notice of Hearing was posted as required by the Rules of the North Carolina Occupational Safety and Health Review Commission. The Notice of Hearing explicitly stated that the purpose of the hearing is to determine all matters relating to Respondent’s Notice of Contest in this matter.

Stacey A. Phipps, Special Deputy Attorney General, North Carolina Department of Justice, appeared remotely for Complainant. Neil Riemann, Attorney at Parry Law, PLLC, appeared remotely for Respondent. No other affected employee of Respondent attended to have a say in, or participate as a party in, the Hearing.

At the Hearing, Complainant and Respondent notified the Undersigned that the parties agree upon certain stipulations and facts as set forth in Court’s Exhibit 1 admitted into evidence. The parties waived the reading of Court’s Exhibit 1 into the record.

As a result of this Hearing, based upon consideration of Complainant’s Complaint, Respondent’s Answer, and the stipulations of the parties, the Undersigned makes the Findings of Fact as hereinafter set forth. During the Hearing, Complainant made the motion set forth in Complainant’s Motion. Complainant’s Motion being granted, Respondent made the Motion set forth in Respondent’s Motion.

FINDINGS OF FACT

Based on the stipulations of the parties at the time of Hearing and the record, the Undersigned makes the following Findings of Fact:

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"), including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. §§95-133 et seq.

2. Pursuant to N.C.G.S. §95-135, the Review Commission has jurisdiction over the parties and the subject matter to this action. The Complainant filed Complainant's Complaint in accordance with the Rules of Procedure adopted by the Review Commission ("Rules of Procedure") and Respondent file its Answer in accordance with the Rule of Procedure.
3. Respondent, Diversified Conveyors International, LLC is a Tennessee corporation, which was authorized to do business in North Carolina on June 18, 2018. It was active and current and maintained a worksite at 6538 Judge Adams Rd, Whitsett, North Carolina at the time of the accident which is the subject of the inspection of this case.
4. Respondent is in the business of designing and erecting conveyor systems for package sorting and conveying.
5. Respondent is an "employer" within the meaning of N.C.G.S. §95-127(11); all of Respondent's employees referred to in this Complaint are "employees" within the meaning of N.C.G.S. §95-127(10).
6. During the period between December 31, 2019 and April 22, 2020, Compliance Safety and Health Officers Lisa Rayborn and Mike Saye employed by the North Carolina Department of Labor, inspected Respondent's worksite located at 6538 Judge Adams Rd., Whitsett, North Carolina, hereinafter referred to as "the site." Officers Rayborn and Saye properly entered onto Respondent's site and properly conducted the inspection pursuant to a facility.
7. Wayne Brown, General Contractor Superintendent, consented to the inspection.
8. At the time of the inspection the construction site was a multi-employer site. Jim Cooper Construction Company, Inc., was the general contractor and Respondent was a contractor for the building owner, FEDEX, performing installation of a conveyor system.
9. Unless otherwise noted below, all conditions described in these allegations existed at the time of Officer Rayborn's and Saye's inspection.
10. Officer Rayborn and Saye determined that the building owner, FEDEX, contracted with Respondent to design and install a proprietary package conveyor/sorting system at the worksite.
 - i. The work being performed was steel erection operations.
 - ii. Those operations included installation of a metal grated floor system for a package conveyor system.
 - iii. The employees performing the installation were employees of Eddie Gerrald dba E. Gerrald & Company (EGC), a steel erection subcontractor (original/1st crew), including an additional crew of four employees (second/2nd crew) identified to EGC by Respondent's site representative, Jerry Janacek.

- iv. The employees were working eighteen (18) feet above the concrete floor.
- 11. Respondent contracted with Eddie Gerrald dba E. Gerrald & Company (EGC) to provide the equipment and services for installing the conveyor/sorting system.
- 12. As noted above, Jerry Janacek was the site representative/site supervisor for Respondent. Mr. Janacek oversaw the installation of the conveyor/sorting system installation performed by EGC.
- 13. Mr. Janacek's duties included but were not limited to:
 - a. Overseeing all aspects of the construction/installation; and
 - b. Directing work.
- 14. The installation began on December 2, 2019, with the 1st Crew.
- 15. As noted above, Mr. Janacek had identified additional laborers (2nd Crew) to EGC who arrived at the jobsite on December 26, 2019.
- 16. The additional laborers, (2nd Crew), started work at the jobsite on December 27, 2019.
- 17. Mr. Janacek was on site every day, all day overseeing the installation operations.
- 18. On December 31, 2019, one of the laborers on the 2nd Crew was installing decking/flooring/grating for the conveyor/sorting system near Column C2.
 - a. That employee was standing on top of the decking/flooring/grating.
 - b. That employee stepped on a section of decking/flooring/grating that was not secured.
 - c. That employee was wearing a harness but was not attached so that the fall protection system would engage upon a fall.
 - d. That employee fell over eighteen (18) feet to a hard concrete surface.
 - e. That employee died as a result of the injuries sustained during the fall.
- 19. On April 22, 2020, as a result of the inspection, Complainant issued One citation, carrying the following proposed abatement dates and penalties:

CITATION NUMBER ONE (Serious)

<u>Item No</u>	<u>Standard</u>	<u>Abate Date</u>	<u>Penalty</u>
Citation One (Serious)			
001	1926.754(e)(5)(i)	immed	\$ 7,000.00
002	1926.760(a)(1)	immed	\$ 7,000.00
003	1926.761(b)	immed	\$ 7,000.00
			\$ 21,000.00

20. For each of the alleged violations, the Complainant calculated the proposed penalties and proposed abatement dates according to the procedures set forth in the Complainant's North Carolina Operations Manual. Pursuant to Chapter VI, section B of the North Carolina Operations Manual, Complainant applied the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty: 0% credit for size, 25% good faith, and 10% credit for history, for a potential total 35% adjustment.
21. Respondent submitted a timely Notice of Contest, dated May 7, 2020. The Notice of Contest was received by the Review Commission on September 28, 2020.
22. On or about October 13, 2020, Complainant received "Employer's/Respondent's Statement of Position," which requested that formal pleadings be served.
23. Complainant's Complaint was filed December 15, 2020 and Respondent's Answer was filed January 25, 2021.
24. 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").
25. 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.
26. Respondent posted the 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.
27. All items have been abated by Respondent. No further documentation is required to be produced.
28. At the Hearing the parties agreed to, and agreed to be comply with, the additional stipulations and agreements set forth in Court Exhibit 2, a copy of which is attached to this Order.

MOTIONS

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

1. Citation 01, Item 001 be deleted in its entirety;
2. Citation 01, Item 002 be deleted in its entirety;

3. Citation 01, Item 003 be amended to change the penalty to \$21,000.00.

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"):

1. 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.

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 an "employer" within the meaning of N.C.G.S. §95-127(11); Respondent's employees referred to in the Complaint are "employees" within the meaning of N.C.G.S. §95-127(10).
3. This Court has jurisdiction over the parties and the subject matter of this Hearing.
4. Respondent is subject to the provisions of the Act and jurisdiction of the Safety and Health Review Commission of North Carolina.

Based on the foregoing Findings of Fact and Conclusions of Law, **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 \$21,000.00 within 30 days of this Order.

Effective this day of Jun 21, 2023

SO ORDERED

R. Joyce Garrett

R. Joyce Garrett (Jun 21, 2023 10:33 EDT)

R. Joyce Garrett
Hearing Examiner

CONSENTED TO:

Stacey A. Phipps

Stacey A. Phipps (Jun 21, 2023 10:28 EDT)

Stacey A. Phipps
Special Deputy Attorney General
North Carolina Department of Justice
PO Box 629
Raleigh, NC 27602-0629

ATTORNEY FOR COMPLAINANT

Neil Riemann

Neil Riemann (Jun 21, 2023 10:26 EDT)

Neil Riemann
Parry Law, PLLC
Europa Center
100 Europa Dr. Suite3 351
Chapel Hill, NC 27514

ATTORNEY FOR RESPONDENT

Court's Exhibit 2

Additional Stipulations And Agreements By Complainant and Respondent

Respondent agreed to and stipulated to the following:

1. that the violations alleged in the Citation and Notification of Penalty, as amended pursuant to Complainant's Motion, have been abated, and agrees to continue to use its best efforts to comply with the requirements of the Occupational Safety and Health Act of North Carolina (hereinafter referred to as the "Act");

2. to do the following:
 - a. To perform "Just in time" verification of training for all subcontracted personnel to include the topics of:
 - i. laying decking/grates tightly and securing or re-securing grates immediately after placement;
 - ii. Personal fall protection devices, working from elevated surfaces, unprotected sides and perimeter cables or guard rails during steel erection.
 - b. Reinforce the knowledge of the topics in i. and ii. above during weekly safety meetings. (It is not intended that every such meeting address topics i and ii.)
 - c. Develop a written policy that includes how Diversified Conveyors International, LLC will ensure that all floor decking and / or grating is secured upon placement before allowing any workers / subcontractors to walk on the decking / grating. The policy shall include such measures as preparing a written layout plan, conducting inspections, marking sections that have / have not been secured, assessing status daily before work begins, etc.
 - d. Train all affected employees and subcontractors in the policy, document the training, maintain the training, and provided the training document(s) to NCDOL OSH Division upon request.
 - e. Develop a Fall Protection Plan for each job site which ensures that all employees and subcontractors working at elevations above 6 feet (or ten feet from a scaffold) have proper fall protection provided and know how to effectively don / use the fall protection. Adequate tie-off point(s) shall be designated and this information shall be conveyed to / required of all employees and subcontractors.
 - f. Inspect the site for proper use of adequate fall protection and adherence to the decking plan daily. Document the inspections including site location, date, and who conducted the inspection. The documented inspections will be maintained for at least three months and provided to NCDOL OSH Division upon request.

3. to continue with its present safety program, including conducting periodic meetings with employees. During such meetings, employees will be able to communicate safety suggestions or

complaints to their supervisor who will forward the information to Respondent's safety spokesperson. Respondent agrees to meet regularly with its employees to discuss safety issues and receive safety suggestions or complaints from employees. Respondent's safety spokesperson shall also make recommendations regarding safety to supervisors who will then present such information to employees at the periodic meetings. Respondent agrees that all employees who make suggestions or complaints to the Committee, shall have the same protection provided employees under Article 21, Chapter 95 of the North Carolina General Statutes.

4. to pay the new proposed penalty of \$21,000.00 within thirty (30) days following the date of the Order, by check, payable to North Carolina Department of Labor, OSHA Division (Identifying Inspection No. **318185873**) and mailed to Budget-Collections, North Carolina Department of Labor, 1101 Mail Service Center, Raleigh, North Carolina, 27699-1101. Credit card payment may also be arranged.

Complainant and Respondent each agreed and stipulated to the following:

1. to bear their own attorney's fees, costs and other expenses that have been incurred in connection with any stage of these proceedings in this matter up to and including the filing of the Order by the Court:

2. that there has been no employee objection to the reasonableness of any abatement period, and that provided the respective Motions of each party are granted there are no other matters that remain to be decided, and that other than a ruling with respect to the Motions and the entry of the Order, no outstanding issues remain to be resolved by an evidentiary hearing of this matter; that the Order filed in this matter is a full and final resolution of the claims set out in the underlying Citation and Notification of Penalty as amended pursuant to Complainant's Motion, and that none of the agreements, statements, stipulations and actions taken by the Respondent set forth in the Order shall be deemed an admission by the Respondent of any of the allegations contained in the Citation and Notification of Penalty or waiver of defenses; provided, however, that in any subsequent proceeding with respect to matters covered by the Order filed in this matter brought directly under the Act by Complainant, the Order shall have the full force and effect of a final order 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.

CERTIFICATE OF SERVICE

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

NEIL RIEMANN
PARRY LAW PLLC
100 EUROPA DR STE 351
CHAPEL HILL NC 27514

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

STACEY 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
carla.rose@labor.nc.gov

via email.

THIS THE 23 DAY OF June 2023.



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