

with respect to its subcontractors were applicable to the matters identified in Docket Nos. 2020-6338, 2021-6389, and 2022-6448" and, therefore, declined to rule on Respondent's liability under the Multi-Employer Citation Policy as applied in the additional cases which had been consolidated with NC OSH Docket No. 2021-6363.

The Commissioner of Labor filed an interlocutory appeal regarding the decision in NC OSH Docket No. 2021-6363 and on or around October 13, 2023 the appeal was voluntarily withdrawn and an evidentiary hearing regarding Docket Nos. 2020-6338, 2021-6389, and 2022-6448 was scheduled. Prior to the hearing the parties submitted a joint prehearing report which included the stipulated facts attached at Appendix A. The hearing was held on January 23 and 24, 2024. Following the hearing, the parties submitted proposed decisions.

WITNESSESS

The following witnesses testified at the hearing:

1. Jennie Cagle, NCOSH District Supervisor.
2. Ted Hendrix, former NCOSH Compliance Safety and Health Officer (now District Supervisor).
3. Bob Tipton, NCOSH Compliance Safety and Health Officer.
4. Eric Mancz, Director of Construction for Respondent.
5. Geoff Shrewsbury, Vice President of Operations for Respondent.
6. Katie Peacocke, Vice President of Human Resources for Respondent.

EXHIBITS

The following exhibits were admitted into evidence at the hearing:

- For the Complainant:
- Ex. A SDH Safety Manual
 - Ex. B SDH Trade Partner Agreement for CJP Construction
 - Ex. C SDH Scope of Work - Framing Labor
 - Ex. D N.C. Secretary of State documents re Respondent
 - Ex. E Certified unredacted file 2021-6363 (Insp. 318211547) pp 1-205.
 - Ex. F Certified unredacted file 2020-6338 (Insp.318202660) pp 1-129.
 - Ex. G Certified unredacted file 2021-6389 (Insp.318214426) pp 1-107.
 - Ex. H SDH Weekly Safety Walk conducted 1/10/20 pp. 1-5.
 - Ex. I Color map of River Park development (onscreen display of p 115 from Ex. J).
 - Ex. J Certified unredacted file 2022-6448 (Insp. 318237120) pp 1-119.
- For the Respondent:
- R-2 Citation and Notification of Penalty
 - R-4 Scope of Work Agreement
 - R-5 Subdivision Map
 - R-6 Purchase Order Inquiry
 - R-7 Trade Partner Agreement
 - R-8 Gaston County Building Permit
 - R-9 City of Mount Holly Zoning Permit

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 and 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

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. #2.
2. Respondent SDH Charlotte, LLC d/b/a Smith Douglas Homes ("SDH" or "Respondent") is a foreign corporation organized under the laws of the State of Georgia, doing business in North Carolina as a residential home builder. Stip. #3.
3. Respondent is an employer within the meaning of N.C. Gen. Stat. §95-127(11). Stip. #5.
4. The Review Commission has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. § 95-135. Stip. #1.
5. SDH developed the River Park subdivision in Mount Holly, in Gaston County, North Carolina. Stip #6. Included within that subdivision are three residential home sites, which were under construction between 2020 and 2022 and which were the subject matter of the January 23, 24, 2024 evidentiary hearing: a two-story residential structure located at 349 Crandon Rd. (NC OSH Docket No. 2020-6338); a residential construction site located at 313 Oxbow Circle (NC OSH Docket No. 2021-6389); and a residential site located at 406 Buford Way (NC OSH Docket No. 2022-6448). Stip. #7; Compl. Exs. F, G, J.
6. The three construction sites which were the subject of this hearing were all multi-employer work sites. Stip. #9.

2020-6338 (Insp. 318202660)
349 Crandon Road

7. On September 2, 2020, Compliance Safety & Health Officer Chris Ray ("Ray") observed from a public way workers exposed to fall hazards while working from the roof of a two-story residential structure under construction. Stip. #11. More specifically, Ray observed the employees on the roof using pneumatic nail guns to secure roofing shingles without railings or personal fall protection in place. Ray parked his vehicle on the public roadway and observed additional hazards which he documented in photographs included in his inspection file. Compl. Ex. F, p 60. See also, e.g., IMG 6506, IMG 6511, IMG 6512, IMG 6517, IMG 6519, IMG 6527, IMG 6533, IMG 6543, IMG 6563, IMG 6578, IMG 6580.
8. Ray approached Respondent's Construction Manager, Jeff Morgan, who contacted Respondent's legal counsel. Stip. #12.
9. Jeff Morgan then invited Officer Ray to join him in a telephone conference with SDH's legal counsel, Mr. Mark Waschak. SDH's legal counsel informed Officer Ray that SDH was a management company, not a general contractor, and that its managers come to the work sites to "review construction progress, quality, and to address 'imminent danger' situations." Compl. Ex. F, p 60. *Emphasis added.*
10. Following conversation with SDH's legal counsel, Jeff Morgan authorized Officer Ray to open an inspection. Stip. #12.
11. After opening the inspection, Ray spoke with Mr. David Johnston, the Construction Manager for CJP Construction of the Carolinas, LLC. ("CJP"). Ray documented the following in his inspection report which he stated was provided to him by Mr. Johnston in the course of the inspection: CJP had been contracted by SDH to frame the structure; CJP subcontracted Jaime Lopez, d/b/a Jaime Lopez Roofing to provide the labor for putting on the structure's roof; Johnston took directions from SDH Construction Manager John Whitley and discussed issues arising during construction with Whitley; SDH was the General Contractor for the site. Compl. Ex. F, p 61.
12. Except for Respondent's contention that it was not a General Contractor for 349 Crandon Rd., Respondent did not offer testimony contradicting the above-described information which Ray gathered during his inspection.
13. CJP Construction of the Carolinas, LLC was hired by SDH pursuant to a Trade Partner's Agreement ("TPA") signed by Chad Pigg on April 19, 2019. Compl. Ex. E, pp 181-196.
14. The TPA provided that CJP was responsible for compliance with all "laws, rules, standards, regulations and rulings" related to completion of the work in a "safe, workman like and professional manner" and contained the following additional language with respect to safety: "For the avoidance of doubt, Company shall have no direct control over the acts or omissions of Trade Partner with respect to safety practices." Compl. Ex. E, p 187.

15. The TPA also incorporated a "Scope of Work" provision which includes the following requirements:
- a) CJP was required to use "pre-fabricated, pre-engineered wood and floor truss systems, provided by Smith-Douglas Homes;"
 - b) CJP was required to use "metal hangers and framing anchors (provided by Smith Douglas Homes);"
 - c) CJP was required to use adhesives provided by Smith Douglas Homes;
 - d) For exterior framing, CJP was required to "have temporary handrails made from 2 x 4 material at 21" + -3 and at 42" + -3, as well as a bottom toe kick. All stair and balcony temporary railings to be set at these heights as well;"
 - e) CJP was required to use temporary safety rails for interior framing "built into the floor system and cut flush when removed (See SDH Typical Details)."

Compl. Ex. E, pp 194-196.

16. NCOSH District Supervisor Jennie Cagle ("Cagle") testified on January 23, 2024 on behalf of Complainant regarding the inspection and citations issued for the SDH property at 349 Crandon Rd.¹ Cagle testified that she was Chris Ray's supervisor in September 2020 and that after he contacted her, Cagle authorized Ray to open the inspection. Cagle supervised and reviewed Ray's work, including the narrative created by Ray. Cagle Test. 22:44; 24:50; 25:42; 42:33; 54:29. Compl. Ex. F.
17. Cagle has extensive experience with NC OSH inspections and the application of OSHA standards, having started with Complainant agency in 2003 as a Compliance Safety & Health Officer, being promoted to the role of senior officer and then serving as a District Supervisor since 2013. Her training includes classes in OSHA standards in the construction industry. Cagle Test. 00:22:44-00:24:50.
18. The purpose of the handrails and interior framing rails specified in Respondent's TPA with CJP Construction was for employee safety. Cagle Test. 1:18:11- 1:20:00.
19. Ray reviewed the OSHA 300 logs of work-related illnesses and injuries for SDH as well the OSHA Express database. He specifically reviewed the investigative file for Inspection Number 318188026 from February 28, 2020 and determined that SDH had been cited for failing to have employees protected by fall protection equipment at least once before in the past three years. Cagle Test. 00:32:29-00:34:07; 00:42:23-00:54:27. Compl. Ex. F.

¹ Citations to witness testimony from January 23, 2024 reflect the time stamp(s) from DAY 1 of the Lifesize Video recording.

20. Ray requested information regarding Respondent's safety and health programs and safety training provided to employees. SDH responded to both requests with the following statement "The employees are not engaged in construction activities." Compl. Ex. F.
21. As a result of Officer Ray's inspection, one Repeat Serious citation with one item and one Serious citation with four items were issued on October 21, 2020, carrying the following proposed abatement dates and penalties:

ITEM NO.	STANDARD	ABATE DATE	PENALTY
CITATION ONE (REPEAT SERIOUS)			
001	1926.501(b)(13)	immediately	\$12,600.00
CITATION TWO (SERIOUS)			
001a	1926.20(b)(1)	immediately	\$ 6,300.00
001b	1926.20(b)(2)	immediately	grouped
002	1926.102(a)(1)	immediately	\$ 2,700.00
003	1926.1053(b)(1)	immediately	<u>\$ 6,300.00</u>
			\$27,900.00

Stip. #13.

22. The violations for failure to ensure that employees had fall protection and eye protection were violations that were visible to Officer Ray from the public roadway. Cagle Test. 1:00:01-1:01:19.
23. The basis for the Repeat designation was Insp. 318188026 (112 Clauser Road, River Park Development, Mount Holly) wherein Respondent was cited for a violation of 1926.501(b)(13) on February 28, 2020, with a final order date of April 15, 2020. Stip. #14.
24. For 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, as appropriate: 10% credit for size, 0% credit for good faith, and 0% credit for history. Stip. #15.

2021-6389 (Insp. 312214426)
313 Oxbow Circle

25. On February 25, 2021, Compliance Safety & Health Officer Bob Tipton ("Tipton") observed from a public way three workers on a pump jack scaffold exposed to fall hazards while working on a residential structure under construction. Stip. #19.
26. After receiving authorization from District Supervisor Jennie Cagle to begin an investigation, Tipton drove past the site at 313 Oxbow Circle to turn his vehicle around and park. As he did so he observed other hazards in residential construction sites in the River Park subdivision. He observed roofers climb up onto a roof without fall protection and observed a concrete subcontractor using a cement saw to cut concrete in a driveway, creating a good deal of dust, but working without a respirator or eye protection. He also observed an employee on a porch roof, about ten feet off the ground, installing roofing gutters without fall protection. He documented his observations with photographs. Tipton Test. 2:44:15 - 2:47:00 (January 23, 2024); Compl. Ex. G, p 48; pp 80-91.
27. Tipton approached SDH employee Cam Warren, presented his credentials and stated that he needed to speak with "whoever is in charge of safety." Warren proceeded to make a phone call. During the time that Warren was on the phone, Tipton was approached by David Johnston, CJP's Construction Manager. Tipton repeated that he needed to speak with the person in charge of safety. Johnston indicated that he would call SDH Construction Manager John Whitley. Tipton Test. 2:47:45 - 2:49:50; 2:55:21 - 2:57:35; Compl. Ex. G, p 48.
28. SDH Construction Manager John Whitley drove to the job site. Officer Tipton attempted to open an inspection but Whitley informed him that Respondent required a warrant before entry on Respondent's property would be permitted. Tipton Test. 2:49:25 - 2:49:51; Stip. #20.
29. Officer Tipton remained on the public way adjacent to and in front of the job sites documenting the hazardous working conditions that he observed. Tipton Test. 2:40:42.
30. Tipton observed that some, but not all, of the violations were abated. Tipton Test. 3:29:30 - 3:33:10.
31. Officer Tipton returned to the site later that day, after 5:00 p.m., to verify the address for his warrant application. While on the public way he, again, observed hazardous working conditions. Specifically, he observed framing contractors working on a roof without fall protection. Tipton also observed a truck that he knew belonged to Respondent's Construction Manager John Whitley. Tipton Test. 2:51:24 - 2:52:25.
32. Officer Tipton applied for and received a warrant and executed that warrant on March 4, 2021. Stip. #21, #22. Thereafter, he conducted an opening conference and inspection with David Johnston from CJP and Eric Mancz, Respondent's Director of Construction (then Area Manager). Tipton Test. 2:53:45.

33. As part of his investigation, Tipton requested Respondent's Safety Manual and the OSHA 300 logs. Respondent did not provide any documents responsive to Tipton's requests. Tipton reviewed previous investigative files for violations alleged against SDH, including the file of Compliance Safety & Health Officer Hobson from an inspection conducted January 21, 2021, where Officer Hobson had requested and received a copy of SDH's Safety & Health Manual and OSHA 300 logs. Tipton Test. 2:55:21 - 2:56:40; 3:00:38 - 3:01:40; 3:16:40; 3:35:03.
34. Tipton also requested that Respondent supply him with "any evidence that [SDH] was a management services general contractor and to provide the CSHO with any documents with their NAICS or SIC code indicating that they were a management services general contractor" Tipton did not receive any documents responsive to this request. Compl. Ex. G, p 57.
35. As a result of the inspection, one Serious citation with one item was issued on June 15, 2021, carrying the following proposed abatement dates and penalties:

ITEM NO.	STANDARD	ABATE DATE	PENALTY
	CITATION ONE (SERIOUS)		
001	1926.20(b)(2)	immediately	\$6,300.00

Stip. #23.

36. For 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, as appropriate: 10% credit for size, 0% credit for good faith, and 0% credit for history. Stip. #24.

**2022-6448 (Insp. 318237120)
406 Buford Way**

37. On January 4, 2022, Compliance Safety & Health Officer Ted Hendrix ("Officer Hendrix") observed from a public way fall hazards on two residential construction sites. Stip. #28.
38. Officer Hendrix observed that workers were framing and installing siding without fall protection or other personal protective equipment. Compl. Ex. J, p 66.
39. Officer Hendrix observed Construction Manager John Whitley for approximately twenty-five minutes, where Whitley had a direct line of sight to the fall protection and eye

protection hazards that Hendrix had observed. Whitley took no action to correct the hazards that could be seen. Compl. Ex. J, p 69.

40. After Officer Hendrix presented his credentials to Construction Manager John Whitley, Whitley contacted Respondent's legal counsel. Hendrix Test. 1:21:28; Compl. Ex. J, p 66.
41. Officer Hendrix was denied entry to the sites by Respondent's Construction Manager John Whitley, who told Hendrix that he would need a warrant to open an inspection. Stip. #29; Hendrix Test. 1:21:14 - 1:22:46.
42. Whitley also told Officer Hendrix that he had to remain in the roadway and that Whitley would not permit Officer Hendrix to interview any subcontractors in the roadway. Hendrix Test. 1:21:14 - 1:22:50; 1:26:45.
43. Officer Hendrix applied for and received a warrant. Officer Hendrix executed the warrant on January 12, 2022. Stip. #30, #31.
44. The hazards observed by Officer Hendrix were not abated on the day observed. Hendrix Test. 1:53:25.
45. Typically, subcontractors only work for one day. Hendrix Test. 1:26:30. See also Mancz Test. 00:47:15 (testifying that roofing subcontractors typically complete their work on a single structure in one day).
46. As part of his investigation, Officer Hendrix requested documents from Respondent, including Respondent's safety manual and OSHA 300 logs. Respondent did not provide documents responsive to those requests. Hendrix Test. 1:46:56.
47. Hendrix did receive a copy of Respondent's Trade Partner Agreements for Jones Construction Services (contracted to provide siding installation) and CJP Construction (contracted to provide framing). There were no attachments to either agreement, including no scope of work documentation. Hendrix Test. 1:34:30; 1:44:45.
48. Officer Hendrix accessed documents from prior inspections at Respondent's work sites via OSHA Express. Hendrix Test. 1:33:25 - 1:34:30.
49. As a result of the inspection, one Serious citation with three subparts was issued on February 18, 2022, carrying the following proposed abatement dates and penalties:

ITEM NO.	STANDARD	ABATE DATE	PENALTY
	CITATION ONE (SERIOUS)		
001	1926.102(a)(1)	2/28/2022	\$2,700.00

002	1926.451(g)(1)(vii)	cdi	\$4,500.00
003	1926.501(b)(13)	2/28/2022	<u>\$4,500.00</u>
			\$11,700.00

Stip. #32.

50. For 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, as appropriate: 10% credit for size, 0% credit for good faith, and 0% credit for history. Stip. #33.

Respondent's Business Model

51. Geoff Shrewsbury is Respondent's Vice-president of Operations. He testified at the February 1, 2023 hearing and on January 23, 2024. He oversees construction, trade relations and home owner warranties. Mr. Shrewsbury has worked for Respondent for over ten years. Shrewsbury Test. 3:39:58; T pp. 50-51. He assumed his current position in January 2023. Prior to that he was Vice-president of Operations for Respondent's Atlanta affiliate and was not involved in North Carolina operations. Shrewsbury Test. 3:42:40 - 3:43:57.
52. Eric Mancz is the Director of Construction for Respondent's Charlotte Affiliate. Mancz testified at the February 1, 2023 hearing and also testified on January 24, 2024.² Mancz began working with Respondent in September 2018 as a Construction Manager, became an Area Manager in January 2020 and became the Director of Construction in June 2022. Mancz Test. 00:01:00 - 00:01:35.
53. Respondent assigns Construction Managers to its home-building sites. Construction Managers' duties include meeting with homeowners, visiting the residential home construction sites to verify that the subcontractors who are scheduled to be working that day are engaged in the work for which they are contracted, that supplies are available on the site, and, when the subcontractor's work is finished, to verify that the work meets completeness standards that would entitle the subcontractor to be paid. Mancz Test., Feb. 1, 2023, T pp 15-16.
54. Shrewsbury believes that Construction Managers spend approximately twenty minutes per day at each residential construction site assigned to them including both a morning and an afternoon / evening visit. Their primary responsibility is to verify that the work is

² Citations to witness testimony from January 24, 2024 reflect the time stamp from DAY 2 of the Lifesize Video Recording.

completed in the manner expected and in order to approve payment for the subcontractor. Shrewsbury Test., Feb. 1, 2023, T pp 53-54.

55. Respondent also requires that all of its subcontractors enter into a more detailed Trade Partner Agreement. Resp. Ex. R-7. The agreement contains a provision describing subcontractors' responsibility for compliance with safety laws. The Trade Partner Agreement does not contain any provision for Respondent to stop or correct the work of the subcontractors due to safety violations. The Agreement does not provide Respondent with the authority to withhold payment from subcontractors for safety violations. Shrewsbury Test., Feb. 1, 2023, T pp 58-59. Compl. Ex. B; Resp. Exs. R-4; R-7; *But see* Finding of Fact ("FOF") #15.

56. At the February 1, 2023 hearing Shrewsbury testified that SDH does not control safety devices used by trade partners at the job sites:

Q. Okay. What about purchase of safety devices for the home sites? Who does that?

A. It's all purchased by the trade partner.

Q. And do they have -- and are they required to get any approval to do so by Smith Douglas?

A. They're not.

Q. What about the installation of safety devices on the home site? Who's responsible for that?

A. The trade partner.

Q. And does it require any approval from Smith Douglas to do so?

A. No.

Shrewsbury Test., Feb. 1, 2023, T p 59.

57. However, Respondent's Trade Partner Agreement / Scope of Work does specify safety devices which must be used and installed at the home sites. *See*, FOF #15, #18; Compl. Ex. E, pp 194-196; Cagle Test. 1:18:11-1:20:00.

58. At the February 1, 2023 hearing Shrewsbury testified that some "years back" Respondent made a deliberate decision to change its business model from that of the traditional General Contractor supervising subcontractors to one of "Construction Managers" who engage "Trade Partners" to execute the various construction projects required to build a house. Mr. Shrewsbury testified that the reason for the change was that, given the number of trades and the variety of construction materials involved in residential construction, Respondent did not have the expertise to monitor subcontractors regarding the subject matter of their work. Shrewsbury Test, Feb. 1, 2023, T pp 54-55; Shrewsbury Test. 4:52:06.

59. On January 23, 2024 Shrewsbury testified that in April 2018 he communicated to his field staff in Atlanta that Respondent would no longer use the safety manual previously

distributed to its employees (Compl. Ex. A). Shrewsbury claimed the manual was abandoned due to Respondent's changed business model. Shrewsbury Test. 3:43:57.

60. Shrewsbury had no knowledge as to whether the same directive was shared by his counterpart(s) overseeing North Carolina residential construction sites with North Carolina Construction Managers. Shrewsbury Test. 3:43:57.
61. Complainant's Exhibit H shows that in January 2020 Eric Mancz, acting as a Construction Manager, documented subcontractors' failures to use personal protective equipment, spoke directly with subcontractors regarding safety violations, and, documented whether safety violations had been remedied by the subcontractor. Mancz Test. 00:4:02 - 00:7:00; 00:8:30 - 00:13:35; Compl. Ex. H.
62. When shown Complainant's Exhibit H, Shrewsbury acknowledged that this was a form with which he was familiar but claimed that Respondent had discontinued its use in 2018. Shrewsbury could not explain why Construction Manager Eric Mancz had used the form on January 10, 2020 and signed the form on January 29, 2020. Shrewsbury Test. 4:18:14 - 4:21:38.
63. On January 21, 2021 N.C. Department of Labor's Compliance Safety and Health Office Curt Hobson opened an inspection of Respondent's job site at 325 Oxbow Circle in the River Park subdivision. Eric Mancz participated in the opening conference conducted by Officer Hobson and, subsequently, in response to Officer Hobson's request for information, Mancz provided Officer Hobson with a copy of Respondent's Safety and Health Manual, representing to Officer Hobson that Respondent had an extensive safety program. Providing the Safety Manual to Officer Hobson resulted in due consideration by Officer Hobson as to whether there should be a penalty reduction based on evidence of good faith efforts to comply with safety regulations. Compl. Ex. E p 10; Mancz Test. 00:15:23 - 00:16:54.
64. Mancz forwarded the Safety and Health Manual to Officer Hobson attached to an email dated February 3, 2021. In the email, Mancz made no statement indicating that the Safety Manual was no longer being used because Respondent changed its business model. Mancz Test. 00:16:03.
65. On February 1, 2023 Eric Mancz testified that that the manual had not been used during his four years with the company which would mean it had been discontinued in 2019. He further testified that the safety checklist was no longer in use within 3-4 months of his employment (which began in 2018). Mancz Test., Feb. 1, 2023, T pp 45-46.
66. On January 24, 2024 Mancz acknowledged he had completed the safety checklist identified as Complainant's Exhibit H in January 2020. Mancz Test. 00:2:35 - 00:2:51.
67. On January 24, 2024 Eric Mancz testified that Respondent stopped using the safety checklist in 2020 but that prior to January 2020 Respondent used the checklist once a week, including in 2018 and 2019. Mancz Test. 00:2:35.

68. The safety checklist included instructions to, "use this audit to assess the following aspects of this site as Safe, At Risk or Not Applicable." In the checklist completed by Mancz he identified safety deficiencies including nails sticking out of 2x4s, plumbers not wearing hard hats, framers using a frame as a ladder and a carpenter's improper placement of an extension cord. Compl. Ex. H; Mancz Test. 00:07:00 - 00:13:35.
69. When Mancz signed the form on January 29, 2020, he indicated that required corrective actions had been taken. Mancz Test. 00:13:35 - 00:14:00.
70. On January 24, 2024 Eric Manz was shown photographs taken by CSHOs at the job sites where Respondent was issued citations being contested in this hearing.
- a) Mancz was shown Photographs #6512 and #6499 which Officer Chris Ray took on September 2, 2020 from the public roadway adjacent to Respondent's job site at 349 Crandon Rd. Mancz readily identified the photographs as showing employees working on the roof of a residential structure, in plain view, without fall protection. Mancz Test. 00:24:25; 00:26:45; Compl. Ex. F.
 - b) Mancz was shown Photograph #8397 which Officer Ted Hendrix had taken on January 4, 2022 from a public roadway adjacent to Respondent's job site at 406 Buford Way. Mancz readily identified the photograph as one of an employee working on the roof of a residential structure, in plain view, without fall protection. Mancz Test. 00:25:55; Compl. Ex. J.
 - c) In each instance where Mancz believed that a hazard existed based on the photographs he was shown, he indicated that he did not believe that he had a duty to correct the hazard and that his only duty was to notify the Trade Partner. Mancz would not have approached the employees nor moved closer to get a better view. Mancz Test. 00:24:45 - 00:27:25.
71. Mancz admitted that no special training was required to see that employees were not using fall protection. Mancz Test. 00:57:12
72. Mancz believed that his only responsibility with respect to safety at the job site was triggered if he viewed exposure to a hazard as life threatening. Mancz Test. 00:24:45.
73. On January 24, 2024 Mancz identified Respondent's employee, Construction Manager Jeff Morgan in a photograph taken in the public roadway adjacent to Respondent's job site at 349 Crandon Rd. The photograph shows Morgan standing in front of the structure where employees are exposed to serious hazards. Mancz Test. 00:27:53; Compl. Ex. F, Photograph #6528 and p 129.
74. The hazards displayed in Photograph #6258 were not corrected by Construction Manager Jeff Morgan. Compl. Ex. F, p 129.

75. With respect to the selection criteria used to hire trade partners, Geoff Shrewsbury testified on February 1, 2023 that:

... [T]here's several criteria. We make sure that, one, that they are a legitimate contractor that they've got any necessary licenses that may pertain to their particular work they do, you know, business license, insurance. We require certain levels of insurance. And then, you know, we negotiate price with them and make sure that they're qualified to handle the volume of work that we want to have them do.

Shrewsbury Test., Feb. 1, 2023, T p 57.

76. On January 23, 2024 Shrewsbury testified that Respondent does not review its trade partners' safety history nor does Respondent have a policy of terminating trade partners who violate safety standards. There is also no oversight regarding a trade partner's selection of a subcontractor. Shrewsbury Test. 3:52:50 - 3:55:18; 3:56:00.
77. Respondent's Trade Partner Agreements contain numerous specific requirements reflecting industry standards (See, for instance, FOF # 15, above). However, Respondent does not actually verify that all of its contractual specifications are met, including those specifications that reflect safety standards. Mancz Test. 00:30:18 - 00:36:00.
78. Respondent will often accept the verbal representation of a trade partner that a specific requirement has been met. Mancz Test. 00:34:00 - 00:36:00.
79. Respondent's trade partners who are cited by OSHA for violations do not suffer any negative consequences in their opportunities to continue to work for Respondent. Mancz Test. 00:35:03.
80. Respondent does not keep a record of safety violations committed or citations for safety hazards received by its trade partners. Mancz Test. 00:35:03 - 00:35:50.
81. Respondent's Vice-president of Operations, Geoff Shrewsbury was shown a current job-posting for a Construction Manager position with Respondent. Among the job duties included in the advertised position was a duty to "review and enforce workplace safety requirements." Completion of the OSHA 10-Hour Training was also listed as a qualification for hiring. Shrewsbury claimed the advertisement for the position was "obsolete" and reflected "a disconnect with human resources." Shrewsbury Test. 4:06:00; 5:05:13.
82. Respondent's Vice-president for Human Resources, Katie Peacocke testified that she was hired in November 2019 and her division is responsible for job postings. She has not ever reviewed advertisements for available Construction Manager positions since being hired. She believed that the position description shown to Mr. Shrewsbury was posted in 2024, earlier in the week, by a recruiter. She believed the description had been created in April 2018. Peacock Test. 3:08:00 - 3:10:50.

83. Ms. Peacocke speculated that a recruiter was responsible for posting an obsolete job description. Peacocke Test. 3:23:45.
84. When new jobs are posted, human resource employees who receive those postings rely on the hiring managers to provide accurate information about the job requirements. Peacocke Test. 3:23:15.
85. SDH had reportable injuries to employees including construction managers in 2019. (Ex. E p. 30).
86. Respondent's management witnesses presented testimony that was, at times, inconsistent with prior testimony or with one another, and, at other times, illustrated that prior testimony was incorrect or incomplete. Such testimony, taken together, undermined the credibility of Respondent's description of its business model, including when and how the model has been implemented:
 - a) Vice-president of Operations Geoff Shrewsbury's February 1, 2023 testimony was incorrect when he testified that SDH did not control the safety devices used by trade partners. FOF #15, #18, #56, #57.
 - b) Vice-president of Operations Geoff Shrewsbury's February 1, 2023 testimony regarding the date Respondent's business model changed was incomplete in that, prior to January 23, 2023, Shrewsbury lacked direct knowledge of North Carolina operations. FOF #51, #59, #60.
 - c) Vice-president of Operations Geoff Shrewsbury and Director of Construction Eric Mancz presented inconsistent testimony regarding when Respondent stopped using the Safety Checklist (Compl. Ex. H). FOF #61, #62, #66, #67.
 - d) Director of Construction Eric Mancz contradicted his February 1, 2023 testimony when he testified on January 24, 2024 about the discontinuation of the Safety Checklist (Compl. Ex. H). FOF #65, #66, #67.
 - e) Vice-president of Operations Geoff Shrewsbury's and Vice-president of Human Resources Katie Peacocke's testimony speculating that a job description that included review and enforcement of safety requirements was obsolete and mistakenly posted was at odds with Peacocke's testimony that human resource employees rely on hiring managers for job descriptions. FOF ##81-84.
 - f) Vice-president of Operations Geoff Shrewsbury's February 1, 2023 testimony regarding Respondent's careful hiring decisions of trade partners was incomplete as he testified on January 23, 2024 that hiring decisions did not include a review of subcontractors' reputations for maintaining safe worksites. FOF ##75-80.

- g) Vice-president of Operations Geoff Shrewsbury testified on February 1, 2023 that Respondent's decision to change its business model from that of a General Contractor overseeing subcontractors to a Construction Management model was due to its inability to maintain the level of expertise needed to supervise various trade professionals. This description as a rationale for why Respondent did not continue to supervise subcontractors' adherence to safety regulations was undermined by Director of Construction Eric Mancz's testimony that no expertise was required to identify the safety hazards documented by Complainant's Compliance Safety & Health Officers at the Mount Holly worksites cited by Complainant. FOF # 59, #71, #72.

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. North Carolina has adopted the Multi-Employer Citation Policy for analyzing employer liability on construction sites such as the sites at 349 Crandon Rd., 313 Oxbow Circle and 406 Buford Way in Mount Holly, NC. The policy provides that "on multi-employer work sites . . . more than one employer may be citable for a hazardous condition that violates an OSHA standard." CPL 2-00.124, Eff. 3/16/2000, p3.
3. The Multi-Employer Citation Policy is an agency document that provides guidance to OSHA inspectors as to when it may be appropriate to cite a particular employer. *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 737 (5th Cir. 2018).
4. The policy originates from the statutory mandate in 29 U.S.C. §654(a)(2) which provides that "each employer . . . shall comply with occupational safety and health standards promulgated under this Act." Appellate courts interpreting this section of the Occupational Safety & Health Act agree that Congress intended that employers who are subject to the Act should be held responsible for failures to comply with safety standards that effect the employer's own employees as well as other employees who may be employed at the employer's place of employment. *Acosta*, 909 F.3d at 737; *Comm'r of Labor v. Weekly Homes LP*, 169 N.C. App. 17, 24, 609 S.E.2d 407, 413 (2005).
5. The policy has been adopted by North Carolina and our appellate courts have also found the policy to reflect a reasonable interpretation of the Occupational Safety & Health Act of North Carolina. *Comm'r of Labor v. Weekly Homes LP*, 169 N.C. App. at 23, 609

S.E.2d at 412 (finding that N.C. Gen. Stat. §95-129(2) "which imposes a specific or special duty on an employer to comply with OSHA standards, does not limit the duty of the employer only to his own employees").

6. Thus, the Multi-employer Citation Policy is not an exception to a general rule regarding employers' duties to maintain a safe workplace; it is a reasonable interpretation of the legislative mandates embodied in the respective federal and North Carolina statutes.
7. As with any interpretation of a legislative mandate, the Commissioner's *application* of the policy must reflect established guidelines. *Cape Medical Transport, Inc. v. N.C. Department of Health and Human Services*, 162 N.C. App. 14, 590 S.E.2d 8 (2004).
8. To decide whether a particular employer is citable under the policy, the Commissioner of Labor (or his designee) engages in a two-step analysis. The Commissioner must first decide whether the employer is one who is creating, exposing, correcting or controlling with respect to the worksite hazard. If the employer meets the definition for one or more of those categories, the Commissioner then determines if the employer's actions were sufficient to meet its obligations under the Act. If the employer does not meet the definition for one of those categories, the analysis stops there. CPL 2-00.124, p 3.
9. It is the Commissioner's burden to establish the applicability of the Multi-employer Citation Policy, as the question of whether an employer is responsible for a violative condition is part of the Commissioner's case in chief. Rule .0514 of the N.C. Safety and Health Review Board provides that "the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." See also, *New River Elec. Corp. v. OSHRC*, 25 F.4th 213, 219 (4th Cir. 2022) (identifying the elements of a *prima facie* case for violations to include both the noncompliance with a safety standard and the employer's actual or constructive knowledge of a violation).
10. Under the Multi-employer Citation Policy a Controlling Employer is "[a]n employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." Control is established by contract or "by the exercise of control in practice." *Id.*, pp 6-7.
11. The evidence presented at this hearing supports a conclusion that Respondent's Trade Partner Agreement is, at best, ambiguous regarding the responsibility for safety at the worksite.
 - a) On the one hand, by its explicit terms, Respondent's Trade Partner Agreement allocates the responsibility for all aspects of OSHA safety standards and compliance therewith to subcontractors. The Respondent's contract states that it shall have no direct control over its subcontractors' employees for their "acts or omissions with respect to safety practices." Respondent also does not reserve for itself any direct control over subcontractors' duties to comply with safety standards by, for instance, withholding payment when a subcontractor fails to

comply with safety or is cited for a violation of safety standards. Ex. R-7; Mancz Test. 00:31:30-00:35:50.

b) On the other hand, the exhibits and testimony at this hearing established that the terms of the contract give Respondent the ability to exercise control over safety, if it chooses to do so:

- i) Respondent has chosen to include in its Trade Partner Agreement some specifications pertaining to materials and methods of construction, including materials and methods that reflect safety standards. Resp. Ex. R-7; Compl. Ex. E, pp 194-196; Cagle Test. 1:18:11-1:20:00; FOF #15, #18, above.
- ii) A breach of those provisions by a trade partner would be a breach of the Trade Partner Agreement entitling Respondent to seek specific performance or compensation. Resp. Ex. R-7, ¶¶ 15,16; Compl. Ex. E, p 192.
- iii) However, Respondent has chosen to structure its daily operations in a way that avoids holding subcontractors accountable for failure to complete their work in accordance with safety provisions of the Agreement:

Shrewsbury Test. 4:43:00-4:46:00 (Construction Managers meet with customers, monitor schedule; typically on site at the beginning of the day; encourage them to visit at the end of the day; each visit is "a few minutes").

Mancz Test. 00:45:54-00:46:11 (Construction Managers spend fifteen to twenty minutes total at each home site).

Shrewsbury Test. 4:49:57 (Construction Managers look for completion of the job, code requirements and cosmetic framing).

Mancz Test. 00:30:18-00:33:00 (Construction Managers verify that a job is completed but do not verify that all specific requirements have been completed. Where the Agreement requires safety rails, the Construction Managers cannot verify that safety rails are used because they do not go into a home before framing is completed).

Mancz Test. 00:34:00 (If a trade partner says a requirement has been completed, the trade partner is paid).

Shrewsbury Test. 5:16:07 (Respondent provides a warranty to customers regarding quality standards and adherence to building codes but Construction Managers do not check to see if specific standards are actually met).

12. Respondent cannot avoid responsibility for safety at its construction sites through its Trade Partner Agreements.
 - a) The NCOSHA Act's "primary purpose is to keep conditions in the workplace safe for workers. This purpose cannot possibly be accomplished where employers are allowed to delegate to a third party a specific duty promulgated under the Act that is designed to protect the safety of workers." *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 34, 426 S.E.2d 282, 287 (1992).
 - b) "When an employer is under a statutory duty and then entrusts its performance to his agent, he becomes responsible for the failure of that agent to comply with the law." *Lebanon Lumber Co.*, 1971-1973 OSHD CCH para. 15,111, at p. 20,179, *aff'd*, 1971-1973 OSHD CCH para. 15,530 (1973).
 - c) "The effectiveness of this particular safety standard would be nullified and the manifest intent of the Act defeated if an employer could delegate a duty clearly enjoined upon him to another." *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 32-33, 426 S.E.2d 282, 286 (1992).
13. Respondent's position that its Trade Partner Agreement permits it to limit its responsibility for safety at its construction sites to instances where life is threatened (FOF #9, #70) provides no protection to workers.
 - a) When workers were photographed from the public roadways constructing roofs without using fall protection, the workers were exposed to a life threatening hazard.
 - b) Yet, Respondent's Construction Manager at the site (Whitley) did not intervene as evinced by witnesses who testified to seeing Whitley have a direct line of site to the hazardous condition and by the fact that inspectors who returned later in the day witnessed the same kind of exposure continuing. FOF #31, #39.
 - c) Upon being shown photographs of workers exposed to the life threatening hazard of falling from a two story residential roof, Respondent's Director of Construction (Mancz) testified that he would not take action to immediately abate the hazard. FOF #70.
14. Particularly where Respondent makes no effort to assess its subcontractors' histories with respect to safety, Respondent could not delegate its obligations under the NC OSH Act. See, FOF ## 76-80. *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 34, 426 S.E.2d 282, 287 (1992) ("Where an employer, on a regular basis, is not aware of the reputation of the electrician who grounds equipment emitting dangerous currents of electricity, this Court cannot ignore such blatant disregard for the safety of employees.")

15. Based on its contract, Respondent was a controlling employer at the 349 Crandon Rd., Mount Holly, NC job site (NC OSH Docket No. 2020-6338); at the 313 Oxbow Circle, Mount Holly, NC job site (NC OSH Docket No. 2021-6389); and at the 406 Buford Way, Mount Holly, NC job site (NC OSH Docket No. 2022-6448). Respondent's Trade Partner Agreements gave it the ability to control safety hazards by implementing methods of oversight for contractual provisions that required subcontractors to perform work in accordance with OSHA safety regulations, including specifying the use of specific materials and methods for safety.
16. Even if control is not established by contract, then it may be established "by the exercise of control in practice." Multi-employer Citation Policy, CPL 2-00.124, Eff. 3/16/2000, pp 6-7. Whether an employer is responsible for enforcing particular safety standards is "a fact-specific inquiry that appears to turn on the responsibilities assumed by the firms in question" rather than how the company identifies itself. *CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 719 (7th Cir. 1999).
17. An employer may practice control through the presence of its management at the work site. *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723 (2018) (GC maintained control over the worksite through the presence of on-site management personnel, including superintendents, project engineers, and project manager).
18. Respondent's management presence supports a finding that it was a controlling employer. Although Respondent claimed that its construction managers are present at a work site for only twenty minutes a day, Complainant's inspectors repeatedly observed Construction Managers who were in a position to observe and recognize safety violations even though they failed to address the same. Tipton Test. 2:51:24-2:52:25 (Returning to the work site at the end of the day, Tipton plainly observed safety violations from the roadway and also observed that Respondent's Construction Manager John Whitley was present); Compl. Ex. J, p 69 (recording Hendrix's observation that John Whitley had a direct line of site to the hazardous conditions that could be seen from the roadway); Compl. Ex. F, Photograph #6582 and p 129 (depicting Construction Manager Jeff Morgan at the site where hazardous conditions were plainly visible from the roadway); and, Mancz Test 00:27:53 (identifying Morgan in Photograph #6582). In addition, the subcontractors viewed Respondent as controlling the site (FOF #11, #27).
19. An employer may practice control by furnishing materials, including safety materials or safety training. *Fama Constr. LLC v. United States DOL*, 2022 U.S. App. LEXIS 18081, 2022 WL 375708 (11th Cir. June 2022) (factors supporting finding of controlling employer included supplying the labor and materials to the site, including, at times, providing safety equipment and conducted mandatory training meetings for subcontractors). The evidence presented at this hearing was that Respondent's trade partner agreement provided specifications for a variety of materials and Respondent supplied some of those materials. FOF #15.
20. Respondent exercised control by withholding consent for Complainant's Compliance Safety & Health Officers to open investigations where hazardous conditions were visible

from public roadways. FOF # 28, #41.

21. Respondent also exercised control when it refused to allow subcontractors to meet with the Compliance Safety & Health Officer in the public roadway. FOF #42.
22. While it is true that no party should suffer a penalty for the exercise of a constitutional right, Courts typically do not allow parties to use a right, privilege or immunity as both a shield and a sword. *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087 (5th Cir. 1979) ("The plaintiff who retreats under the cloak of the fifth amendment cannot hop to gain an unequal advantage against the party he has chosen to sue. To hold otherwise would . . . enable plaintiff to use his fifth amendment shield as a sword"). Accord. *Jones v. B.C. Christopher & Co.*, 466 F. Supp. 213, 227 (D. Kan. 1979) (refusing to allow civil litigant who properly asserted fifth amendment privilege against self-incrimination to prejudice defendant in civil action seeking discovery); *United States v. Keith*, 42 F.3d 234, 239 (4th Cir. 1994) (refusing to allow defendant to use rights under the Speedy Trial Act "as a sword and a shield" when defendant had requested additional time); *Heaney v. Associated Bank N.A.*, No 88-CV-913, 1990 U.S. Dist. LEXIS at *83, (1990 WL 446707), (ED Wis. Jul 11, 1990,) (where plaintiff asserts marital communication privilege in lawsuit, court will not allow her to use as both a shield to protect her from bad facts and a sword to prevent defendants from conducting discovery).
23. The requirements for an administrative warrant are designed to reconcile the privacy interests of employers with the public interest in the enforcement of safety and health regulations. The purpose of an administrative warrant is to ensure that the inspection is reasonable under the Constitution, authorized by statute, and conducted pursuant to an administrative plan containing specific neutral criteria. Furthermore, a warrant rarely prevents an inspection; it advises an employer of the scope, object and limits of the search. *Marshall v. Barlow's, Inc.*, 429 U.S. 307, 322 (1978).
24. Noting that, in this instance, Respondent's pattern of requiring a warrant evinces control over both the work site and the subcontractors does not, by itself, make the exercise of the right more costly. In fact, it was arguably less costly for Respondent, as it permitted time to abate violations and resulted in fewer citations. *See, e.g.*, Tipton Test. 3:30:00 - 3:35:50.
25. In the two instances where a warrant was required, Respondent attempted to use its constitutional right as a shield and a sword. The implication of Respondent's clear exercise of a sword to control access to the subcontractors cannot be ignored in the analysis of control.
26. The Commissioner followed established guidelines to determine that SDH was a controlling employer where Complainant demonstrated that subcontractors viewed SDH as controlling the site, where SDH exercised control over the means and materials used by the subcontractors, and where SDH had the ability to make corrections if it chose to enforce the provisions of its own subcontractor agreements.

27. On multi-employer construction sites, a general contractor is responsible for violations of its subcontractors when the general contractor could reasonably be expected to prevent or to detect and to abate hazards by reason of its supervisory capacity over entire work site, even when its own employees are not exposed. *Secretary of Labor v. Sparrow Constr.*, 16 O.S.H. Cas. (BNA) 1529, 1993 O.S.H. Dec. (CCH) ¶ 30202 (O.S.H.R.C.A.L.J. Sept. 2, 1993).
28. An employer is expected to make reasonable efforts to detect and abate any violation of safety standards of which it is aware and to which its employees are exposed despite the fact that the employer did not commit the violations. *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 469, 372 S.E.2d 342, 347 (1988).
29. If a reasonable and prudent person would recognize a hazard, the industry cannot eliminate it by closing its eyes." *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988).
30. The Complainant has carried its burden to show that SDH acted unreasonably under the circumstances by: failing to correct hazardous working conditions in plain sight of its construction managers; by failing to review or take into account subcontractors' reputations for safety; by failing to put into place any measures to supervise subcontractors' compliance with safety regulations; and, by promoting a climate where Respondent's deliberate choice to ignore unsafe conduct rewards such conduct and makes it likely that unsafe conduct will be repeated.
31. Furthermore, Complainant has met its burden to show, by the preponderance of the evidence, that the cited standards were applicable to the conditions observed, that employees were exposed to hazardous conditions that substantially increased the probability of an accident that could result in death or serious physical injury and that SDH knew or should have known of the conditions or conduct that created the hazard. *N&N Contractors, Inc. v. Occupational Safety & Health Rev. Comm'n*, 255 F.3d 122, 125-26 (4th Cir. 2001); *Comm'r of Labor v Liggett Group, Inc.*, OSHANC 94-3175 (Nov. 1 1996).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that the citations issued by the Complainant are **AFFIRMED** as issued. Respondent shall pay the following penalties:

- (1) With respect to NC OSH Docket No. 2020-6338 Respondent shall pay a total of \$27,900.00 for the violations cited;
- (2) With respect to NC OSH Docket No. 2021-6389 Respondent shall pay a total of \$6,300.00 for the violations cited;
- (3) With respect to NC OSH Docket No. 2022-6448 Respondent shall pay a total of \$11, 700.00 for the violations cited.

Respondent's total penalty amount of **\$45,900.00** shall be paid within **30 days** of the entry of this ORDER.

This the 10th day of June 2024.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner Presiding
maleon@leonlaw.org

APPENDIX A

PARTIES' STIPULATIONS

Prior to the hearing the parties submitted a joint prehearing report which included the following stipulated facts:

1. Pursuant to N.C.G.S. §95-135, the Review Commission has jurisdiction over the parties and subject matter to this action.
2. 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, including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. §§95-133 et seq.
3. Respondent is a foreign corporation, duly organized and existing under the laws of Georgia. It is active and current and maintains a place of business in Midland, North Carolina.
4. Respondent is a residential builder.
5. Respondent is an "employer" within the meaning of N.C.G.S. §95-127(11).
6. Respondent is developing and marketing the "River Park" Subdivision, a 200+ home residential development located in Mount Holly, Gaston County, North Carolina.
7. Each inspection herein occurred in the River Park Subdivision.
8. Gaston County is or was part of the Special Emphasis Program (SEP) for construction at all times relevant herein.
9. This was a multi-employer worksite pursuant to the Multi-Employer Worksite Policy CPL 02-00-124.
10. The parties do not dispute the timeliness of any pleadings or discovery in these matters.

Stipulations Specific to Each Inspection:

**2020-6338 (Insp. 318202660)
349 Crandon Road**

11. On September 2, 2020, Officer Chris Ray observed from a public way workers exposed to fall hazards while working from the roof of a two-story residential structure under construction.
12. After consultation by phone with counsel, Jeff Morgan, Construction Manager for Respondent, authorized the inspection to continue.

13. As a result of the inspection, one Repeat Serious citation with one item and one Serious citation with four items were issued on October 21, 2020, carrying the following proposed abatement dates and penalties:

ITEM NO.	STANDARD	ABATE DATE	PENALTY
	CITATION ONE (REPEAT SERIOUS)		
001	1926.501(b)(13)	immediately	\$12,600.00
	CITATION TWO (SERIOUS)		
001a	1926.20(b)(1)	immediately	\$ 6,300.00
001b	1926.20(b)(2)	immediately	grouped
002	1926.102(a)(1)	immediately	\$ 2,700.00
003	1926.1053(b)(1)	immediately	<u>\$ 6,300.00</u>
			\$27,900.00

14. The basis for the Repeat designation was Insp. 318188026 (112 Clauser Road, River Park Development, Mount Holly) wherein Respondent was cited for a violation of 1926.501(b)(13) on February 28, 2020, with a final order date of April 15, 2020.
15. For 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, as appropriate: 10% credit for size, 0% credit for good faith, and 0% credit for history.
16. No informal settlement conference was requested or held.
17. Respondent submitted a Notice of Contest, dated November 4, 2020.
18. Thereafter, Complainant received "Employer's/Respondent's Statement of Position," dated December 17, 2020, which did not request that any formal pleadings be served.

**2021-6389 (Insp. 312214426)
313 Oxbow Circle**

19. On February 25, 2021, Officer Bob Tipton observed from a public way three workers on a pump jack scaffold exposed to fall hazards while working on a residential structure under construction.
20. Officer Tipton attempted to open an inspection with John Whitley, Construction Manager for Respondent, who informed him a warrant was required.
21. Officer Tipton applied for and received a warrant.
22. Officer Tipton executed the warrant on March 4, 2021.
23. As a result of the inspection, one Serious citation with one item was issued on June 15, 2021, carrying the following proposed abatement dates and penalties:

ITEM NO.	STANDARD	ABATE DATE	PENALTY
	CITATION ONE (SERIOUS)		
001	1926.20(b)(2)	immediately	\$6,300.00

24. For 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, as appropriate: 10% credit for size, 0% credit for good faith, and 0% credit for history.
25. No informal settlement conference was requested or held.
26. Respondent submitted a Notice of Contest, dated July 1, 2021.
27. Thereafter, Complainant received "Employer's/Respondent's Statement of Position," dated July 30, 2021, which did not request that formal pleadings be served.

**2022-6448 (Insp. 318237120)
406 Buford Way**

28. On January 4, 2022, Officer Ted Hendrix observed from a public way fall hazards on two residential construction sites.

29. Officer Hendrix was denied entry to the sites by John Whitley, Construction Manager for Respondent.
30. Officer Hendrix applied for and received a warrant.
31. Officer Hendrix executed the warrant on January 12, 2022.
32. As a result of the inspection, one Serious citation with three subparts was issued on February 18, 2022, carrying the following proposed abatement dates and penalties:

ITEM NO.	STANDARD	ABATE DATE	PENALTY
	CITATION ONE (SERIOUS)		
001	1926.102(a)(1)	2/28/2022	\$2,700.00
002	1926.451(g)(1)(vii)	cdi	\$4,500.00
003	1926.501(b)(13)	2/28/2022	<u>\$4,500.00</u>
			\$11,700.00

33. For 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, as appropriate: 10% credit for size, 0% credit for good faith, and 0% credit for history.
34. An informal settlement conference was requested and held, which resulted in a "no change" letter.
35. Respondent submitted a Notice of Contest, dated March 30, 2022.
36. Thereafter, Complainant received "Employer's/Respondent's Statement of Position," dated May 20, 2022, which did not request that formal pleadings be served.

CERTIFICATE OF SERVICE

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

JAMES LARRY STINE
WIMBERLY, LAWSON
SCHNEIDER, STECKEL & STINE, PC
3400 PEACHTREE RD NE
SUITE 400
ATLANTA, GA 30326

By depositing a copy of the same in the United States Mail, by 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

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 12 DAY OF June 2024.

PAUL E. SMITH
CHAIRMAN



Karissa B. Sluss
Docket Administrator
NC Occupational Safety &
Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (984) 389-4132
NCOSHRC@oshrc.labor.nc.gov