

FILED

MAY 25 2023

NC OSH Review Commission

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

COMMISSIONER OF LABOR FOR)	DOCKET NO: 2020 - 6341
THE STATE OF NORTH CAROLINA)	
)	INSPECTION NO: 318197969
Complainant,)	
)	CSHO ID: E2636
v.)	
ASPLUNDH TREE EXPERT, LLC)	<u>CONSENT ORDER</u>
and its successors)	
Respondent.)	

THIS CAUSE coming on pursuant to the Notice of Pre-Hearing Conference (“Hearing Order”) on May 25, 2023 at 10:00 a.m., via the LifeSize teleconferencing platform. The Hearing Order was posted as required by the Rules of the North Carolina Occupational Safety and Health Review Commission. Stacey A. Phipps, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, appeared as counsel for the Complainant. Michael D. McKnight, attorney with Ogletree Deakins, Nash, Smoak, and Stewart, P.C., Raleigh, North Carolina, appeared as counsel for Respondent.

Pursuant to the Hearing Order a pre-hearing conference (the “Hearing”) was held for the purpose of considering matters which would simplify the issues and expedite the proceedings in the above referenced case. Upon a final resolution of the case being reached, such resolution is to be set forth in a Consent Order which shall constitute the final Order in the case. No affected employee of Respondent, or its representative, attended to have a say in, or participate as a party in, the Hearing.

At the time of the Hearing Complainant and Respondent (i) notified the Undersigned that the parties agree upon certain stipulations (“Stipulations”) and wish to make certain motions (“Motions”), and (ii) request that the Stipulations and Motions be made part of the Hearing record and that a Consent Order be issued. The Stipulations and Motions are as follows:

STIPULATIONS

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").

2. The Review Commission has jurisdiction over the parties and the subject matter to this action.

3. Respondent is a foreign limited liability company which was authorized to do business in North Carolina on October 6, 2017. It is active and current and maintains a place of business in Charlotte, North Carolina. Respondent is an "employer" within the meaning of N.C.G.S. Section 95-127(11); Respondent's employee specifically identified in the Complaint is an "employee" within the meaning of N.C.G.S. Section 95-127(10). Respondent is in the business of performing tree trimming and removal services, including trimming and removing trees and vegetation near electrical lines.

4. On June 29, 2020, Compliance Safety and Health Officer Bob Tipton, employed by the North Carolina Department of Labor, inspected Respondent's worksite located at 212 Croft Drive, Kings Mountain, North Carolina (the "Inspection"). Officer Tipton entered the worksite pursuant to his observing from a public way what he believed to be a hazard and the Special Emphasis Program addressing hazards associated with logging, tree harvesting, and tree removal operations. Respondent's Regional Safety Superintendent consented to the Inspection.

5. On September 16, 2020, as a result of the Inspection, Complainant issued the following Citation and Notification of Penalty (herein referred to as the "Original Citation"):

CITATION 01 (Serious)			
<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1910.269(r)(1)(iii)	Corrected During Inspection	\$ 3,250.00

6. Respondent submitted a timely Notice of Contest dated November 2, 2020.

7. On or about December 25, 2020, Complainant received "Employer's/Respondent's Statement of Position," which requested that formal pleadings be served. The Complaint was filed January 26, 2021 and Respondent's Answer And Affirmative Defenses To Complaint was filed March 5, 2021.

8. 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").

9. Complainant and Respondent waived the making of a transcript of the proceeding before the undersigned, and neither objected, either procedurally or otherwise, to this Hearing and to entry of this Order.

10. Respondent posted the Original Citation and the Hearing Order as required by the Rules. Neither Complainant nor Respondent has 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.

11. Respondent confirms that the violation alleged in the Original Citation as amended pursuant to Complainant's Motion has been abated. Complainant confirms that no additional documentation of abatement is required by Complainant.

12. The parties agree that upon granting of Complainant's Motion the proposed penalty for each Item designated in the Original Citation as amended pursuant to Complainant's Motion has been calculated in accordance with the standard Field Operations Manual procedure; and the new proposed penalty for each Item designated in the Original Citation as amended pursuant to Complainant's Motion has been derived giving consideration to standard mitigating factors and to specific factors applicable to Respondent.

13. Respondent agrees:

(a) That within ninety days of entry of this Order, it will hold a safety stand-down or other refresher training for any employee who may serve as a spotter on a North Carolina worksite regarding the duties, responsibilities, and expectations of an effective spotter.

(b) To pay the penalty assessed in this matter, as amended by Complainant's Motion, within 30 days of the date of this Consent Order. In the event Respondent does not pay the penalty as agreed upon, Complainant retains the right to institute collection proceeding as allowed by law. Respondent agrees to pay attorney's fees to Complainant in the event that the Complainant has to institute collection proceedings to collect the debt.

Payment is to be by check payable to the North Carolina Department of Labor, OSHA Division (identifying Inspection No. 318197969) and mailed to North Carolina Department of Labor, Financial Services Division, ATTN: Collections Division, 1101 Mail Service Center, Raleigh, North Carolina 27699-1101.

14. The parties agree to bear their own fees, costs and other expenses, including attorney's fees if any, that have been incurred in connection with any stage of these proceedings up to and including the filing of this Consent Order.

15. Complainant and Respondent agree 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 no outstanding issues remain to be resolved by an evidentiary hearing of this matter. The parties agree that this Consent Order is a full and final resolution of the claims set out in the underlying Original Citation, as amended pursuant to Complainant's Motion. The parties further agree that (i) the modification of any portion of the Original Citation by Complainant shall not be deemed to be an admission by Complainant that any such portion was alleged without merit, and (ii) none of the foregoing agreements, statements, stipulations and

actions taken by Respondent shall be deemed an admission by the Respondent of any of the allegations contained in the Original Citation as amended or waiver of defenses; provided however that in any subsequent proceeding with respect to matters covered by this Consent Order brought directly under the Act by Complainant, this Consent Order shall have the full force and effect of a final order. The agreements, statements, stipulations and actions herein by Complainant and by Respondent are solely for the purpose of resolving this matter economically and amicably without litigation 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. Respondent's agreement to accept any Citation under a particular standard shall not be deemed as an admission by Respondent that the cited standard applies to its operations for purposes of any other matter. There has been no employee objection to the reasonableness of any abatement period.

MOTIONS

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

1.Amend Citation 01, Item 001 from a Serious violation of 29 C.F.R. 1910.269(r)(1)(iii) to a Non-Serious Violation of 29 C.F.R. 1910.266(f)(2)(vii).
2.Revise the AVD to state: "(a) Job site at 212 Croft Drive, Kings Mountain, NC – where a machine was not operated at such a distance from employees and other machines such that the operation did not create a hazard for an employee."

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. **To 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.

FINDINGS OF FACT

Based on the record and on the Stipulations at the time of the Hearing as memorialized herein, the Undersigned makes the following Findings of Fact:

1. Complainant, Commissioner of Labor of the State of North Carolina, is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Act.

2. Respondent is subject to the provisions of the Act and jurisdiction of the Safety and Health Review Commission of North Carolina.
3. This Court has jurisdiction over the parties and the subject matter of this action.
4. Neither party has any objection, procedural or otherwise, to this Hearing.
5. The Stipulations are incorporated by reference as Findings of Fact to the extent necessary to give effect to the provisions of this Order.

CONCLUSIONS OF LAW

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.

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**.

Effective May 25, 2023.

R. Joyce Garrett
R. Joyce Garrett (May 25, 2023 11:01 EDT)

R. Joyce Garrett
Hearing Examiner

CONSENTED TO:

Stacey A. Phipps
Stacey A. Phipps (May 25, 2023 10:43 EDT)

Stacey A. Phipps
Special Deputy Attorney General
Attorney for Complainant

Michael D. McKnight
Michael D. McKnight (May 25, 2023 10:41 EDT)

Michael D. McKnight
Ogletree, Deakins, Nash, Smoak, and Stewart, P.C.
Attorney for Respondent

CERTIFICATE OF SERVICE

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

MICHAEL D MCKNIGHT
OGLETREE DEAKINS
8529 SIX FORKS RD
RALEIGH, NC 27615

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

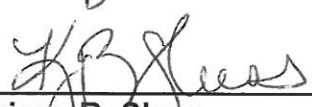
STACEY A PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

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 26 DAY OF May 2023.



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