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OCT 18 2021

NC Occupational & Safety Commission

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

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA **Complainant,** **v.** **SEARS CONTRACT INC** and its successors **Respondent.**	)))))))))))	**DOCKET NO: 2020 - 6343** **INSPECTION NO: 318202959** **CSHO ID: # K2192** **DECISION AND ORDER**

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on October 7, 2021 pursuant to a Notice of Hearing. Rory Agan, Assistant Attorney General, North Carolina Department of Justice, appeared for Complainant. Michael C Lord, Attorney with Williams Mullen, Raleigh, North Carolina, appeared for the Respondent.

At the time of the Hearing the parties agreed upon and consented to the following Stipulations:

1. The Hearing in this matter shall be conducted via the video conferencing platform known as "Lifesize";
2. The presence of a court reporter during the Hearing is waived;
3. The Hearing's audio and video will be recorded through Lifesize (the "Recording");
4. The Recording will be the official record of the Hearing;
5. The Recording will be made available to all counsel after the Hearing concludes (the Host will send a link to the Recording as soon as is practicable after the Hearing concludes);
6. The Administrative Law Judge shall control when the Hearing is on and off the record;
7. The Hearing will be deemed to have taken place in Raleigh, North Carolina;
8. During the period of time of the OSHA inspector's inspection, two employees of HV Drywall were not tied off and were in violation of the standard cited in Citation 01 Item 002, and such violation was serious; and
9. During the period of time the OSHA inspector observed the violative conditions the superintendent of Respondent, who was Respondent's sole employee, was not present at the site.

Neither party objected to the Undersigned conducting the Hearing.

At the Hearing Complainant's sole witness was Compliance Safety and Health Officer Ms. Peggy Reme ("CHOS Reme"). Witnesses called by the Respondent were: Mr. Juan Marquina, Respondent's Superintendent at the work site; Mr. Edy Herrera, owner and operator of HV Drywall; Mr. Russ Rodems, Safety Director for Respondent; and CHOS Reme.

Complainant issued to Respondent Citation 01 with two items: Item 001 was for an alleged violation of 29 CFR 1926.102(a)(1) relating to failure to use required eye protection; and Item 002 was for an alleged violation of 29 CFR 1926.453(b)(2)(v) relating to failure to use required fall protection. During the cross-examination of CHOS Reme Complainant moved to withdraw Citation 01 Item 001 with prejudice.[1] There being no objection by Respondent, Complainant's Motion was **GRANTED**. Accordingly, for purposes of brevity and clarity the portion of Citation 01 related to eye protection in not included and no evidence nor discussion pertaining to Citation 01 Item 001 shall be included in this Decision and Order.

Citation 01, Item 002

Complainant alleged a violation of the Occupational Safety and Health Act of North Carolina in Citation 01, Item 002 as follows:

> Citation 01 Item 002 Type of Violation: Serious
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> 29 CFR 1926.453(b)(2)(v): A body belt was not worn and a lanyard was not attached to the boom or basket when working from an aerial lift: (Note: As of January 1, 1998, subpart M of this part (1926.502(d)) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restrain system is acceptable and is regulated.)
>
> a) jobsite, two framing subcontractor employees installing Tyvek Commercial Wrap from a JLG aerial lift, up to 20 feet from the ground, were not using personal fall protection.
>
> Date By Which Violation Must Be Abated: Corrected During Inspection
> Proposed Penalty: $5,600.00

[1] CHOS Reme testified (1) there were two subcontractor employees working in an aerial basket using a power drill to install Tyvek Commercial Wrap; one employee, Edy Herrera, was not wearing eye protection and he was the exposed employee; and (2) the Investigative File she prepared was complete and accurate and that photographs 2, 3 and 16 in the Investigative File were evidence which supports the violation – photo 2 showed two workers in basket but not their faces; photo 3 showed the back of a worker's head but Edy Herrera was not in the photo; photo 16 was photo of equipment with no person in photo. When questioned about photo 4 in the Investigative File CHOS Reme identified Edy Herrera as the worker in the basket who was facing the camera and confirmed that the photo showed that Edy Herrera was wearing safety glasses.

The Standard

29 CFR 1926.453(b)(2)(v) specifically provides the following:

"A body belt shall be worn and a lanyard attached to the boon or basket when working from an aerial lift." [Note to paragraph (b)(2)(v): As of January 1, 1998, subpart M of this part (§1926.502(d)) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is required under §1926.502(e).]

Background

Relevant to the history of this matter: CHOS Reme observed, from a public area, two workers in Cabarrus County, North Carolina, performing construction work while in an aerial basket and not protected by personal fall protection; Cabarrus County is subject to the Special Emphasis Program for Construction Activities which includes fall protection; CHOS Reme contacted her supervisor and was given approval to proceed with an inspection of the work site; it was a multi-employer worksite at which Potter Construction Services ("Potter") was the general contractor, Sears Contract, Inc. (herein sometimes referred to as "Sears" or "Respondent) was the first tier framing sub-contractor, and HV Drywall, Inc. ("HV Drywall") was the second tier framing sub-contractor pursuant to the *terms of a contract with Sears*; at the time of her arrival at the jobsite on September 2, 2020, Sears' superintendent Juan Marquina ("Marquina") had gone to lunch and was not at the site; Marquina returned to the work after the sub-contractor employees were out of the basket; CHOS Reme opened the inspection with Marquina, presented her credentials and conducted the inspection, taking photographs, conducting interviews, and making notes; she did not obtain any written witness statements; she held a closing conference and recommended that a citation be issued to Respondent; she prepared an Investigative File (Complainant's Exhibit C-1) which she believed to be complete and accurate.

Based on the Stipulations at the time of the Hearing, and on the testimony/evidence presented at the Hearing and considering the record and the briefs/memoranda of the parties, and applicable law, the Undersigned makes the following Findings of Fact and Conclusions of Law.

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

2. Respondent is a North Carolina corporation, active and in good standing, in the State of North Carolina, and maintains a place of business in North Carolina. Respondent at all times relevant to this action maintained a place of business in North Carolina, where it was engaged in construction, a class of activity which as a whole affects interstate commerce. Respondent is, therefore, an "employer" as defined by N.C.G.S. Section 95-127(11). Respondent maintains employees as defined by N.C.G.S. Section 95-127(10).

3. Around lunch time on September 2, 2020, a Compliance Safety and Health Officer Peggy Reme employed by the North Carolina Department of Labor conducted an inspection of Respondent's work site located at 4070 Harris Square Drive in Harrisburg, North Carolina (the "Inspection"), pursuant to the Complainant's special emphasis program for construction in Cabarrus County.

4. During the Inspection CHOS Reme took a number of photographs of the work site which were incorporated into the Investigative File and entered into evidence. She also interviewed employees and incorporated statements into the Investigative File.

5. As a result of the Inspection, on November 6, 2020, Complainant issued one citation carrying the following proposed abatement dates and penalties (herein collectively referred to as the "Original Citation"):

CITATION 01 (Serious)

Item No.	Standard	Abatement Date	Penalty
001	29 CFR 1926.102(a)(1)	Immediately Upon Receipt	$ 3,500.00
002	29 CFR 1926.453(b)(2)(v)	Corrected During Inspection	$ 5,600.00

Item No. 001 was withdrawn by Complainant during the Hearing.

6. The Respondent submitted a timely Notice of Contest.

7. A Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of North Carolina (the "Rules").

8. Based on Stipulations 8 and 9, the remaining issue between the parties is whether Respondent had knowledge of the violative condition.

9. Relative to the alleged violation of 29 CFR 1926.453(b)(2)(v) CHOS Reme provided evidence that: (1) she observed the workers in the aerial basket at 11:55 a.m. on September 2, 2020, and that the employees were working in the basket about 15 minutes; (2) during that time period the workers were not wearing fall protection equipment; (3) the workers were employees of Respondent's subcontractor HV Drywall; (4) she had no evidence that Respondent's

superintendent was present at the time the subcontractor's workers got into the aerial basket and went up to do the 15 minutes of work; (5) when she arrived at the site Respondent's superintendent was not present and he did not return until after the workers were out of the basket; (6) she interviewed workers of HV Drywall; (7) she is not fluent in Spanish; (8) Respondent had a safety and health program.

10. CHOS Reme also provided evidence that: (1) she was not asserting that Respondent had 'actual' knowledge that the two workers were not tied off during the approximately 15 minutes when she observed them in the aerial basket, but rather that Respondent had 'constructive knowledge' that they were not wearing fall protection. (2) her basis for constructive knowledge was: (i) because Respondent's superintendent 'was on the site all day long every day except for lunch break', (ii) the workers doing framing operation had been on site for about a week, this was not the first day the workers had been installing Tyvek on the building, and at the time of the Inspection the workers were completing the installation of Tyvek on the 3rd side of the building (iii) on September 2 the subcontractor employees had come to work at about 8 a.m. although she did not know that the employees were working in the aerial basket at 8 a.m.; (iv) the view of the aerial basket 'from the ground was not obstructed', (v) Respondent 'had control over the subcontractor', (vi) when she asked the workers to show her their PPE the workers had to go to a box and truck to get the equipment, it took them about 10 minutes to find equipment, and it 'looked like they were searching for' the equipment, (vii) in her opinion, with reasonable diligence Respondent's supervisor knew what work would be done during the day, and the supervisor should be able to anticipate what work would be done and what kind of exposure.

11. CHOS Reme also testified that in her opinion the fall protection produced to her was not acceptable' ('one harness did not have legible markings on it' ; 'a couple of retractable components were not suitable for that piece of equipment'; 'not a lanyard and harness that was readily available'; 'only one complete harness was available).

12. Juan Marquina, Respondent's on site supervisor, provided evidence that: (i) he was on duty the week before the inspection; (ii) he inspected for safety; each day he walked the site to look for hazards; (iii) he looked to see if workers of subcontractor tied off when in aerial basket; he saw them tied off; (iv) fall protection was used by workers appropriate for the work; (v) he broke for lunch about 11:40 to 11:45 a.m. on September 2, and had lunch at Subway about 3-4 minutes away; (vi) during lunch he received a call from the supervisor for general contractor informing him of the OSHA inspection and he returned to the site; (vii) he was surprised to learn that subcontractor workers got back into the aerial basket after he left for lunch; (viii) he was very surprised they were working without fall protection; (ix) up to the time of the Inspection the workers were tied off when working in the air; (x) he had inspected the subcontractor's fall protection equipment and thought the equipment was appropriate.

13. Edy Herrera, the owner/operator of HV Drywall provided evidence that : (i) English is his second language, and he was the only member of HV Drywall that spoke English; (ii) on September 2 he had been wrapping a building with Tyvek; descended from lift to ground for lunch; when got to ground took off fall protection equipment; had a piece of Tyvek to put up; went back up without fall protection for about 5-10 minutes; neither he nor other fella in basket tied off; (iii) Marquina was not there when they went back up; (iv) he made a 'mistake' -- he did

not tie off – 'never imagined someone would come around during lunch time' to inspect; (v) he had been trained in working safely from lift basket and wearing fall protection; working without fall protection was against the training; (vi) Drywall had 2 safety harnesses, 1 lanyard, and 1 yo-yo.

14. HV Drywall had a contract with Respondent for the work at the site; HV Drywall does a majority of it work for Respondent; HV Drywall works job by job, one job at a time; and HV Drywall can work for contractors other than Respondent.

15. Russ Rodems provided evidence that : (i) he is the Safety Director for Respondent, with 40 years experience in construction; (ii) he did not participate in the inspection by CHOS Reme but he was part of the 'on-going inspection'; he contracted Juan Marquina; talked to Edy Herrera; talked to general contractor; reviewed the Citation and the Investigative File; (iii) in his professional opinion a yo-yo (self retractable lanyard) is as satisfactory as a fixed lanyard for the work which was being performed, and HV Drywall had appropriate equipment for fall protection; (iv) prior to the time of the Inspection on September 2, there had been no problem with Edy Herrera and safety; (v) he would not expect Juan Marquina as superintendent for Respondent to 'get into the tool box' of its subcontractor 'to inspect its equipment'; (vi) after the inspection Respondent required Juan Marquina and Edy Herrera to take the OSHA 30 hour course; further Respondent has sought the assistance of OSHA's consultative services in Raleigh and in Charlotte, North Carolina.

16. Contrary to CHOS Reme's testimony Russ Rodems testified that there were on site 2 harnesses, 1 lanyard, and 1 yo-yo (which is a self retracting lanyard, or SRL).

17. The Investigative File which CHOS Reme testified was complete and accurate, and which was introduced into evidence by Complainant, contained the following statements:

> Regarding Respondent's Safety and Health Program:
> Page 36 : Respondent had Jobsite audits/inspections; Disciplinary action program Frequent/regular safety inspections, Enforcement of safety rules.
>
> Respondent had Fall protection training program ; Fall protection – training certification; PPE assessment conducted/certified; Appropriate PPE provided/required; each of these items were designated as having 'Deficiencies' [Note: no specific deficiencies were identified]
>
> Respondent's safety and health program was assigned a designation of "Basic (25%)"
>
> Page 43: in section captioned "Evaluation of Employer's Overall Safety and Health Program" were the following statements:
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> "Employer has a developmental safety and health program that includes employee training on various topic such as ...accident prevention...personal protective equipment ... fall protection ....Superintendents conduct frequent and regular job site inspections and tool box talks."
>
> Page 50: in section captioned "Evidence of EMPLOYER KNOWLEDGE" regarding the standard cited in Citation 01 Item 002:

"Constructive Knowledge: Juan Marquina, Superintendent is at the jobsite all day except for lunch breaks. He was monitoring the work activities of the framing subcontractor. His daily activities include checking for hazards, such as damaged tools and improper personal protective equipment." "The aerial lift had warning signs on it including one that stated 'Wear approved fall protection items and attach to marked locations.' "

18. Respondent's supervisor was not present at the work site during the 15 minute interval in which the subcontractor's employees were working in an aerial basket without fall protection, and Respondent did not have actual knowledge of such event.

19. 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

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. The Respondent is subject to the provisions of the Occupational Safety and Health Act of North Carolina, N.C.G.S. 95-126 et seq (the "Act").

3. The burden of proof is on the Complainant to prove by a preponderance of the evidence that Respondent had either constructive knowledge or actual knowledge of the cited condition and violation and that Respondent violated the cited provision of the Act.

4. The Complainant has failed to prove by a preponderance of the evidence that Respondent had either constructive or actual knowledge of the fall protection violation of 29 CFR 1926.453(b)(2)(v) [Citation 01 Item 002], for which it has been cited in this case.

DISCUSSION

To establish a violation of a specific OSHA standard, Complainant must establish the following elements: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). To establish that the violation was serious the Complainant must also establish that the hazard created the possibility of an accident and that the substantially probable result of an accident could be death or serious bodily injury. See *Commissioner of Labor v Liggett Group, Inc., OSHANC 94-3175 (1996); Commissioner of Labor v Yates Construction Company, Inc., OSHANC 93-2967 (1995); JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009); Commissioner of Labor v. Young Construction Co., OSHANC 02-4130 (2004). A reasonable person standard is used to determine

if an employer knew or should have known of the condition or conduct. Daniel Construction Co. v. Brooks, 73 N.C. app. 426 (1984).

Complainant has the burden of establishing each element by a preponderance (greater weight) of the evidence. *Rule .0514(a); See Hartford Roofing Co., 17 BNA OSCH 1361 (No. 92-3855, 1995).* A preponderance of the evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982). If Complainant fails to meet its burden of proof on any one of the required elements, then the violation cannot be sustained.

In this case the parties stipulated to three of the four elements necessary to establish a violation of a specific OSHA standard, and to the classification as 'serious'. Stipulations 8 and 9. Accordingly, proof with respect to those elements is not required. The only remaining element on which the Complainant carries the burden of proof is that of knowledge (i.e. the employer had actual or constructive knowledge of the violation).

This is a case where a 1st tier framing sub-contractor is being held liable under the multi-employer worksite doctrine for violation by its 2nd tier framing subcontractor. The multi-employer worksite doctrine was first enumerated by the North Carolina Review Commission in Commissioner of Labor v. Romeo Guest Associates, Inc., OSHANC 96-3513, Slip Op., (RB 1998) and was later confirmed in Commissioner of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 28 (2005) (review denied 359 N.C. 629 (2005)). It states that a general contractor's duty under N.C.G.S. 95-129(2) to comply with "occupational safety and health standards or regulations" extends to employees of subcontractors while they are on the jobsite. However, this is a reasonable duty and not one of strict liability. "...the general contractor is only liable to those violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity. In addition, the general contractor cannot anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations created by others....The general contractor is required to make reasonable efforts to anticipate hazards to subcontractor's employees and reasonable efforts to inspect the jobsite to detect violations that its subcontractors may create." Romeo Guest, Slip Op. at 6-7 (internal citations omitted).

Complainant's witness, CHOS Reme, testified that Respondent should have had knowledge of the violative conditions cited in Citation 01 Item 002 (subcontractor employees working in an aerial lift without fall protection), and that the Respondent was cited based on 'constructive knowledge', and not on 'actual' knowledge. Complainant cites Allred v. Cap. Area Soccer League, Inc., 194 N.C. App. 280, 288, 669 S.E.2d 777, 782 (2008) for the principal that constructive knowledge can be shown where violative conditions are so open and obvious that it should have been detected.

Regarding the violative conditions cited in Citation 01 Item 002 being open and obvious, the uncontroverted evidence shows that the subcontractor employees where working in the aerial basket without fall protection for only about 15 minutes at a time when Respondent's supervisor,

and sole employee at the site, was having lunch some 2 to 3 minutes away. Even though the violative condition may have been open and obvious to someone on the ground at or near the work site, it was not visible to the Respondent's superintendent who was not at or near the work site.

CHOS Reme's statements that the subcontractor did not have appropriate fall protection equipment available for use by its two employees who worked in the aerial basket was disputed by testimony of Juan Marquina, Respondent's on site supervisor, the testimony of Edy Herrera, the owner/operator of the 2nd tier subcontractor, and by the testimony of Russ Rodems, the Safety Director for Respondent. Marquina, Herrera and Rodems also gave evidence to show that Respondent supervised its employees, had a training program, and established work rules designed to ensure that workers used fall protection when working in the air in an aerial lift. Their testimony was not specifically rebutted by Complainant. Although these witnesses were affiliated in some way with Respondent, their testimony was sufficiently credible, together with statements in the Investigative File that Respondent had a safety and health program including safety rules, training and inspection, to prevent Complainant from carrying the burden of proof on the element of constructive knowledge.

It is generally recognized that an employer lacks constructive knowledge if the employer exercises reasonable diligence to discern the presence of violative conditions. Secretary of Labor v. Republic Services of Florida, L.P., 2009 WL 5915371, 23 OSH Cas. (BNA) 1156 (Dec. 15, 2009). Exercising reasonable diligence includes factors such as adequately supervising employees, implementing training programs, and establishing work rules designed to ensure that employees work safely. Secretary of Labor v. R. Williams Constr. Co., 20 OSH Cas (BNA) 2026, 2004 W 1505411 (June 28, 2004), citing Mosser Constr. Co., 15 BNA OSHC 1408, 1414 (1991). When the evidence shows that the employer exercised reasonable diligence the employer cannot be held to have constructive knowledge of the hazard and a violation cannot be established.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED, ADJUDGED AND DECREED** that the Citation 01 Item 002 proposed in this matter is **DISMISSED**.

This 18th day of October, 2021.

R. Joyce Garrett
Administrative Law Judge

CERTIFICATE OF SERVICE

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

MICHAEL C LORD
WILLIAMS MULLEN
PO BOX 1000
RALEIGH NC 27602

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

RORY AGAN
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

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

THIS THE 26 DAY OF October 2021.

Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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Raleigh, NC 27699-1101
TEL.: (919) 733-3589