

BEFORE THE OCCUPATIONAL SAFETY AND HEALTH **FILED**  
REVIEW COMMISSION OF NORTH CAROLINA

NOV 3 2023

NC OSH Review Commission

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT - RESPONDENT,

DOCKET NO. OSHANC 2019-6131  
OSHA INSPECTION NO. 318162112

v.

LENNAR CAROLINAS, LLC  
and its successors

**ORDER OF THE COMMISSIONERS**

RESPONDENT - PETIONER.

**DECISION OF THE REVIEW COMMISSION**

This appeal was heard at or about 10:00 A.M. on the 18<sup>th</sup> day of November 2022, via remote online courtroom, by Paul E. Smith, Chairman, William Rowe, and Terrence Dewberry, members of the North Carolina Occupational Safety and Health Review Commission.

**APPEARANCES**

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

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

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission AFFIRMS the Order of Hearing Examiner Laura Wetsch.

## ISSUES PRESENTED

**WHETHER THE EMPLOYER LENNAR, AS THE GENERAL CONTRACTOR, COMMITTED A SERIOUS VIOLATION OF 29 CFR 1926.501 (b)(13) BY FAILING TO CORRECT A HAZARD TO WHICH THE EMPLOYEE OF A SECOND TIER SUBCONTRACTOR WAS EXPOSED?**

## SAFETY STANDARDS AND/OR STATUTES AT ISSUE

**29 CFR 1926.501 (b)(13) Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels was not protected by guardrail systems, safety net system, or personal fall arrest system, nor was the employee provided with an alternative fall protection measure under another provision of paragraph 1926.501(b).**

## FINDINGS OF FACT

1. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10) and is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
3. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
4. On February 28 and March 1, 2022, a remote hearing was held before the Honorable Laura Wetsch.
5. On April 7, 2022, Hearing Examiner Laura Wetsch filed an Order finding that the provisions of 29 CFR 1926.501 (b)(13), as alleged in instance (a) and instance (c) in Citation One, Item 1 had been violated and affirming the proposed penalty and abatement date associated with the violation for a total of \$7,000.00.
6. On May 9, 2022, Respondent timely petitioned the Review Commission for a review of the decision of the Hearing Examiner.
7. An Order granting review was filed on May 20, 2022.

8. The oral arguments were heard by the full Commission on November 18, 2022.
9. The Review Commission adopts the Hearing Examiner's findings of facts.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing adopted findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.
2. The Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The Complainant met its burden of proving by substantial evidence that the Respondent committed a serious violation of 29 CFR 1926.501 (b)(13).
5. The Commission AFFIRMS the Order of Hearing Examiner Laura Wetsch.

### **DISCUSSION**

As General Contractor, Lennar was subject to the multi-employer doctrine as set forth in *Commissioner of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 609 S.E.2d 407 (2005). Under the multi-employer doctrine, “an employer who controls or creates a worksite safety hazard may be held liable under the Occupational Safety and Health Act even if the employees exposed to the hazard are employed solely by another employer.” *Id.* at 23, 609 S.E.2d at 413. “[T]he duty is a reasonable duty and the general contractor is only liable for violations that its subcontractor may create if it could reasonably have been expected to detect the violation by inspecting the job site.” *Id.* at 28, 609 S.E.2d at 415. One way to establish liability under the

multi-employer doctrine is to show that the controlling employer had actual or constructive knowledge of the violative condition and failed to take corrective action. Constructive knowledge can be shown by proving that the violative condition was so open and obvious that it should have been detected by the general contractor. *See, e.g., Allred v. Cap. Area Soccer League, Inc.*, 194 N.C. App. 280, 288, 669 S.E.2d 777, 782 (2008) (recognizing that a party has constructive knowledge of a danger if it is “so open and obvious that it should have been known”).

In this case, Lennar was the controlling employer of the worksite and the employees exposed were the employees of a second or third-tier subcontractors. It is undisputed that Lennar employees Scott Pittman and Brandon Hutchens, Construction Managers, were on the jobsite while the violations were occurring. Scott Pittman testified at the hearing. These two employees were observed in a stationary golf cart 140-175 feet from the residential structures where the violative conditions were occurring (T1pp 19-91, Comp. Exh. 3.2, 3.6, 3.7, 3.29, 3.31, 3.32, 3.36, 3.37). CSHO Burgette testified that after introducing himself, he asked Lennar Construction Manager Pittman if he saw the employees working on the structures and Pittman replied that he did (T1 p 96). Neither Lennar Construction Managers Scott Pittman or Brandon Hutchens addressed the hazards. While they may or may not have seen the violations, in the exercise of reasonable diligence they plainly should have and should have taken steps to abate the risk. That is all that is required to hold Lennar accountable under the multi-employer doctrine.

The violations were open, obvious, and ongoing. The Compliance Officer saw safety violations from the public right of way and that prompted his inspection. The two Lennar constructions managers were on-site when the violations were occurring over an extended period

of time. "If an employer is allowed to 'contract' away his responsibility in providing a safe workplace, the effectiveness of the safety standards employed by the legislative Act would be drastically diminished." *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 34, 426 S.E.2d 282, 287 (1993). As General Contractor Lennar had a duty of reasonable care. Lennar did not meet that duty.

The Hearing Examiner upheld citation 1 item 1a and 1c. Item 1a is written in the citation as Lot 10, and in the Order finding of fact 46 the Hearing Examiner states that Complainant Department of Labor did not meet their burden of proof for Lot 10, but she also states in finding of fact 50 that the Complainant misidentified Lot 11 as Lot 10. She did find violative conditions and knowledge or constructive knowledge for Lots 11 and 103 in finding of fact 45. The Hearing Examiner also points out that the Complainant's citation mis-identified Lot 10 as Lot 11 and Lot 11 as Lot 10. This can be hard to follow, but as the Hearing Examiner states on page 13 of her order, "These discrepancies are concerning and may have been sufficient to defeat the Complainant's case **but for** the multiple photographs and the testimony of Respondent's witnesses, all of which together establish the open and obvious violations of Lots 11 and 103 over a substantial period of time, and the Respondent CM's ability to see those violations with the exercise of due diligence. Accordingly, the cumulative weight of the evidence establishes the Complainant's citation by a preponderance of the evidence."

## ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's April 7, 2022, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. Respondent abated the violations during the inspection and is now ordered to pay the assessed penalty of \$7,000.00 within 30 days of the filing date of this Order.

This Nov 3, 2023.

Paul E. Smith

Paul E. Smith (Nov 3, 2023 16:11 EDT)

PAUL E. SMITH, CHAIRMAN

TD

Terrence Dewberry (Oct 30, 2023 08:40 EDT)

TERRENCE DEWBERRY, MEMBER

William D Rowe

William D Rowe (Oct 30, 2023 08:55 EDT)

WILLIAM D. ROWE, MEMBER

**CERTIFICATE OF SERVICE**

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

DAVID SELDEN  
JULIE PACE  
PSGM LAW  
7901 N. 16TH ST STE 200  
PHOENIX, ARIZONA 85020

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

SAGE BOYD  
NORTH CAROLINA DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH, NC 27602-0629

By depositing 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 3rd DAY OF November, 2023.



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