

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

**COMMISSIONER OF LABOR OF THE
STATE OF NORTH CAROLINA**

COMPLAINANT,

v.

**SOUTHERN APPALACHIAN
GRADING AND EXCAVATION, INC.,
and its successors
RESPONDENT.**

) **DOCKET NO.: OSHANC 2021-6419**
) **INSPECTION NUMBER: 318225273**
) **CSHO ID: U6109**

ORDER

FILED

JAN 25 2023

NC OSH Review Commission

THIS CAUSE came on for hearing and was heard before the undersigned, Reagan H. Weaver, Hearing Examiner for the North Carolina Occupational Safety and Health Review Commission, January 23, 2023 at 10 a.m., via the Lifesize teleconferencing platform, pursuant to a Notice of Hearing, and having reconvened on January 25, 2023 at 11 a.m. by agreement of all parties. Jonathan D. Jones, Assistant Attorney General, North Carolina Department of Justice, appeared for Complainant. Travis W. Vance, Fisher & Phillips, LLC, appeared for Respondent. 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 the parties agreed upon and consented to the following stipulations:

STIPULATIONS

1. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance 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 of this action.
3. Respondent, Southern Appalachian Grading & Excavation, Inc. is a North Carolina corporation, duly organized and existing under the law of the State of North Carolina, which does business in the State of North Carolina, and maintains a principal place of business in Waynesville, North Carolina. Respondent was authorized to do business in North Carolina on November 21, 2005. Respondent is in the business of providing excavation and grading services. Respondent is an "employer" within the Meaning of

N.C.G.S. § 95-127(11); and maintains “employees” within the meaning of N.C.G.S. § 95-127(10).

4. On or between July 29, 2021 and September 9, 2021, Compliance Safety and Health Officers Denese Ballew and Michael Greer and Compliance Safety and Health Officer in Training Tracy Wolfe, employed by the North Carolina Department of Labor, inspected Respondent’s worksite located at 3 Pinnacle Crest Circle, Arden, North Carolina pursuant to a complaint referral.
5. As a result of the inspection, Complainant issued the following citations carrying the following proposed abatement dates and penalties on September 9, 2021:

CITATION NUMBER ONE (Repeat Serious)

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	29 CFR 1926.651(c)(2)	Corrected during insp.	\$5,600.00
2	29 CFR 1926.652(a)(1)	Corrected during insp.	\$5,600.00

6. The Respondent submitted a timely Notice of Contest, dated November 3, 2021.
7. A hearing in this matter was scheduled pursuant to the Rules of Procedure of the Occupational Safety and Health Review Commission of North Carolina (“the Rules”).
8. 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 the entry of this Order.
9. 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 his or her 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.
10. Respondent confirms that the violations alleged in the Original Citation have been abated.
11. The parties agree to bear their own attorney’s fees (if any), costs and other expenses that have been incurred in connection with any stage of these proceedings up to and including the filing of this Order.
12. Provided the respective Motions below of each party are granted, Complainant and Respondent agree that:

- (a) 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;
- (b) this Order is a full and final resolution of the claim set out in the underlying Original Citation;
- (c) 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;
- (d) none of the 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 or as a waiver of defense, provided however, that in any subsequent proceeding with respect to matters covered by this Order brought directly under the Act by Complainant, this Order shall have the full force and effect of a final order;
- (e) 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 further litigation and shall not be used for any other purposes except for proceedings and matters arising under the Act and Article 21, Chapter 95 of the North Carolina General Statutes;
- (f) the penalty for each item designated in the Original Citation has been calculated in accordance with the standard Field Operations Manual procedure giving consideration by Complainant to standard mitigating factors and to specific factors applicable to Respondent; and
- (g) there has been no employee objection to the reasonableness of any abatement period.

13. Respondent agrees to continue its best efforts to comply with the requirements of the Act.

14. Respondent further agrees to the following:

- (a) Improve and maintain an effective and comprehensive safety and health program. As part of the safety and health program, the Respondent will conduct job hazard analyses of all tasks that might expose workers to hazards. The Respondent will implement elements to meet the requirements of the North Carolina Department of Labor – Occupational Safety and Health Division (hereafter “OSH Division”) Focused Construction Inspection criteria and revise existing safety and health programs to thoroughly address issues resulting from this inspection. This program will include written plans for fall protection, machine guarding, excavation and trenching, electrical, PPE/hazard assessment, heat stress,

Hazard Communication, lifting and rigging loads and others as required by 29 CFR 1926.

(b) Respondent will develop and utilize an excavation and trenching inspection checklist, which will be required to be completed by the Competent Person prior to employees entering the excavation/trench. The inspection checklist shall be maintained on site and will be provided to the OSH Division upon request;

(c) Within sixty (60) days of this Order, employees shall receive excavation and trenching competent person and awareness training. Respondent will also provide excavation and trenching awareness refresher training to all employees on at least an annual basis. In addition, Respondent will require their managers and/or designated onsite Competent Person(s) to attend and successfully complete an OSHA 10 or 30- Hour Construction Course within ninety (90) days of this Order;

(d) Ensure that safety and health rules are enforced (by Respondent) through regular, scheduled, and unscheduled, worksite inspections and established, documented progressive disciplinary procedures. In addition, Respondent will document the worksite inspections and will maintain records of all worksite inspections and disciplinary actions associated with safety and health issues. These records will be provided to the OSH Division upon request.

(e) Continue any present Safety Program, including conducting periodic safety meetings with employees at regular intervals. Respondent will conduct tool box talks on at least a weekly basis with employees. Respondent will actively encourage all workers to participate in workplace safety activities. During such meetings, employees should be able to communicate safety suggestions or complaints to their supervisor.

15. Respondent agrees to pay the proposed total penalty of **\$28,000.00 within ninety (90) days of this Order**. Payment is to be by check payable to North Carolina Department of Labor, OSH Division (Identifying Inspection No. 318225273) and mailed to North Carolina Department of Labor Financial Services Division, ATTN: Collections Division, 1101 Mail Service Center, Raleigh, North Carolina, 27699-1101.

MOTIONS

1. Complainant moves to make the following amendments to the Original Citation

("Complainant's Motion"):

(a) Reclassify Citation One, Item 1 from Repeat Serious to Serious

(b) Reclassify Citation One, Item 2 from Repeat Serious to Serious

(c) Increase the penalty on Citation One, Item 1 from \$5,600.00 to \$14,000.00; and

(d) Increase the penalty on Citation One, Item 2 from \$5,600.00 to \$14,000.00.

Except as expressly set forth above in Complainant's Motion, the Original Citation shall remain unmodified or amended.

Respondent did not object to Complainant's Motion.

2. Respondent requested that, upon granting the Complainant's Motion, the Undersigned consider its Motion to Withdraw Respondent's Notice of Contest to the Original Citation.

Complainant did not object to Respondent's Motion.

FINDINGS OF FACT

Based on the stipulations at the time of the Hearing and as memorialized herein, the Undersigned makes the following:

1. Complainant, Commissioner of Labor of the State of North Carolina, is an agency of the State Charged by law with 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 Conference.
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. The Complainant's Motion is hereby **GRANTED**; and
2. The Respondent's Motion is hereby **GRANTED**, and Respondent shall pay the penalty of **\$28,000.00** in the manner set forth herein.

This Jan 25, 2023

Reagan H. Weaver

Reagan H. Weaver (Jan 25, 2023 11:13 EST)

REAGAN H. WEAVER
Hearing Examiner

CONSENTED TO:

JOSHUA H. STEIN
Attorney General



Digitally signed by Jonathan D. Jones
DN: cn=Labor Section, o=North Carolina
Department of Justice, cn=Jonathan D.
Jones, e=sjones@ncdoj.gov
Reason: I am the author of this document
Location
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ATTORNEYS FOR COMPLAINANT

Travis W.
Vance

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Charlotte, North Carolina 28236

Telephone No. (704) 778-4164
tvance@fisherphillips.com

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

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

TRAVIS W. VANCE
FISHER & PHILLIPS
227 WEST TRADE ST.
SUITE 2020
CHARLOTTE, NC 28202

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

JONATHAN D. JONES
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

via email to carla.rose@labor.nc.gov.

THIS THE 30 DAY OF January 2023.



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