

BEFORE THE NORTH CAROLINA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE	)	DOCKET NO.: OSHANC 2022-6480
STATE OF NORTH CAROLINA	)	INSPECTION NUMBER: 318241130
	)	CSHO ID: L1173
COMPLAINANT,	)	
	)	
v.	)	FINAL ORDER
	)	
PROCAR II, INC.	)	
<i>and its successors</i>	)	
	)	
RESPONDENT.	)	

THIS MATTER came on for a virtual recorded hearing and was heard remotely before the undersigned on October 18, 2023 via the Lifesize video platform. The Complainant, Commissioner of Labor of the State of North Carolina (“Complainant”), was represented by Assistant Attorney General Madison L. Beveridge. Respondent, Procar II, Inc. (“Respondent”), was represented, without counsel, by owner and president Brent McKinney. Complainant’s witness was then Compliance Safety and Health Officer, Ted Hendrix (now a District Supervisor). Respondent’s witness was Brent McKinney, President and Owner of Procar II, Inc.

Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

**ISSUES PRESENTED**

1. Whether Complainant met its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.20(b)(2) where a competent person did not conduct frequent and regular jobsite safety inspections to identify hazardous conditions to which subcontractor employees were exposed.
2. Whether Complainant met its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.102(a)(1) by failing to ensure subcontractor employees were using appropriate eye and face protection while using pneumatic nail guns and circular saws.
3. Whether Complainant met its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.501(b)(13) by failing to ensure subcontractor

employees performing framing activities on the second floor of a new two-story home under construction were protected from falling by providing guardrails, personal fall arrest systems, or an alternative fall protection measure.

4. Whether the penalty amounts were properly calculated in an amount totaling \$5,200.00.

#### **SAFETY STANDANDS AND/OR STATUTES AT ISSUE**

29 CFR 1926.20(b)(2) provides as follows:

Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

29 CFR 1926.102(a)(1) provides as follows:

The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

29 CFR 1926.501(b)(13) provides as follows:

Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

#### **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, including making inspections and issuing citations and other pleadings. N.C. Gen. Stat. § 95-126 *eq seq.* (“the Act”).
2. Respondent is an “employer” within the meaning of N.C. Gen. Stat. § 95-127(11) and, at all times relevant to this matter, is subject to the provisions of the Act.
3. Respondent is in the business of construction, specifically residential framing.
4. Respondent is a North Carolina Corporation, which was authorized to do business in North Carolina on September 30, 2005. Respondent was administratively dissolved by the Secretary of State on May 30, 2017. While the corporation is administratively dissolved, the company is still operating under that name.

5. At the time of the events relevant to this matter, Respondent was contracted by Professional Builders Supply to frame a residential building located at 1641 Batson Creek Lane in Weddington, North Carolina, hereinafter "the site."
6. JCH Construction Carolinas, LLC dba Jones Homes was the general contractor for the project. Jones Homes contracted with Professional Builders Supply to provide the framing material and labor for the residence.
7. Professional Builders Supply hired Respondent to frame the residence. Respondent subcontracted the labor for the framing work to Kevin Framing.
8. At the time of the events relevant to this matter, Respondent was responsible for supervising and controlling the framing activities at the site. Jorge Castillo, Superintendent for Respondent, was responsible for inspecting and supervising Respondent's jobsites, including the site located at 1641 Batson Creek Lane in Weddington, North Carolina.
9. On March 29, 2022, Mr. Castillo was present at the site. During that time, workers were engaged in framing activities on the second floor, operating pneumatic nail guns, and using circular saws.
10. On March 29, 2022, then Compliance Safety and Health Officer ("Officer") Ted Hendrix, employed by the North Carolina Department of Labor, met with Respondent at the site located at 1641 Batson Creek Lane in Weddington, North Carolina. Officer Hendrix properly entered onto Respondent's site and properly conducted the inspection at issue in this matter.
11. The site was located in Union County, which is included in the Complainant's Special Emphasis Program for Construction Activities pursuant to the Complainant's Operational Procedure Notice 123X.
12. On that day, Officer Hendrix observed, from a public right of way, four workers installing floor joists on the second floor of an under-construction residential building without any fall protection; there were no guardrails or safety nets erected to protect the workers from falling from the edge of the structure.
13. The workers in question were employees of Kevin Framing, Respondent's subcontractor.
14. During the inspection, Officer Hendrix took measurements from the second floor to the ground: the fall distance from the second floor to the ground at the right side of the structure was fifteen feet, eleven inches; the fall distance at the front of the structure was fourteen feet, four inches. If workers fell from the second floor, they would land on hard, compact earth.
15. There was a substantial probability that death or serious physical injury--such as concussion, broken bones, serious internal injuries--would result if an employee fell from the unprotected second level of the under-construction residence to the hard, compact earth.

16. Six subcontractor employees were also using pneumatic nail guns to install floor joists on the second floor and using circular saws to cut lumber without the use of eye or face protection, such as safety glasses.
17. The subcontractor employees working without eye or face protection were in plain view while Mr. Castillo was at the site.
18. There were no safety glasses or any other form of eye or face protection at the site.
19. There was a substantial probability that death or serious physical injury would result if an employee were struck by flying nails, wood fragments, or nail-collating materials, resulting in serious injury to the eyes.
20. Mr. Castillo was present at the site while multiple subcontractor employees worked from the second floor where no guardrails or safety nets had been erected. The subcontractor employees were working in plain view and were also not wearing any personal fall protection.
21. Mr. Castillo's job duties included supervising Respondent's subcontractors on Respondent's jobsites, including the site at issue in this matter.
22. On March 29, 2022, Mr. Castillo failed to address the hazards while visiting the jobsite, despite the hazards being in plain view.
23. After the on-site inspection, Officer Hendrix requested jobsite safety inspection records from Mr. Brent McKinney, the Owner and President of Respondent.
24. Mr. McKinney submitted a blank copy of his "Job Site Safety Check" form to Officer Hendrix. Mr. McKinney did not provide any completed inspection forms.
25. Mr. Castillo, Respondent's Superintendent, had never heard of or seen the Job Site Safety Check form. At the time of the events relevant to this matter, Mr. Castillo was Respondent's only field employee.
26. Mr. Castillo further informed Officer Hendrix that Respondent had completed the framing for three homes in the same neighborhood where the site in question was located, and Mr. Castillo had not conducted any jobsite safety inspections at these three sites or the site at issue in this matter.
27. On May 16, 2022, as a result of the inspection, Complainant issued one citation with three items against Respondent, carrying the following proposed abatement dates and penalties:

**CITATION NUMBER ONE (Serious)**

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
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001	29 CFR 1926.20(b)(2)	July 1, 2022	\$2,100.00
002	29 CFR 1926.102(a)(1)	Corrected During Insp.	\$1,000.00
003	29 CFR 1926.501(b)(13)	Immediately Upon Receipt.	\$2,100.00
			<b>\$5,200.00</b>

28. For each of the alleged violations in Citation 1, Items 1, 2, and 3, 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: 60% credit for size, 0% credit for good faith, and 10% credit for history, for a total 70% adjustment.
29. Respondent submitted a timely Notice of Contest.

### CONCLUSIONS OF LAW

30. 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.
31. Respondent is subject to the provisions of the Act.
32. Pursuant to N.C. Gen. Stat. § 95-135, the Review Commission has jurisdiction over the parties and subject matter to this action.
33. North Carolina has adopted the multi-employer doctrine for analyzing employer liability on construction worksites, which is the worksite at issue in this matter. *Commissioner of Labor v. Weekley Homes*, 169 N.C. App. 17, 28 (2005). Pursuant to the multi-employer doctrine, controlling employers are liable for violations created by a subcontractor if the controlling employer had actual or constructive knowledge of the violation.
34. A controlling employer is defined as an 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." CPL 2-0.124. "Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice." *Id.*
35. Under the multi-employer doctrine, correcting employers may also be liable for violations created by a subcontractor. A correcting employer is "[a]n employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard." *Id.*
36. In the present case, Respondent was both a controlling employer and correcting employer under the multi-employer doctrine. *Id.*
- a. Respondent acknowledged that it was the controlling employer for purposes of the framing activities conducted on the jobsite by Kevin Framing, its subcontractor.

- b. Respondent exercised control over Kevin Framing at the job site by supervising the work being performed.
  - c. Respondent was engaged in the same undertaking at the same worksite as the exposing employer in this case, Kevin Framing. Both employers were engaged in the framing of the residence and Respondent was responsible for correcting hazards related to the framing activities being performed.
  - d. Respondent's Superintendent, Jorge Castillo, was responsible for supervising the framing activities conducted by Respondent's subcontractors.
37. "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 conduction and failed to take correction action." *Commissioner of Labor v. Lennar Carolinas*, No. OSHANC 2018-6039, Slip. Op. at p. 4 (2021).
  38. Constructive knowledge can be established where "the violative condition was so open and obvious that it should have been detected . . . ." *Id.* (citing *Allred v. Cap. Area Soccer League, Inc.*, 194 N.C. App. 280, 288, 669 S.E.2d 777, 782 (2008)).
  39. In the present case, Respondent's Superintendent was present at the site while the hazards were in plain view, thus the violative conditions were "open and obvious."
  40. Respondent knew, or should have known, with reasonable diligence, of the hazardous conditions existing at the site.
  41. In the present case, Respondent's Superintendent also was not aware of the existence of Respondent's "Job Site Safety Check" form. Respondent's Superintendent admitted he had not conducted any inspections at the site in question or at Respondent's other three job sites in the same neighborhood.
  42. As a result of the hazards at the site and the failure of Respondent to conduct frequent and regular inspections of its job sites, subcontractor employees were exposed to the possibility of an accident, the probable result of which would be death or serious injury.
  43. Complainant has proved by a preponderance of the evidence that Respondent violated 29 CFR 1926.20(b)(2), 29 CFR 1926.102(a)(1), and 29 CFR 1926.501(b)(13) and that these violations were serious.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

Citation One, Item 1 is affirmed as a serious violation of 29 CFR 1926.20(b)(2) and a penalty of \$2,100.00 is hereby imposed.

Citation One, Item 2 is affirmed as a serious violation of 29 CFR 1926.102(a)(1) and a penalty of \$1,000.00 is hereby imposed.

Citation One, Item 3 is affirmed as a serious violation of 29 CFR and a penalty of \$2,100.00 is hereby imposed.

Respondent shall pay the total of \$5,200.00 within twenty (20) days of the date of filing of this Order.

This the 12 day of Nov., 2023.



Reagan H. Weaver  
Hearing Examiner





CERTIFICATE OF SERVICE

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

BRENT MCKINNEY  
PROCAR II, INC.  
PO BOX 44132  
CHARLOTTE, NC 28215

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


MADISON BEVERIDGE  
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 15 DAY OF November 2023.

  
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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  
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