

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

COMMISSIONER OF LABOR OF THE)	
STATE OF NORTH CAROLINA,)	DOCKET NO: OSHANC 2023-6522
)	
COMPLAINANT,)	INSPECTION NO: 318247954
)	
)	CSHO ID.: M3094
v.)	
)	
)	
MAINSCAPE, INC.)	
<i>and its successors,</i>)	
)	
RESPONDENT.)	

FILED
APR 21 2025
NC OSH Review Commission

DECISION AND FINAL ORDER

THIS MATTER was duly noticed and came on for hearing before the undersigned on February 10, 11, 12, 13, 2025, via the Lifesize video platform. The Complainant, Commissioner of Labor of the State of North Carolina (“Complainant”), was represented by Special Deputy Attorney General Rory Agan. Respondent Mainscape, Inc. was represented by Neil Riemann, Parry Law, PLLC.

PROCEDURAL HISTORY

On January 4, 2023 Complainant issued one Willful Serious Citation with one item and a second Serious Citation also with one item. On or around February 1, 2023 Respondent submitted a timely Notice of Contest. On or around March 3, 2023 Respondent submitted a timely Statement of Employer's Position which requested formal pleadings. Following motions requesting additional time, the Complaint and Answer were filed on May 3, 2023 and June 15, 2023, respectively.¹ On November 4, 2024 Respondent filed a Motion to Dismiss and on November 12, 2024 Respondent filed a "Renewed Motion to Dismiss," also requesting, in the alternative, a continuance for the hearing. Respondent's motion requested dismissal on the grounds that Complainant failed to provide disclosures required by N.C. Gen. Stat. §95-136(e1).

¹ Hearing examiner Laura Wetsch was presented with the parties' respective motions for additional time to file their pleadings. However, underlying the respective motions was Complainant's acknowledged failure to timely file its formal pleading in accordance with a previously allowed extension. Hearing Examiner Wetsch concluded that, while Complainant had violated procedural rules, dismissal was not an appropriate sanction.

In the undersigned's discretion, prejudice to the Respondent by Complainant's failure to follow procedure could be mitigated by continuing the hearing. By Order entered November 14, 2024, the hearing was continued to the February 10, 2025 docket. On January 7, 2025 the undersigned entered an order denying Respondent's November 4, 2024 Motion to Dismiss. The parties submitted their pre-hearing reports on February 6, 2025.

On the record on the morning of February 10, 2025 Complainant's counsel moved that the hearing be continued based upon the unavailability of Complainant's primary witness. Complainant's counsel stated that the unavailability was due to failure to provide the witness, a former N.C. Department of Labor employee, with a contract for payment of witness fees. Complainant's motion to continue the hearing was denied. However, the undersigned exercised her discretion to determine that the hearing would begin with Respondent's witnesses, except that Respondent's retained expert witness would not be required to testify until after Complainant presented its case-in-chief.

On February 10, 2025 the following witnesses testified:

Doug Cook	Regional Vice President, Mainscape, Inc.;
Tina Miller	Director of Human Resources, Mainscape, Inc.;
Salvador Amaya	Staffing Manager, Mainscape, Inc.;
Tony Dover	Safety Director, Mainscape, Inc.;
Larry Boyle	Wilmington branch manager, Mainscape, Inc.

On February 11, 2025, the following witnesses testified:

Jesus Morales	Wilmington Operations Manager, Mainscape, Inc.;
José Morales,	Crew Leader, Mainscape, Inc.;
Nashawn Price	Crew Member, Mainscape, Inc.;
Mike Peterson	Operations Field Manager Mainscape, Inc.; and
Shawn Peterson	Crew Leader.

On February 12, 2025 Mr. Lafayette Atkinson, who was a former supervisor for the North Carolina Department of Labor, NC OSH Division, testified on behalf of Claimant. On that day Mr. Atkinson testified for approximately six hours. When asked during cross-examination about his unavailability on the previous two days of the hearing, Mr. Atkinson stated that he was "unavailable Monday and Thursday [of the week of February 10, 2025] . . . ;" that he was first contacted during the middle of the previous week [the week of February 3, 2025]; reiterated that he had "a conflict Monday and a conflict Thursday" and that Tuesday was his "prep time." Lifesize Video Replay, 20236522MainscapeDay3Video4of502/12/2025, Timestamp 03:49:34 - 03:51:41. When Court adjourned for the evening on February 12, 2025, Mr. Atkinson was still being cross-examined.

On the morning of February 13, 2025 Complainant's counsel notified the Court and Respondent's counsel that Mr. Atkinson had a health event and would be unavailable for the remainder of the day. Complainant's counsel requested that the witness's testimony be resumed on February 14, 2025 and that, instead, Respondent's last witness, its retained expert, be required

to testify. Following discussion with counsel, the undersigned accepted Respondent's offer to end its cross-examination prematurely and further directed that re-direct examination of Mr. Atkinson would not be permitted. Although Complainant had listed "Former CSHO Indira Jagdeo" as a potential witness, Complainant did not call another witness and rested its case. During the hearing the following Exhibits were admitted into evidence:

For the Respondent: R1, Mainscape Orientacion de Seguridad (Mainscape Safety Orientation);
R2, Worksite Map
R3, Area Map
R4, Mainscape Heat and Cold Stress Policies
R7, NC DOL Field Information Procedure / Operational Procedure Notice 141B

For the Complainant: C1, Certified Inspection File for Inspection 318247954, with accompanying photographs separately labeled C2.

Following the close of Complainant's evidence, Respondent moved, pursuant to N.C. R. Civ. P. 41(b), that Complainant's case be dismissed.

DECISION

In considering Respondent's Rule 41(b) Motion to Dismiss, the undersigned carefully weighed all of the competent evidence presented at the hearing, including the sworn testimony of the witnesses presented, the documents and exhibits received and admitted into evidence, judicially noticed information pursuant to N.C. Gen. Stat. §8C-1-201 and the entire record in this proceeding. The undersigned has taken into account appropriate factors for judging the credibility of all of the evidence, including but not limited to the demeanor of witnesses and any interests, biases, or any prejudice any witness may have. Further, the undersigned has carefully considered the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which they testified, and whether the testimony of the witnesses was reasonable, and consistent with all other believable evidence in the case. Based upon the foregoing, the Undersigned makes the following:

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. N.C. Gen. Stat. § 95-126 et seq. ("the Act").
2. Respondent Mainscape, Inc. is an Indiana corporation authorized to do business in North Carolina, maintaining a place of business in Wilmington, NC. Respondent is a national landscaping company, employing over one thousand employees at forty branch locations in fourteen states. N.C. *Complaint*, ¶4; *Answer*, ¶4; *Testimony of Doug Cook*.
3. On or around July 1, 2022 Respondent hired a group of seasonal employees, including Jose de Jesus Lupercio Medina (hereafter "Jose Medina" or "Mr. Medina"). The seasonal

employees arrived in Wilmington, NC via an approximately three-day bus trip from different states in Mexico. The employees were provided rooms at a local hotel. Four days later, on July 5, 2022, the seasonal employees, including Mr. Medina, reported for their first assignment with Respondent. These employees were Spanish speakers. *Testimony of Tina Miller; Testimony of Larry Boyle.*

4. On July 5, 2022 Respondent was providing landscaping services to two different communities in the Wilmington, NC area. Respondent's employees began their work day at approximately 7:00 a.m. with a regular safety meeting which lasted around one hour. The meeting was led by Respondent's Wilmington Branch Manager, Larry Boyle, with assistance from Mr. Jesus Morales, Respondent's Wilmington Operations Manager, who provided English-Spanish translation for the Spanish speaking employees. In the safety meeting, Mr. Boyle advised employees that the day was expected to be exceptionally hot and employees should consume water throughout the day and take breaks as needed. Following the safety meeting, employees were assigned to one of the two work sites. The new seasonal employees were provided with "hands on" job training for several hours in the morning and then began working for the remainder of the day. The day included a forty-five minute lunch break and breaks throughout the day, as needed. Work ended at approximately 4:00 to 4:30 p.m. *Testimony of Larry Boyle; Testimony of Jesus Morales.*
5. On July 6, 2022 the new seasonal employees began their day in Respondent's safety training orientation which was presented via the Zoom meeting platform. The orientation was provided in Spanish and English, using a power point presentation that contained both Spanish and English instructions and included opportunities to ask questions. The training took approximately one and one-half hours. *Testimony of Salvador Amaya.*
6. Respondent's safety training orientation included instruction for using personal protective equipment, with pictures to illustrate various pieces of protective attire, including required eye protection and a section addressing "Why we require ANSI Safety Glasses." The safety orientation also included instruction on severe climate hazards, including heat. The orientation reviewed what factors determine a heat index, the causes of heat stress, changing risks associated with climbing temperatures, prevention of heat stress, signs and symptoms of heat stress, mitigation measures that included frequency of breaks and consumption of fluids varying with the elevation in the heat index, and, emergency measures to be taken when signs or symptoms of heat stress or heat stroke are observed. Exh. R1; Compl. Ex. #1 pp 138-180 (English Language version).
7. Following their safety orientation training, the seasonal employees then joined other crew members at their respective work sites. *Testimony of Larry Boyle*
8. Mr. Jose Medina was working in the Park View Community near the intersection of Leesburg Dr. and Bellerby Cove. He collapsed around 2:30 p.m. on July 6, 2022. Following emergency resuscitation efforts at the site Mr. Medina was transported to the local hospital and subsequently died. *Testimony of Jose Morales; Testimony of Mike*

Peterson; Testimony of Larry Boyle; Compl. Ex. #1, pp 193-196 (Report of Medical Examiner, New Hanover County).

9. NC OSH received a fatality report from law enforcement. Investigation of the workplace fatality was assigned to NC OSH District Supervisor Lafayette Atkinson and Compliance Safety and Health Officer in training, Indira Jagdeo. An investigation was conducted between July 7, 2022 and December 22, 2022, with on-site inspection and employee interviews conducted on July 7, 8, 13 and September 19, 2022. *Compl. Ex., #1, p 59.*
10. On January 4, 2023 one Willful Serious Citation, with one item was issued for an alleged violation of N.C. Gen. Stat. §96-129(1), the "General Duty Clause" of the NC OSH enabling statute, and, one Serious Citation, with one item, was issued for an alleged violation of 29 C.F.R. §1910.133(a)(3). Citation One alleged that Mr. Medina's death was the result of Respondent's failure to "implement protective measures to prevent employees from experiencing a heat-related illness." The citation further alleged that "an adequate supply of water was not available to all employees . . . and [the newly hired seasonal employees] were not provided training on recognizing and preventing heat-related illnesses, nor were they included in a heat acclimatization program." The proposed penalty for Citation One was \$145,027.00. *Compl. Ex. #1, pp 54-55.* The second citation (Citation Two) alleged that "an employee wearing prescription glasses did not wear ANSI-approved prescription lenses while working near employees operating lawn equipment." The proposed penalty for Citation Two was \$6,500.00 *Id., at p 56.*
11. Since there is no specific standard for determining whether an employer has failed to prevent a workplace hazard from high temperatures, the standard applied by the Complainant was based on the employer's heat and cold stress policy. *Exh. R4.*
12. The Respondent's training program and the mitigation efforts outlined in its heat and cold stress policy were thorough and detailed and these elements were reflected in the training Respondent provided to its employees, including the seasonal employees hired on July 1, 2022. Respondent's training program reflected all reasonable efforts that an employer can make to prevent serious injury of its employees from the hazards of excessive heat, to mitigate against the effects of excessive heat and to recognize symptoms of heat-related illnesses. *Exh.'s R1, R4.*
13. Respondent successfully implemented its heat stress policy on July 5, 2022 and July 6, 2022 when the reported heat index required attention to prevention of heat-related hazards.
 - a) On the morning of July 5, 2022 Respondent's management advised all employees (in English and in Spanish) of the day's expected high temperatures, of the need to stay well hydrated and of the expectation that employees would need to take frequent rest breaks. Employees, including supervisors, who had been employed with Respondent prior to July 1, 2022 had previously received training on the recognition of heat stress and heat stroke symptoms. *Testimony of Larry Boyle; Testimony of Jesus Morales; Testimony of Salvador Amaya.*

b) On July 6, 2022 the three newly hired seasonal employees participated in a safety orientation that provided information on the potential for experiencing heat stress and/or heat stroke with high outside temperatures; the specific behaviors required to mitigate against high temperatures that could lead to heat stress and/or heat stroke; and, how to recognize symptoms of heat stress and heat stroke. The new employees received training in Spanish. *Testimony of Salvador Amaya.*

c) On July 5, 2022 and on July 6, 2022 Respondent's employees had readily accessible sources of water. The preponderance of the evidence established that a water truck was a short distance from where the employees were working and that the truck moved as the employees' work location moved. The preponderance of the evidence also established that, in addition to the water truck, Respondent's supervisors moved throughout the site and brought bottles of water directly to employees. Complainant's evidence indicated that, on July 6, 2022, prior to Mr. Medina's collapse, supervisors had distributed enough water for each employee to have received approximately 10 bottles of water. *Compl. Ex. #1, pp 63-64.*

d) Based on Respondent's investigation, Mr. Medina was working approximately 450 feet from the truck containing water. *Exh. R2; Testimony of Tony Dyer.*

e) The preponderance of the evidence indicated that the new seasonal employees, who were from different states in Mexico, had four days in North Carolina to acclimatize before beginning work. They indicated their intentions to walk around outdoors during the four days before they began working. *Testimony of Larry Boyle.*

14. Complainant's evidence was insufficient to establish that there was a hazard on July 5, 2022. Although the Compliance Safety & Health Officer's narrative mentioned specific temperatures allegedly based on "historical data from weather underground and the National Weather Service website," these data were not included in Complainant's Exhibit #1. *Compl. Ex. #1, p 62.*
15. Complainant's assertion that water resources were a mile from where the employees were working lacked credibility. Complainant credited two witnesses who did not speak English but who allegedly provided statements. The statement attributed to Jesus Escalante states that the truck was "far away." The statement was not written by Mr. Escalante; it is a typed statement that alternates between the first-person and the third-person perspectives, making it unclear which, if any, of the statements contained on the page were actually uttered by Mr. Escalante. The second statement, also typed, is attributed to Manuel Vasquez and contains a statement that the water truck was "10-12 houses away when it was close" and "around 10-12 minutes" away at the furthest distance. Complainant's inspection of the worksite should have made clear that Mr. Vasquez's estimates were not an indication that the truck was an unreasonable distance from the employees. Respondent's Exhibit R2 shows that there are 11 houses on Bellerby Cove where the crew was working on July 6, 2022, which suggests that the truck was

located at the top of Bellerby Cove intersecting with Leesburg Drive. If the investigators had walked 11 houses from Mr. Medina's last location they would have discovered the distance was 450 feet and walkable in less than a minute. The furthest distance was under two tenths of a mile and walkable in under four minutes. *Exh. R2; Tony Dover Testimony.*

There was also no record of the questions that either Mr. Escalate or Mr. Vasquez were asked, making it difficult to determine the context within which the information was provided. In addition, although each witness's signature appeared below a statement indicating the witness had "read" the statement, those statements were in English. There was no evidence presented that the witnesses had been presented with a Spanish language copy of any statements attributed to them. *Compl. Ex. #1, p102 (Statement attributed to Jesus Escalante); p 100 (Statement attributed to Manuel Vasquez).*

16. Complainant also relied upon a statement by Nashawn Price who stated that the truck was "a mile away." However, the evidence presented at the hearing demonstrated unequivocally that, within the subdivision where the employees were working, there were no two points that were one mile apart or even close to being one mile apart. Complainant's investigators had the opportunity to view the work site and could have easily determined that Mr. Price's measurement was wildly inaccurate. *Compl. Ex. #1, p 104. Exh. R3.*
17. While crediting the statements of Escalante, Vasquez and Price, Complainant's investigators discounted, and made no effort to reconcile, contradictory statements by two other employees. Employee Fred Wheeler located the truck at a "two minute walk" from where the men were working. Employee Jose Morales described the location with specificity, identifying the "cul-de-sac" and the traffic "island" as the truck's locations which were easily compared with the employees' locations, including where Mr. Medina collapsed in the afternoon. Using Mr. Morales' specific landmarks, it is clear that the water was never "far away," "a 10-12 minute walk," or "a mile" from where employees worked. Furthermore, Mr. Morales also described how bottles of water were brought to employees, meaning that employees had access to water other than from the truck. Yet this latter fact was excluded from Complainant's summary of where water resources were located. *Compl. Ex. #1 pp 96; 97-98.*
18. Complainant's evidence did not demonstrate that the acclimatization steps taken by the Respondent failed to satisfy the procedures described in the Respondent's policy or that the steps were, in any way, deficient. Complainant's witness, Lafayette Atkinson, asserted that nothing was done to acclimatize the new employees prior to beginning work on July 5, 2022. Mr. Atkinson had no evidence to support this assertion. The competent evidence at the hearing showed that the employees were in North Carolina for four days before they began working; that the employees came from different states in Mexico whose climates were not identical; and that the investigators relied on a description of the climate from "the southern part of Zonora Mexico" but that Mr. Medina lived in Villa Hildago in Jalisco Mexico, more than nine hundred miles away. *Compl. Ex. #1, pp 100; 111.*

19. Complainant presented no evidence at the hearing or in Complainant's Exhibit #1, that any employee appreciated symptoms in himself, or, recognized symptoms in co-workers suggestive of heat stress or heat stroke on July 5, 2022 or July 6, 2022. The preponderance of the evidence demonstrated the opposite: that no employee observed signs or symptoms associated with heat stress or heat stroke, including that there were no signs or symptoms apparent in Mr. Medina during the break taken shortly before Mr. Medina's collapse. Two witnesses reported asking him if he was feeling "okay" when he walked over to a shaded area moments before he collapsed. To both individuals, Mr. Medina denied feeling unwell. *Testimony of Mike Peterson, Testimony of Nashawn Price, Testimony of Jose Morales.*
20. The report of the autopsy examination included in Complainant's Exhibit #1 states that Mr. Medina's cause of death was "systemic complications of hyperthermia." However, this report by itself, without accompanying expert testimony, is insufficient to establish Respondent's liability. To the untrained reader, the report appears to indicate that there were pre-existing health conditions which may or may not have contributed to Mr. Medina's heat stroke. Without the ability to cross-examine an expert witness it is impossible to conclude that Mr. Medina's death was foreseeable by Mainscape, particularly given the sworn testimony regarding the training, supervision and mitigation measures undertaken by Mainscape. *Compl. Ex. #1 pp 233-238.*
21. Respondent's employee Manuel Ramon Vazquez was alleged to have been working without proper protective eyewear. Complainant's investigator observed Mr. Vazquez wearing prescription eye glasses while *not* working. Mr. Vasquez, who predominately, or perhaps exclusively, spoke Spanish was interviewed by Complainant's investigators. The typed, written statement attributed to Mr. Vasquez was translated from Spanish to English but contained no verification that Mr. Vasquez had an opportunity to review the statement in Spanish before signing the document which the investigators placed in front of him. In any case, the statement indicates that Respondent provided him with proper safety glasses. Mr. Vasquez's statement offered no evidence that he did *not* wear those safety glasses while performing landscaping work. Mr. Vasquez also received training regarding proper eyewear protection and individualized directions to use the safety glasses when working. Respondent's crew leader, Shawn Peterson, testified that, on July 5, 2022, he had instructed Mr. Vasquez to wear his safety goggles while in the field and that Mr. Vasquez complied with that instruction. Respondent's witnesses Mike Peterson, Jose Morales, and Nashawn Price also testified that they observed Mr. Vasquez wearing safety glasses while engaged in work. The preponderance of the evidence established that Mr. Vazques did not wear his prescription glasses while he worked. *Testimony of Lafayette Atkinson; Testimony of Shawn Peterson, Testimony of Mike Peterson, Testimony of Jose Morales, Testimony of Nashawn Price. Compl. Ex. #1, p 100.*
22. Complainant's witness Lafayette Atkinson testified that there was a prior eye injury at Respondent's Wilmington location, but failed to establish any relationship between that prior injury and the alleged conduct supporting Citation Two.

23. At the close of Complainant's evidence testimony had been received from Respondent's witnesses Doug Cook, Tina Miller, Salvador Amaya, Tony Dover, Larry Boyle, Jesus Morales, Jose Morales, Nashawn Price, Mike Peterson and Shawn Peterson; and from Complainant's witness NC OSH District Supervisor Lafayette Atkinson. At the close of Complainant's evidence Respondent moved for dismissal of the citations pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure.

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012). 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. Respondent is an employer within the meaning of N.C. Gen. Stat. §95-127(11).
3. The Review Commission has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. § 95-135.
4. A hearing examiner may summarily dispose of matters pursuant to a motion to dismiss made in accordance with the Rules of the Commission and the North Carolina Rules of Civil Procedure. NC OSH Rev. Comm'n. R. of Proc. .0507(8); .0102(2).
5. Rule 41(b) of the North Carolina Rules of Civil Procedure provides for summary disposition where, at the close of the Complainant's evidence, the Respondent moves for dismissal on the grounds that, upon the facts and the applicable law, the Complainant has not established "a right to the relief sought." In considering a Rule 41(b) motion, the evidence need not be evaluated in the light most favorable to the non-movant. *Greensboro Masonic Temple Co. v. McMillan*, 142 N.C. App. 379, 381, 542 S.E.2d 676, 678 (2001). The judge must consider and weigh all competent evidence before the Court. *Progressive Sales, Inc. v. Williams, Willeford, et al.*, 86 N.C. App. 51, 356 S.E.2d 372 (1987). In weighing the evidence and determining the facts, the judge may render judgment on the merits against the non-movant even though Complainant may have presented a *prima facie* case. *McKnight v. Cagle*, 76 N.C. App. 59, 331 S.E.2d 707, *cert. denied* 314 N.C. 541, 335 S.E.2d 20 (1985).
6. Following Rule 41(b) in the Federal Rules of Civil Procedure, the Occupational Safety & Health Review Commission has held that where, at the close of Complainant's case, the preponderance of the evidence is against the Complainant, a Rule 41(b) motion may be allowed. *Morgan & Culpepper, Inc.* 1977, No. 9850, OSAHRC LEXIS 1081 at *4-5, 5

OSHC (BNA) 1123 (Mar. 9, 1977). Accord. *American Cynamid Co.*, No. 80-2767, 1982 OSAHRC LEXIS 286 at *25 (Feb. 25, 1982).

7. To establish a violation of a specific OSHA standard, the Complainant has the burden of proof to demonstrate that (1) the standard applies to the alleged violative act; (2) a violation occurred; (3) employees were exposed to the hazard which the standard was designed to prevent; and, (4) the employer had actual or constructive knowledge of the violation. *N&N Contrs. Inc. v. OSHRC*, 255 F.3d 122, 126 (4th Cir. 2001).
8. N.C. Gen. Stat. §95-129(1), the "General Duty Clause," requires that "[e]ach employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm." For violations alleged under the General Duty Clause, Complainant must demonstrate that there was a "recognized hazard" that was causing or likely to cause death or serious harm. *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 463-64, 372 S.E.2d 342, 344 (1988) (adopting the elements used in the federal statute).
9. Whether or not a hazard exists is determined by the standard of a reasonably prudent person. *Id.*
10. Not all hazards are preventable and the General Duty Clause was not intended to impose a strict liability upon employers. Thus, "only preventable hazards must be eliminated." *Rebarco*, 91 N.C. App. at 464, 372 S.E.2d at 345 (cleaned up). It is the Complainant's burden to show that a hazard can be eliminated. *Id.*
11. The preponderance of the competent evidence presented at the hearing established that Respondent provided its employees a worksite free from recognized hazards likely to cause death, serious injury or serious physical harm. More specifically:
 - a) The Respondent's policy adequately addressed all preventable hazards associated with excessive heat. The Respondent adequately trained all employees regarding heat stress, conduct to mitigate against heat hazards and the symptoms of heat stress and heat stroke to be recognized. Respondent made sure that employees had ample access to water, requiring little effort to hydrate. Respondent encouraged employees to take frequent breaks in areas away from direct sun, and, allowed new seasonal employees the opportunity to acclimatize for four days prior to beginning landscaping work.
 - b) No reasonable employer could have foreseen that Mr. Medina's death was due to a preventable hazard at the worksite.
12. 29 C.F.R. §1910.133(a)(3) requires that employers ensure that each affected employee "who wears prescription lenses **while engaged in operations that involve eye hazards** wear[s] eye protection that incorporates the prescription in its design, or wears eye protection that can be worn over the prescription lenses without disturbing the proper position of the prescription lenses or the protective lenses." There was no competent

evidence presented at the hearing that any of Respondent's employees engaged in operations involving eye hazards while not wearing eye protection required by the standard.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that Respondent's Motion to Dismiss Complainant's Complaint pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure is **ALLOWED**. The citations issued by the Complainant as a result of the instant inspection are hereby **VACATED**. The Dismissal is **WITH PREJUDICE**.

So **Ordered**, this the 21st day of April 2025.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner Presiding
maleon@leonlaw.org

CERTIFICATE OF SERVICE

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

NEIL RIEMANN
PARRY LAW, PLLC
100 EUROPA DR.
SUITE 351
CHAPEL HILL, NC 27517

By depositing a copy of the same in the United States Mail, by 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

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.

THIS THE 23 DAY OF April 2025.

PAUL E. SMITH
CHAIRMAN



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