

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

RALEIGH, NORTH CAROLINA

FILED

JAN 27 2025

NC OSH Review Commission

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA)	DOCKET NO: 2023 - 6524
)	
Complainant,)	INSPECTION
)	NO: 318246998
v.)	
)	CSHO ID: J0504
BOTTOMLEY EVERGREENS & FARMS, INC.)	
and its successors)	<u>ORDER ON RESPONDENT'S</u>
)	<u>MOTION FOR</u>
Respondent.)	<u>SUMMARY JUDGMENT</u>
)	

This Matter came before the undersigned on Respondent's Motion For Summary Judgment ("Motion") filed on November 25, 2024, by Respondent's counsel C. Daniel Barrett of The Barrett Law Firm, Clemmons, North Carolina. Such Motion was made pursuant to the Rules of Procedure of the Occupational Safety and Health Review Commission of North Carolina. Respondent also filed its Brief in Support of Motion for Summary Judgment ("Respondent's Brief"). Complainant on January 23, 2025 filed Complainant's Response to Respondent's Motion for Summary Judgment ("Complainant's Response") through its counsel Sage A. Boyd, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina.

In its Motion Respondent contends that in this case there is no genuine issue of material fact and that Respondent is entitled to judgment as a matter of law. Respondent relies upon the Affidavit of former Vice-President for Compliance Michele Gordon and on Respondent's Brief. Complainant has responded to the Motion in Complainant's Response, providing the supporting affidavit of Francisco Rodriguez.

Oral argument was not requested and is unnecessary. After consideration of (i) Respondent's Motion; (ii) Respondent's Brief; (iii) the Affidavit of Michele Gordon; (iv)

Complainant's Response; and (v) the Affidavit of Francisco Rodriguez and its Exhibits A, B, C, D, E, F, G, H and I, and considering the arguments set forth therein, the Undersigned rules as follows:

The Respondent's Motion for Summary Judgment on the grounds that there is no genuine issue of material fact and that Respondent is entitled to judgment as a matter of law is **DENIED**.

FACTS RELATIVE TO MOTION

In summary:

1. A Compliance Safety and Health Officer conducted an inspection of one of Respondent's worksites --- Complainant asserts that there was a single inspection which was extended; Respondent asserts that there were two investigations. This matter is at controversy.
2. The inspection was pursuant to a fatality reported when an employee of Respondent sustained a fatal injury in an accident involving a pickup truck and a trailer. Respondent asserts that the pickup truck and trailer were both 'farm vehicles'. Complainant asserts that the pickup truck was not a 'farm' vehicle. This matter is at controversy.
3. The citation issued was for the alleged violation of N.C.G.S. 95-129(1) which is frequently referred to as the 'general duty clause'.
4. Respondent asserts in Respondent's Brief
 - a. "OSHA has promulgated a safety standard that mandates wheel chocking for trucks, trailers, and railroad cars in certain situations. 29 CFR § 1910.178(k) and m(7). However, OSHA makes it clear in the precatory language to this section that these chocking requirements do not apply to farm vehicles. 'This section does not apply to compressed air or nonflammable compressed gas-operated industrial trucks, **nor to farm vehicles**, nor to vehicles intended for earth-moving or over-the-road hauling. 29 CFR §1910.178)a)(1) (**emphasis added**)."
 - b. "The General Duty Clause is only applicable in the absence of a specific standard addressing the subject matter... 'The principle that compliance with an applicable safety standard bars general-duty liability is... reflected in Commission precedent that states that the general-duty-clause is inapplicable for a failure to prevent a hazard 'if a standard specifically addresses the hazard cited.'" [citations omitted]
 - c. "farm vehicles" are exempted for the standard which requires wheel chocks.
 - d. "The vehicles involved here were 'farm vehicles' and were only used for agriculture" per the Affidavit of Michele Gordon.

- e. "Complainant's citation under the 'General Duty Clause' is foreclosed by a specific standard that exempts farm vehicles from wheel chocking."
5. Complainant asserts in Complainant's Response
- a. The general duty clause is applicable in the absence of a specific standard.
 - b. "Respondent has **failed** to show that an applicable standard existed that would foreclose citation for violation of the general duty clause in this case."
 - c. The truck was not a farm vehicle.
 - d. The General Duty Clause is applicable to the situation in this matter.

Summary Judgment Standard

North Carolina Rules of Civil Procedure 56(c) provides a clear formula for determining whether summary judgment is proper under specific circumstances. The determination is based on satisfaction of two stated conditions: first, there must remain no genuine issue as to any material fact, and second, that any party is entitled to a judgment as a matter of law. Applicable North Carolina case law provides guidance regarding satisfying these conditions:

In ruling on a motion for summary judgment the court must closely scrutinize the movant's materials while it regards with indulgence the non-movant's materials. *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 148, 296 S.E.2d 302, 304-305 (1982), disc. rev. denied, 307 N.C. 468, 299 S.E.2d 221 (1983); *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 239-30, 382 S.E. 2d 874, 877 (1989);

The non movant need only present evidence sufficient to rebut the movant's showing of either an affirmative defense or nonexistence of an essential element of the claim. See *Dickens v. Puryear*, 302 N.C. 473, 453, 276 S.E.2d 325, 335 (1981).

Summary judgment is appropriate only when there are "no genuine disputes as to any material fact." *Guthrie v. PHH Mortg. Corp.*, 79 F.4th 328, 342 (4th Cir. 2023) (citing *Sedar v. Reston Town Ctr. Prop., LLC*, 988 F.3d 756, 761 (4th Cir. 2021)) A dispute is "genuine" if the evidence presented would allow a reasonable factfinder to find for the nonmovant. *Id.* A fact is "material" if it may influence the outcome of the suit under governing law. *Jones v. Chandrasuwan*, 820 F.3d 685, 691 (4th Cir. 2016); *Bhattacharya v Murray*, 93 F.4th 675, 686 (4th Cir 2024) (internal quotation marks omitted).

When viewing the evidence in the light most favorable to the nonmoving party, reasonable minds must be able to reach only one conclusion --- that the moving party is entitled to judgment as a matter of law. In making that determination, a court must view all facts, and

reasonable inferences taken therefrom, in the light most favorable to the nonmoving party – in this case, Complainant. Davison v. Rose, 19 F.4th 626, 633 (4th Cir. 2021), cert. denied, 143 S. Ct. 106 (2022).

Discussion


Respondent clearly sets out that under certain circumstances 29 CFR 1910.178 is the standard to cite regarding failure to use wheel chocks for trucks. However, Respondent also clearly identifies that such standard expressly excludes ‘farm vehicles’. Respondent asserts that the truck which is the subject of the inspection was a ‘farm vehicle’, however the only evidence supporting such assertion is the Affidavit of Respondent’s former Vice-President for Compliance Michele Gordon that “The truck and trailer involved in this case were owned by Bottomley Farms and used solely for work in agriculture. The truck and trailer were farm vehicles.” However such statements are conclusory and not supported by specific evidence. Respondent asserts that the General Duty Clause is not applicable to Respondent under the circumstances of set forth in this matter based on 29 CFR 1910.178 — based on the reference to farm vehicles Respondent argues that 29 CFR 1910.178 is a more specific standard applicable to the cited conditions and therefore excludes the applicability of the General Duty Clause.

Complainant asserts, among other things, that (i) 29 CFR 1910.178 is not a more specific standard applicable to the cited conditions, and (ii) the General Duty Clause is applicable, and (iii) there is a dispute as to whether the vehicle which was not chocked is a ‘farm vehicle’.

Conclusion

The Undersigned concludes that genuine disputes of material fact exist and cannot conclude that Respondent as moving party is entitled to judgment as a matter of law. Respondent’s Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED on this 27 day of January, 2025.



R. Joyce Garrett, Hearing Examiner

CERTIFICATE OF SERVICE

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

C. DANIEL BARRETT
THE BARRETT LAW FIRM
3540 CLEMMONS RD
SUITE 104
CLEMMONS, NC 27012

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:

SAGE BOYD
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 29 DAY OF January 2025.

PAUL E. SMITH
CHAIRMAN



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