

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

FILED

DEC 5 2024

<p>COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">v.</p> <p>DEE'S CUSTOM HOMES, INC. and its successors</p> <p style="text-align: center;">Respondent.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>DOCKET NO: 2023 - 6527</p> <p>INSPECTION NO: 318246857</p> <p>CSHO ID: U6109</p> <p><u>CONSENT ORDER</u></p>
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THIS CAUSE coming on pursuant to the Notice of Pre-Hearing Conference (“Hearing Notice”) on December 4, 2024 and continued to December 5, 2024 at 10 a.m., via Lifesize teleconferencing platform. Rory Agan, Special Deputy Attorney General, North Carolina Department of Justice, appeared for Complainant. Shannon Spainhour, Attorney with Constangy, Brooks, Smith & Prophete LLP., Asheville, North Carolina, appeared for Respondent.

Pursuant to the Hearing Notice a pre-hearing conference (the “Hearing”) was held for the purpose of considering matters which would simplify the issues and expedite the proceedings in the above referenced case including considering such matters that may be necessary or advisable for the completion of the case, and if possible, to reach a resolution without the necessity of further hearing. No affected employee of Respondent attended to have a say in, or participate as a party in, the Hearing.

At the Hearing, Complainant and Respondent (i) notified the Undersigned that the parties agree upon certain stipulations (“Stipulations”) and wish to make certain motions (“Motions”), and (ii) requested that the Stipulations and Motions be make part of the Hearing record and that a Consent Order be issued. The Stipulations and Motions are as follows:

STIPULATIONS

1. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance with 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"), including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. §§95-133 et seq.

2. Pursuant to N.C.G.S. §95-135 the Review Commission has jurisdiction over the parties and the subject matter of this action.

3. Respondent is a North Carolina corporation, duly organized and existing under the laws of the State of North Carolina. It is active and current in North Carolina and maintains a place of business in Swannanoa, North Carolina. Respondent is a general construction contractor engaged in constructing buildings and other structures. Respondent is an "employer" within the meaning of N.C.G.S. Section 95-127(11); Respondent's employees referred to in this matter are "employees" within the meaning of N.C.G.S. Section 95-127(10).

4. During the period between June 23, 2022 and July 12, 2022, Occupational Safety and Health Compliance Officer Denese Ballow ("CSHO Ballow"), employed by the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at 162 Wildflower Cove Drive, Swannanoa, North Carolina, pursuant to a fatality notification (the "Inspection"). Melvin Moore was present during the Inspection. CSHO Ballow presented credentials and informed Mr. Moore that he was investigating a fatality. A residential two-story log house was under construction. The homeowner was acting as the general contractor utilizing Respondent; he had a payroll, hired employees, furnished equipment (such as power tools) and carried workers compensation insurance.

5. As a result of the Inspection, on December 15, 2022, Complainant issued the following Citation and Notification of Penalty (herein referred to as the "Original Citation"):

CITATION 01 (Serious)

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1926.20(b)(2)	Immediately Upon Receipt	\$ 2,900.40
002	29 CFR 1926.403(b)(1)(iii)	Corrected During Inspection	\$ 2,900.40
003	29 CFR 1926.404(b)(1)(i)	Immediately Upon Receipt	\$ 2,900.40
004	29 CFR 1926.451(a)(6)	Immediately Upon Receipt	\$ 4,350.60
005	29 CFR 1926.451(b)(1)(i)	Immediately Upon Receipt	\$ 4,350.60
006	29 CFR 1926.451(b)(2)	Immediately Upon Receipt	\$ 4,350.60
007	29 CFR 1926.451(f)(3)	Immediately Upon Receipt	\$ 2,900.40
008	29 CFR 1926.501(b)(13)	Corrected During Inspection	\$ 4,350.60
009	29 CFR 1926.502(b)(2)	Corrected During Inspection	\$ 2,900.40
010	29 CFR 1926.502(b)(2)(iii)	Corrected During Inspection	\$ 2,900.40
011	29 CFR 1926.502(d)(15)	Corrected During Inspection	\$ 2,900.40
012	29 CFR 1926.503(a)(2)	Corrected During Inspection	\$ 4,350.60
013	29 CFR 1926.1053(b)(5)(i)	Immediately Upon Receipt	\$ 2,900.40

CITATION 02 (NonSerious)

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1904.39(a)(1)	Immediately Upon Receipt	\$ 2,000.00

6. Respondent submitted a timely Notice of Contest, dated February 15, 2023. On or about March 15, 2023, Complainant received "Employer's/Respondent's Statement of Position" which requested that formal pleadings be served. The Complaint was filed September 18, 2023 and Respondent's Answer was filed June 1, 2023.

7. The Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of North Carolina (the "Rules").

8. Complainant and Respondent have no objection, either procedural or otherwise, to this Hearing; both parties consent to the conduct of this Hearing by the Undersigned, and to entry of this Consent Order. Complainant and Respondent confirm that there has been no employee objection in this matter to the reasonableness of any abatement period.

9. Respondent posted the Original Citation and the Hearing Notice as required by the Rules. Neither Complainant nor Respondent have received notification from any affected employee that such employee, or its 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 time.

10. Respondent confirms that the violations alleged in the Original Citation as amended pursuant to Complainant's Motion have been abated.

Complainant confirms that no additional documentation of abatement is required by Complainant.

11. The parties agree that upon granting of Complainant's Motion that the proposed penalty for each Item designated in the Original Citation has been calculated in accordance with the standard Field Operations Manual procedure; and the new proposed penalty for each Item designated in the Original Citation as amended pursuant to Complainant's Motion has been derived in consideration of the standard mitigating factors and specific factors applicable to Respondent.

12. Respondent agrees to pay the penalty of \$37,564.96 assessed in this matter as follows: in 24 monthly installments, with the first installment being \$1,565.36 due and payable on the first business day of January, 2025. All 23 subsequent installments of \$1,565.20 each shall be due and payable on the first business day of each month thereafter. In no event shall the payment term extend beyond a consecutive 24 month period, unless agreed upon by the Complainant.

In the event Respondent does not timely pay the penalty as stated above for two consecutive months, all unpaid amount shall become immediately due and payable, and the Complainant

retains the right to institute collection proceedings as allowed by law. Respondent agrees to pay attorney's fees to Complainant in the event that the Complainant institutes collection proceedings to collect the debt.

Payment is to be by check payable to the North Carolina Department of Labor, OSHA Division (identifying Inspection No. 318246857) and mailed to North Carolina Department of Labor Financial Services Division, ATTN: Collections Division, 1101 Mail Service Center, Raleigh, North Carolina 27699-1101. Credit card payment may also be arranged.

Respondent further agrees that:

1. On or before January 1, 2025, Respondent will ensure:
 - a. employee(s) are trained in fall protection, scaffolds, ladders, use of personal protective equipment, electrical and other hazards they may be exposed to during the course of their work;
 - b. site safety inspections will be conducted on a daily basis and documented at least weekly; and
 - c. if subcontractors are hired to perform any work for the employer, a review of the subcontractor's safety and health program will be conducted.
2. Within 120 days of entry of this Order, at least one management official shall successfully complete an OSHA 10 and/or an OSHA 30 hour construction course.
13. The parties agree to bear their own fees, costs and other expenses, including attorney's fees if any, that have been incurred in connection with any stage of these proceedings up to and including the filing of this Final Order.
14. Complainant and Respondent agree that provided the respective Motion of each party is granted:
 - 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 Consent Order is a full and final resolution of the claims set out in the underlying Original Citation, as amended pursuant to Complainant's Motion;
 - 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 as amended or a waiver of any defense, provided however, that in any subsequent proceeding with respect to matters covered by this Consent Order brought directly under the Act by Complainant, this Consent 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.

MOTIONS

Complainant moved to do the following ("Complainant's Motion"):

- a) Regarding Citation 01, Item 001 to reduce the penalty to \$2,320.32;
- b) Regarding Citation 01, Item 002 to reduce the penalty to \$2,320.32;
- c) Regarding Citation 01, Item 003 to reduce the penalty to \$2,320.32;
- d) Regarding Citation 01, Item 004 to reduce the penalty to \$3,480.48;
- e) Regarding Citation 01, Item 005 to reduce the penalty to \$3,480.48;
- f) Regarding Citation 01, Item 006 to reduce the penalty to \$3,480.48;
- g) Regarding Citation 01, Item 007 to reduce the penalty to \$2,320.32;
- h) Regarding Citation 01, Item 008 to reduce the penalty to \$3,480.48;
- i) Regarding Citation 01, Item 009 to reduce the penalty to \$2,320.32;
- j) Regarding Citation 01, Item 010 to reduce the penalty to \$2,320.32;
- k) Regarding Citation 01, Item 011 to reduce the penalty to \$2,320.32;
- l) Regarding Citation 01, Item 012 to reduce the penalty to \$3,480.48;
- m) Regarding Citation 01, Item 013 to reduce the penalty to \$2,320.32;
- n) Regarding Citation 02, Item 001 to reduce the penalty to \$1,600.00.

Except as set forth in this motion, the Original Citation shall remain unmodified or amended.

Respondent did not object to Complainant's Motion.

Respondent requested that upon the granting of Complainant's Motion the Undersigned consider the following motion by the Respondent ("Respondent's Motion"):

- a) To withdraw Respondent's Notice of Contest to the Original Citation as amended pursuant to Complainant's Motion set forth above.

Complainant did not object to Respondent's Motion.

FINDINGS OF FACT

Based on the Stipulations at the time of the Hearing and the record, the Undersigned makes the following Findings of Fact:

1. Complainant, Commissioner of Labor of the State of North Carolina, is an agency of the State of North Carolina charged with the administration 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 Hearing.
4. Neither party has any objection, procedural or otherwise, to this Hearing.
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

1. 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.G.S. §95-127(11); Respondent's employees referred to in the Complaint are "employees" within the meaning of N.C.G.S. §95-127(10).
3. This Court has jurisdiction over the parties and the subject matter of this Hearing.
4. Respondent is subject to the provisions of the Act and jurisdiction of the Safety and Health Review Commission of North Carolina.

Based on the foregoing Findings of Fact and Conclusions of law, **NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:**

1. That Complainant's Motion is hereby **GRANTED**;
2. That Respondent's Motion is hereby **GRANTED**;
3. That Respondent shall meet the requirements of Stipulation 12 as set out above; and
4. That the parties shall comply with the terms and conditions set forth in the Stipulations and in this Consent Order.

Effective the 5th day of December, 2024.

SO ORDERED

R. Joyce Garrett
R. Joyce Garrett (Dec 5, 2024 11:38 EST)

R. Joyce Garrett
Hearing Examiner

CONSENTED TO:

JOSHUA H. STEIN, Attorney General

Rory Agan

Rory Agan (Dec 5, 2024 10:44 EST)

Rory Agan
Special Deputy Attorney General
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Counsel for Complainant

Shannon Sumerell Spainhour

Shannon Sumerell Spainhour (Dec 5, 2024 10:39 EST)

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Asheville, North Carolina 28803
Tel. 828-277-5138
Email: mspanhour@constangy.com
Counsel for Respondent

CERTIFICATE OF SERVICE

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

SHANNON SUMMERELL SPAINHOUR
CONSTANGY BROOKS
84 PEACHTREE RD
SUITE 230
ASHEVILLE, NC 28803

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 11 DAY OF December 2024.

PAUL E. SMITH
CHAIRMAN



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