

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

**COMMISSIONER OF LABOR OF THE** )  
**STATE OF NORTH CAROLINA** )  
  
**COMPLAINANT,** )  
  
**v.** )  
  
**MOTORSPORTS ON MAIN, LLC,** )  
**and its successors,** )  
  
**RESPONDENT.** )  


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**DOCKET NO. OSHANC: 2023-6547**  
**INSPECTION NUMBER: 318255304**  
**CSHO ID: C4570**

**FILED**

**AUG 12 2024**

NC OSH Review Commission

**ORDER**

THIS MATTER came on for hearing and was heard remotely before the undersigned on June 4, 2024 pursuant to a notice of remote hearing. Complainant was represented by Madison L. Beveridge, Assistant Attorney General, North Carolina Department of Justice, and Respondent was *pro se*. No employees appeared other than as below noted.

Complainant’s witness was Compliance Safety and Health Officer, Sam Atassi. Respondent’s witness was Michael LaLima, Manager of Respondent.

Based upon the evidence presented at the hearing, and with due consideration of post-hearing submissions of the parties, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion and enters an Order accordingly.

**SAFETY STANDARDS AND/OR STATUTES AT ISSUE**

29 CFR 1910.141(b)(1)(i):

Potable water shall be provided in all places of employment, for drinking, washing of the person, cooking, washing of foods, washing of cooking or eating utensils, washing of food preparation or processing premises, and personal service rooms.

29 CFR 1910.141(d)(2)(i):

Lavatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph.

**ISSUE PRESENTED**

Did Complainant prove more likely than not that Respondent failed to provide a lavatory and potable water to its employees who worked at its retail sales location?

**FINDINGS OF FACT**

1. Respondent is a retail and service establishment selling motorsports vehicles such as ATV’s, UTV’s, motorcycles and scooters to the public. Respondent operates both a retail and a repair/service facility located on two separate properties that are situated diagonally on opposite sides of the same road approximately 350 feet apart.
2. Pursuant to the Occupational Safety and Health Act of North Carolina, hereafter “the Act,” N.C.G.S. § 95-126, et al., and specifically, N.C.G.S. 95-135, the Review Commission has jurisdiction over the parties and subject matter of this action.
3. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of this Act, including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. 95-133 et seq.
4. The Respondent is an “employer” within the meaning of N.C.G.S. 95-127(11) and its employees are referred to herein as “employees,” within the meaning of N.C.G.S. 95-127(10).
5. On November 7, 2022, Compliance Safety and Health Officer Sam Atassi, employed by the North Carolina Department of Labor, met with Respondent’s representative at Respondent’s work site at 115 Anna Lewis Drive, Lexington, North Carolina.
6. Officer Atassi properly entered onto Respondent’s site and conducted an inspection which was prompted by the receipt of a complaint from an employee.
7. The inspection was permitted by Mr. LaLima.
8. On March 31, 2023, as a result of the inspection, Complainant issued two citations carrying the following abatement dates and penalties:

**CITATION NUMBER ONE (SERIOUS)**

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	29 CFR 1910.141(b)(1)(i)	Immed. upon receipt	\$750.00
2	29 CFR 1910.141(d)(2)(i)	Immed. upon receipt	\$750.00
			TOTAL \$1,500.00

9. For each of the alleged violations, the Complainant calculated the proposed penalties and proposed abatement dates according to the procedures set forth in the Complainant’s North Carolina Operation Manual. Pursuant to Chapter VI, section B. of the North Carolina Operation Manual, Complainant applied the following Adjustment Factors to

the Gravity Based Penalty to calculate the proposed adjusted penalty, as appropriate: 70% credit for size; 0 % credit for good faith; and 10% credit for history for a total adjustment of 80%.

10. Respondent submitted a timely Notice of Contest and a Statement of Position on or about June 14, 2023.
11. Respondent has two work locations roughly across a common road between them. One location is a service and storage facility where Respondent services the vehicles it sells across the road at its sales lot. There is no lavatory or potable water for employees on the sales lot, but both are available approximately 350 feet from the sales lot in the service and storage facility which has two lavatories and two water fountains.
12. Respondent has a gas-powered golf cart available to drive from one area to the other, and if that vehicle were not available, numerous vehicles for sale on the lot are also available to be used to go between the two locations.
13. Employees are at both work areas during the course of the work day.
14. Respondent provides reasonably prompt and reasonably unrestricted access to lavatory and potable water facilities.
15. While there was a suggestion that the road was busy, which was disputed by Respondent, there was no evidence offered in the hearing to prove the statement that the road was busy. COSHO Atassi noted that there was not a crosswalk, but there was insufficient evidence to prove that the crossing of the road was hazardous.
16. Complainant did not prove the road was hazardous nor did it prove that employees going between the two locations would be exposed to hazards.
17. The U.S. Department of Labor, Occupational Safety and Health Administration issued on April 6, 1998, an Interpretation of a related standard, 29 CFR 1910.141(c)(1)(i): Toilet Facilities, which provides helpful guidance. This interpretive letter clarifies that the issue in making toilets available to employees is to make sure that, “The employer may not impose *unreasonable restrictions* on employee use of the facilities” (Emphasis added).
18. The Interpretation Letter states, “In light of the Standard’s purpose of protecting employees from the hazards created when toilets are not available, it is clear that the standard requires employers to allow employees prompt access to sanitary facilities. Restrictions on access must be reasonable and may not cause extended delays.”
19. The Interpretation Letter notes that the field sanitation standard for farm workers provides that toilets be “located no more than a quarter mile from the location where employees are working” and highlights that the field standard arose out of the *only* OSHA rule making to address explicitly the question of worker need for prompt access to toilet facilities.
20. The Interpretation Letter concludes that the evaluation of restrictions on the use of toilet facilities requires a case-by-case evaluation looking at seven factors:
  - a. Nature of the restriction;
  - b. Length of time employees are required to delay using facilities;

- c. The employer's explanation for the restriction;
  - d. Whether the restriction arises from general policy or particular circumstances or with particular supervisors;
  - e. Whether the employer policy recognizes individual employee medical needs;
  - f. Whether employees have reported adverse health impacts; and
  - g. The frequency with which employees are denied permission to use facilities.
21. The Interpretation Letter notes that State Plan States are not required to issue their own interpretations, but their standards and interpretations should be "at least as effective" as the Federal standard.

### **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. At all times material to this proceeding, the Respondent was subject to the requirements of N.C. Gen. Stat. §95-126 *et seq.* and the standards promulgated thereunder.
3. The Review Commission has jurisdiction of the parties and the subject matter.
4. Complainant had the burden to prove by a preponderance of the evidence that Respondent committed violations of 29 CFR 1910.141(b)(1)(i) or 29 CFR 1910.141(d)(2)(i).

### **DISCUSSION**

Complainant acknowledges that the federal Standard Interpretation Letter notes that "there is no bright line rule regarding the acceptable distance between employees' workstations and sanitary facilities, nor is that the only factor to consider." This opinion relies on the Interpretation Letter for guidance in order to ensure that its decision is consistent with the spirit and intent of the federal standard.

In his memorandum post-hearing, Complainant cites two California cases for guidance. The first of the two cases he concedes found no violation where the toilet was 250-325 feet away but that bathroom was within the same building. *Sec of Labor v. The Justus Co., Inc.*, 1 OSAHRC 775 (O.S.H.R.C.A.L.J. 1972). The second case also found no violation of a previous version of the standard when the bathrooms were 475 feet away from a shop where the employees worked. Complainant notes five factors that were key in determining the lack of a violation: 1) the employer provided protective clothing for outside travel; 2) transportation was offered via motor scooter; 3) the path to the bathroom was on a quiet road rarely traveled by vehicles; 4) employees regularly worked within 200 feet of the bathrooms during their shifts; and 5) no employees had complained about the accessibility of the bathrooms. *B.F. Goodrich Co.*, 2 OSAHRC 677 (O.S.H.R.C.A.L.J. February 23, 1973).

With the case law cited by Complainant and his evaluation of those cases and a careful review of the Interpretation Letter, it is clear to this hearing officer that as instructed by the Interpretation Letter, each Citation finding violations of the standards in question must be viewed in a case-by-case basis. While this Respondent location is not an example of the application of a field sanitation standard, it is significant that the only time OSHA rule making has addressed explicitly the question of worker need for prompt access to toilet facilities, it concluded that the distance within which toilet facilities could acceptably be placed was a quarter mile. The distance between the facilities and the retail sales location in this case is 350 feet versus 1,320 feet (5,280 feet/mile divided by 4 = 1,320 feet) in a field situation. Obviously, the work of a field hand is different from a retail sales employee in a case such as this, but the distance required of an employee to travel in this case is substantially less than has been approved for field hands. If a quarter mile is not an unreasonable restriction of prompt access to lavatories and potable water for field hands, it is certainly a factor to consider when evaluating the reasonableness of the restrictions on retail sales employees for Respondent Motorsports on Main.

The Interpretation Letter also isolates factors that should be considered in determining whether restrictions on the use of toilet facilities is reasonable. This discussion will now consider the seven factors identified and consider in addition the items highlighted by Complainant from *B.F. Goodrich*. Before considering the factors, it is acknowledged that the Interpretation Letter considers a different subparagraph of the standard, yet the specific citation *sub judice* alleges that neither a lavatory nor potable water was provided to the employees. This is almost identically the issue considered by the Letter in that it addresses the availability of toilet facilities. In this case, the Respondent's lavatories and potable water are in the same location — the service building. The issue is whether unreasonable restrictions are placed on their availability. For the purposes of this decision, the lavatories and potable water are treated as one issue.

The first factor identified by the Letter looks at the nature of the restriction. When an employee is working at the retail sales location the lavatories are 350 feet away and the employee is required to either walk the distance or use the gas-powered golf cart or, if the golf cart is not present, one of the vehicles from among the ones for sale. The provision of the cart or one of the other vehicles is at least equivalent to the circumstance of being given access to a motor scooter as in *B.F. Goodrich*.

If the employee is working at the service facility, then the lavatories are in the same building and there is no restriction. This is similar to *B.F. Goodrich* where the employees sometimes had work duties that placed them only 200 feet from the lavatories. Similarly, in this case, the testimony established that the employees worked at both locations during the course of a work day, and when they were at the service facility there was no restriction.

The *B.F. Goodrich* case noted that the path to the lavatories was a “quiet road rarely travelled by vehicles.” While Complainant argued that the road in this case was busy, the evidence was insufficient to prove that it was either busy or hazardous. Respondent denied that its employees

would have to ride in the lanes of the road. The only contact with the road surface was testified to have been when the road was crossed. Consequently, even if the road was busy (which was not established), the exposure to traffic would have been only at the point of crossing.

The second factor concerns how long a delay is incurred by the employee who needs to use the facilities. Testimony at the hearing suggested that the trip in the cart would take just 10 seconds and was unchallenged. Even if the trip took a multiple of that length of time, the delay in access to the facilities is modest at most.

The third factor looks at the Respondent's explanation for the restriction. Motorsports asserted that employees were free to use the restrooms whenever needed and that the restriction was not a problem because of the ready availability of the vehicles to transport an employee who did not choose to walk.

The fourth factor looks at whether the restriction arises from general policy or particular circumstances or particular supervisors. Motorsports asserted what appeared to be a general policy that it believed sufficient provisions had been made by the availability of transportation to the building across the road where it had bathrooms and a drinking fountain. There was no evidence offered to suggest that particular circumstances or supervisors had any role to play in the access of the employees to the facilities.

The fifth factor considered whether the employer policy addressed individual employee medical needs. Michael LaLima, the manager who testified for the company noted his own medical needs and his satisfaction with the golf cart accommodation for transport.

The sixth factor addressed whether employees had reported adverse health impacts. In this case, an employee had complained to Complainant which had been the stimulus for the OSHA inspection, but no particular adverse health need for the employee who complained was noted. It is noted that the B.F. Goodrich decision was partly based on the absence of a complaint. In this case, the complaint asserted that there were no bathrooms, and in addition, the employee complaint noted that male employees had chosen to urinate on the grounds rather than go to the service facility across the road. Complainant argues that male employees urinating on the grounds demonstrates that the bathrooms were not promptly available or convenient, but Respondent denied that employees urinate on the grounds. Assuming that employees had, in fact, been urinating on the grounds does not prove the bathrooms were unreasonably restricted. It is just as likely evidence that one or more male employees were uncouth and preferred not to walk or ride to the bathroom to relieve themselves.

The seventh factor addressed the frequency with which the employees were restricted from using the toilet. The evidence at hearing did not establish anything more than what has already been noted that the employees at the retail facility had access to vehicles to ride the 350 feet to the bathrooms across the road in the service facility.

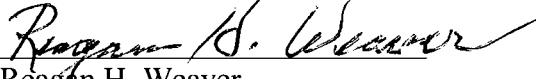
In considering the B.F. Goodrich factors, there was no evidence elicited in this case to address how employees were supposed to navigate weather complications or how employees would protect themselves if they were caused to use a vehicle other than the golf cart that might require a helmet or other safety equipment. The burden is on Complainant to substantiate the citations. There was insufficient evidence of the possible need for PPE to justify the Complainant's argument.

In the final analysis, each case needs to be evaluated based on its particular facts. In this case, after considering the numerous factors addressed above, the evidence is insufficient to justify Citation Items 1 or 2. Respondent does not impose unreasonable restrictions on retail sales employees' use of the lavatories and water fountains.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. the Citations against the Respondent are hereby **DISMISSED**.

This the 12 day of August, 2024.

  
Reagan H. Weaver  
Hearing Examiner

**CERTIFICATE OF SERVICE**

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

**MICHAEL LALIMA  
MOTORSPORTS ON MAIN LLC  
115 ANNA LEWIS DR.  
LEXINGTON, NC 27292**

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:

**MADISON BEVERIDGE  
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 14 DAY OF August 2024.

**PAUL E. SMITH  
CHAIRMAN**

  
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**Karissa B. Sluss  
Docket Administrator  
NC Occupational Safety &  
Health Review Commission  
1101 Mail Service Center  
Raleigh, NC 27699-1101  
TEL.: (984) 389-4132  
NCOSHRC@oshrc.labor.nc.gov**