

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

**COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,**)
)
)
COMPLAINANT,)
)
)
v.)
)
**ADAN DIAZ dba
Professional Stucco Design, Inc.,
and his successors,**)
)
)
RESPONDENT.)

FILED

JUN 12 2024

**NC Occupational Safety & Health
Review Commission**

**AMENDED
ORDER**

**OSHANC NO: 2023-6559
INSPECTION NO.: 318256898**

CSHO ID: AO177

This matter was duly noticed and came on for hearing before the undersigned on May 9, 2024, via the Lifesize video platform. The Commissioner of Labor of the State of North Carolina (“Complainant”) was represented by Assistant Attorney General Jonathan Jones, and Adan Diaz (the “Respondent”) appeared on his own behalf, without legal counsel.

At the hearing Complainant’s Exhibits 1 (the Complainant’s certified investigative report), and 2-31 (photographs of the Worksite) were admitted without objection. Respondent offered no Exhibits.

During the hearing, the following witnesses testified under oath: Respondent’s employees Rene Torres and David Hernandez, Complainant’s CSHO Jamie Lawson, and the Respondent. Luis Del Rio also attended as an interpreter for Messrs. Torres and Hernandez, and after being duly sworn, interpreted the questions propounded to these witnesses, and their responses.

After considering the sworn testimony, the exhibits admitted during the hearing, judicially noticed information pursuant to N.C.Gen.Stat. §8C-1-201, the arguments of the parties and the applicable law, the undersigned makes the following:

Findings of Fact:

1. The Complainant is an agency of the State of North Carolina charged with administering and enforcing the Act.

2. Respondent is an individual and sole proprietor of a business employing at least four other individuals to install stucco siding on buildings, and at all times material to this matter was an “employer” within the meaning of N.C.Gen.Stat. § 95-127(9), with “employees” within the meaning of N.C.Gen.Stat. § 95-127(1), including witnesses Torres and Hernandez.

3. From December 2019 to the date of hearing the Respondent had not received any final orders affirming willful, serious or repeat violations.

4. In December 2022 four of Respondent’s employees – witnesses Torres and Hernandez, and two others known to these witnesses as “Tonio,” and “Don Gordo,” were working on the stucco façade of a commercial building located in Forsyth County at 4991 Reidsville Road in Walkerton, N.C. (“the Worksite”). In order to perform their work, the Respondent and his employees had erected scaffolding around the building. The scaffolding rested on bare ground and consisted of multiple non-continuous levels:



5. The building’s owner hired Respondent to perform the stucco work on the building, and paid the Respondent \$9,060 for the work, which was estimated to take two weeks. The building’s owner did not have any control over the work site.

6. On December 16, 2022, Respondent’s employees had completed approximately one week of the work.

7. At approximately noon on December 16, 2022, Complainant’s Compliance Safety and Health Officers (CSHOs) Jamie Lawson and Adam Key stopped for lunch at a convenience store across the street from the Respondent’s Worksite. After exiting the convenience store, the CSHOs observed the Worksite for approximately twenty minutes. Their observation led them to reasonably believe that there were several potential violations of OSH standards at the Worksite, and they took photographs of the same which were introduced into evidence without objection (Comp. EXHs 2-15).

8. After observing the Worksite, the CSHOs approached the Worksite, introduced themselves to the employees, and attempted to identify the person who was the crew leader or supervisor or was otherwise in charge. The employees with whom the Complainant’s CSHOs communicated did not have good English skills, and did not understand much of the communication with the CSHOs, but three of the employees pointed to a fourth employee (Torres) as the person in charge and the CSHOs observed Mr. Torres giving direction to the other three.

9. During their conversation with Mr. Torres, he provided the phone number for Respondent, who was in Virginia. The CSHOs called the Respondent, explained to him their purpose for being on the Worksite and asked the Respondent for permission to inspect the Worksite. (The Respondent stated (not under oath) that he did not recall being asked to give permission, but he would have given permission if he was asked.)

10. Having received consent from the Respondent, the CSHOs inspected the site, taking additional photos of conditions at the Worksite (Comp. EXH. 16-31), and spoke with the Respondent and the Respondent's employees to gather additional information.

11. At the time of the CSHO's pre-entry observation and subsequent inspection, the following conditions existed at the Respondent's Worksite:

- a. Fabricated steel scaffolding had been erected on the Worksite by the Respondent and one or more of his employees;
- b. The height of the fabricated steel scaffolding varied from 12 feet ten inches to 15 feet 2.5 inches from the bare ground below, and working platforms/walkways varied from 10 feet three inches to 13 feet ten inches from the ground below (see, e.g. Comp. EXH. 3, 25, 27-29);
- c. The Respondent's employees were applying a Parex DPR Acrylic Finish to a stucco surface on the building. The Parex product was pre-mixed in 5-gallon pails and applied by the employees with trowels (see, e.g., Comp. EXH 2-26).
- d. The Respondent purchased and provided the Parex DPR Acrylic Finish for use by his employees at the Worksite but did not develop, implement, or maintain at the workplace a written hazard communication program relating to this product, and did not maintain or provide to the employees a safety data sheet or safety training regarding the Parex DPR Acrylic Finish;
- e. The Safety Data Sheet for Parex DPR Acrylic Finish stated that it was a water-based product containing titanium dioxide, with a pH of between 8-10,¹ and potential hazards of exposure included eye irritation, chemical burns, and blindness, as well as chemical burns of the skin that could take several hours to manifest.
- f. None of the Respondent's employees were using face/eye protection, and no evidence was presented that face/eye protection was provided or available to them on-site;
- g. All four of Respondent's employees moved among the several levels of the scaffolding, with two employees working below upper-level employees at times, and one employee standing on the ground in front of the scaffolding, approximately 2-3 feet from the front face of the scaffolding while other employees were working on the scaffolding above him (see, e.g., Comp. EXH. 7, 8, 11, 13, 14);
- h. Although Respondent's employees had hardhats in a work truck at the time of

¹ The Complainant's Investigative File (Comp. EXH. 1) included a 2015 Safety Data Sheet ("SDS") applicable to all Parex DPR Finishes used as EIFS Coating. The Complainant's analysis in its investigative file was not consistent with the SDS for this product, and the undersigned has relied on the SDS for this finding. See Comp. EXH 1 at pp. 143, 146.

inspection, none of the Respondent's employees were wearing those hardhats or any other head covering to protect from impact or injury due to falling tools or pails from higher levels of the scaffolding;

- i. The fabricated steel scaffolding was missing diagonal braces, cross-braces, planks, and guardrails (see, e.g., Comp. EXH. 2, 3, 6-16, 27);
- j. One walkway at a height of approximately 13 feet had a hole in the end of approximately 3-4 inches (Comp. EXH 21), while another working platform at a height of approximately 7-8 feet was missing planking that created a gap of approximately 6-8 inches in the platform (Comp. EXH 9-15);²
- k. Platforms throughout the scaffolding were not fully seated on their cleats, and one cleat was inserted into an outrigger pipe (installed upside-down and used as a platform support), and wired to hold it in place (see, e.g. Comp EXH. 20);
- l. Several platforms extended less than six inches over the centerline of their supports and others extended more than 18 inches over the centerline of their supports, with 2x4 wooden boards wedged under them to prevent teetering of the platform (see, e.g., Comp. EXH. 2-4, 6-14);
- m. One scaffolding footing and mudsill were submerged in water, and another footing was placed approximately 1/3 off its mudsill (Comp. EXH. 18, 19);
- n. Pins that held vertical supports together were missing (see, e.g., Comp. EXH. 30);
- o. The Respondent's employees did not use a ladder to access the different levels of the scaffolding; instead, they climbed up and down the scaffolding using rungs built into its vertical end frames (see Comp. EXH. 10, 13);
- p. The vertical endframes that the employees used to access the scaffolding each contained three rungs; due to curving, the flat portion of the bottom rung was less than 8 inches in length.

12. The foregoing conditions were open and obvious and each of the employees on site at the time of the inspection knew of them, including Mr. Torres, who was acting as crew leader.

13. Because the Respondent was not onsite, he did not know and with the exercise of reasonable diligence could not have been aware of the employees' failure to wear the hardhats that were available to them.

14. At one point during the CSHO's pre-entry observations, one employee stood on a 5-gallon pail placed on the scaffolding in order to reach a higher level (see Comp. EXH. 12). However, Respondent was not present on-site to observe this employee, and there was no evidence presented that crew leader Torres saw the employee standing on the pail, or with the exercise of

² The CSHOs were unable to obtain precise measurements because obtaining access to measure would have required that they expose themselves to the hazards of the Worksite.

reasonable diligence could have seen the employee standing on the pail: Mr. Torres was on an upper platform approximately 10 feet away, with a corner of the building and/or planking blocking his view, and there was no indication how long the employee was on the pail, or whether Mr. Torres moved to a location that would have allowed him a view of the employee while the employee was on the pail.

15. The Respondent admitted that no one had inspected the scaffolding system prior to the beginning of the workshift. This admission is supported by the numerous obvious defects in the erection of the scaffolding which would have been corrected if the scaffolding had been inspected by a competent person at the beginning of the shift.

16. As a result of the inspection, and pursuant to its obligation to enforce the Occupational Safety and Health Act of North Carolina, N.C.Gen.Stat. § 95-126 *et seq.* (“the Act”), on February 28, 2023 Complainant issued one citation with sixteen items. On June 29, 2023 the Respondent emailed notice to the Complainant that he contested “the penalties charged” as a result of the Complainant’s inspection, and on August 9, 2023 the Respondent submitted his Statement of Position admitting all citations that did not carry a penalty, and objecting to each other citation, in whole or in part. More specifically, the Citation Items and position of the Respondent on each was:

a. The Respondent asserted three grouped serious violations of 19 CFR §1910.1200:

i. **Item 001a:** violation of subsection (e)(1) (failure to develop, implement, and maintain at each workplace a written hazard communication program that satisfies minimum regulatory requirements for labels and other forms of warning, employee information, training, etc.), with a proposed penalty of \$750.00 and abatement date of April 17, 2023;

(Respondent admitted the violation but denied the designation as serious, and objected to the penalty and abatement date.)

ii. Item 001b: violation of subsection (g)(8) (failure to maintain in workplace copies of required safety data sheets for each hazardous chemical, etc.), with a proposed penalty of \$0 due to grouping, and an abatement date of April 17, 2023;

(Respondent did not contest this item.)

iii. Item 001c: violation of subsection (h)(1)(failure to provide employees with effective information and training on hazardous chemicals in their work area), with a proposed penalty of \$0 due to grouping, and an abatement date of March 24, 2023;

(Respondent did not contest this item.)

b. **Item 002:** one serious violation of 29 C.F.R. §1926.100(a) (where there is possible danger of head injury from impact or from falling or flying objects, employees shall be

protected by protective helmets) with a proposed penalty of \$1,000 and an abatement date stating the violation was corrected during inspection;

(Respondent denied the violation and classification, and objected to the penalty and abatement date.)

- c. **Item 003:** one serious violation of 29 C.F.R. §1926.102(a)(1)(failure to ensure affected employee uses appropriate eye or face protection when exposed to hazards from flying particles, liquid chemicals, acids or caustic liquids or vapors), with a proposed penalty of **\$750** and an abatement date stating the violation was corrected during inspection;

(Respondent admitted the violation, but denied the classification, and objected to the penalty and abatement date.)

- d. ten grouped and ungrouped serious violations of 29 C.F.R. § 1926.451:

- i. **Item 004:** violation of subsection(a)(6) (scaffolds shall be designed, and constructed and loaded in accordance with that design), with a proposed penalty of **\$1000** and an abatement date stating the violation was corrected during inspection;

(Respondent admitted the violation and classification as charged, but objected to the penalty and the abatement date.)

- ii. **Item 005a** – violation of subsection 451(b)(2)(k) (scaffold planks, decks or platforms shall be installed so that the space between adjacent units and the platform and uprights is no more than 1 inch wide), with a proposed penalty of **\$1000** and an abatement date stating the violation was corrected during inspection;

(Respondent admitted the violation and classification as charged, but objected to the penalty and abatement date.)

- iii. **Item 005b** (grouped) – violation of subsection 451(b)(4) (each end of platform, unless cleated or otherwise restrained by hooks or equivalent means, shall extend over the centerline of its support at least 6 inches), with a proposed penalty of \$0 due to grouping, and an abatement date stating the violation was corrected during inspection;

(Respondent did not contest this Item.)

- iv. **Item 006** – violation of subsection 451(e)(1)(scaffold platforms more than 2 feet above or below a point of access require use of ladders, ramps, walkway or direct access from another scaffold; crossbraces shall not be used as a means of access), with a proposed penalty of **\$2,900.40** and an abatement date stating the violation was corrected during inspection;

(Respondent admitted the violation and classification as charged, but objected to the penalty and the date of abatement.)

- v. **Item 007a** – violation of subsection 451(f)(3)(scaffolds shall be inspected by competent person for visible defects before each shift and after any occurrence that could affect scaffold’s structural integrity), with a proposed penalty of **\$2,900.40** and an abatement date stating the violation was corrected during inspection;

(Respondent denied the violation and classification, and objected to the proposed penalty and abatement date.)
- vi. **Item 007b (grouped)** – violation of subsection 451(c)(2)(i) (footings shall be level, sound, rigid and capable of supporting loaded scaffold without settling or displacement), with a proposed penalty of \$0 due to grouping and an abatement date stating the violation was corrected during inspection;

(Respondent did not contest this Item.)
- vii. **Item 008** – violation of subsection 451(f)(7) (scaffolds erected or altered under supervision and direction of competent person and performed by experienced and trained employees), with a proposed penalty of **\$1,000** and an abatement date stating the violation was corrected during inspection;

(Respondent admitted the violation and classification as charged, but objected to the proposed penalty and abatement date.)
- viii. **Item 009a** – violation of subsection 451(g)(4)(i)(guardrails shall be installed along all open sides and ends of platforms), with a proposed penalty of **\$2,900.40** and an abatement date that stated the violation was corrected during inspection;

(Respondent admitted the violation and classification as charged, but objected to the proposed penalty and abatement date.)
- ix. **Item 009b (grouped)** – violation of subsection 451(e)(5)(i)(ramps and walkways 6 feet or more above lower levels shall have guardrail systems), with a proposed penalty of \$0 due to grouping and an abatement date stating that the violation was corrected during inspection;

(Respondent did not contest this Item.)
- x. **Item 009c (grouped)** – violation of subsection 451(f)(14)(makeshift devices such as boxes and barrels shall not be used on top of scaffold platforms to increase working level height of employees), with a proposed penalty of \$0 due to grouping and an abatement date stating that the violation was corrected during inspection;

(Respondent did not contest this Item.)
- e. **Item 010:** one serious violation of 29 C.F.R. 1926.452(c)(2)(scaffolding frames and panels shall be braced by cross, horizontal or diagonal braces), with a proposed penalty

of \$2,900.40 and an abatement date stating that the violation was corrected during inspection.

(Respondent denied this violation and classification, and objected to the penalty and abatement date.)

Violations Wholly Denied:

17. Respondent denied Citation 1, Item 2, alleging a violation of 29 CFR § 1926.100(a), which provides: “Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects... shall be protected by protective helmets.” In support of this citation, Complainant presented evidence that Respondent’s employees were not wearing protective helmets that were available to them in a work truck, and that one employee was on the ground 2-3 feet in front of the scaffolding, with other employees working above him on the scaffolding, but the employee on the ground was not wearing head protection.³ (Comp. EXH. 6, 8, 11, 13, 14). The Respondent did not contest the Complainant’s evidence or present any evidence relating to this Item.

18. Respondent denied Citation 1, Item 7a in which Complainant alleged a violation of 29 CFR § 1926.451(f)(3) which provides: “Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which would affect a scaffold’s structural integrity.” In support of this Item Complainant presented evidence of the multiple open and obvious defects on the day of inspection (listed above), that Respondent and crew leader Torres were both present at the Worksite on the morning of the inspection, and Respondent and crew leader Torres each participated in construction of the scaffolding. Respondent admitted at hearing that he was present at the Worksite every day and often twice a day, he was at the Worksite on the morning of the inspection, and he helped erect the scaffolding, but he did not inspect it the morning of the CSHO’s inspection.

19. Respondent denied Citation 1, Item 10, in which Complainant alleged a violation of the last sentence of 29 C.F.R. § 1926.452(c)(2), specifically:

Frames and panels shall be braced by cross, horizontal, or diagonal braces, or combination thereof, which secure vertical members together laterally. The cross braces shall be of such length as will automatically square and align vertical members so that the erected scaffold is always plumb, level, and square. All brace connections shall be secured.

In support of this Item, Complainant’s CSHO testified that “flip lock pins” or “fingers” designed to secure vertical supports were non-functioning or missing in several locations, and explained that these missing or defective pins could cause the scaffolding to fail. In support of this contention the Respondent presented photos of vertical supports that were missing cross braces entirely, and did not have bolts or pins securing them together (Comp. EXH. 22). The CSHO also testified that some of the fingers securing cross braces were worn out and should be rotated so that bracing

³ The Complainant’s CSHO also pointed to a employee on the scaffolding below other employees on the scaffolding, but there was no evidence explaining how a tool or pail could fall or fly from the solid platform above and strike the employee on the platform below.

cannot come off, presenting Comp. EXH 24 in support of his testimony. Respondent argued that Comp. EXH 24 showed the finger pin rotated sufficiently to hold the brace in place.

Serious Classifications

20. As to Citation 1, Items 1a, 2, 3, 7a, and 010, the Respondent admitted the violations but objected to each violation's classification as "serious." In support of its classification for these violations, the Respondent submitted the following evidence:

- a. Item 1a – the Complainant presented evidence that 29 C.F.R. § 1926.1200(e)(1) was intended to require the Respondent to provide pertinent information regarding the hazards of exposure to the Parex DPR Acrylic Finish used by Respondent's employees, and what to do in case of exposure. The Complainant's CSHO testified that the hazard to which employees were exposed included skin irritation and rash, but the Complainant's investigative report stated that the hazard included chemical burns to the eye and skin, which are also hazards identified in the SDS form for the product. See Comp. EXH. 1, pp. 75, 146. The CSHO further testified that the Respondent knew, and admitted to, this violation at the time of the inspection. The Respondent presented no evidence on this issue.
- b. Item 2 - the Complainant presented evidence that 29 C.F.R. § 1926.100(a) was intended to protect employees from head injuries resulting from falling objects, including concussion or lacerations that could require hospitalization or prevent employees from performing their regular jobs; and that the Respondent's crew leader knew that Respondent's employees were at risk of injury from falling objects but were not using the hard hats provided to them to prevent this injury. The Respondent presented no evidence on this issue.
- c. Item 3 – Complainant presented evidence that 29 C.F.R. § 1926.102(a)(1) was intended to protect employees from exposure to flying particles from the Parex DPR Acrylic Finish they were using, which could cause chemical burns to the face and eyes, and that both the Respondent's crew leader and the Respondent knew or could have known of this violation at the time of the inspection: the crew leader was using the product at the time of the inspection but was not wearing any eye goggles or face mask, and the Respondent provided the product used by the employees and knew or could have known with reasonable diligence that eye goggles and face masks were not present on-site for use by his employees on the day of the inspection. The Respondent presented no evidence on this issue.
- d. Item 7a – the Complainant presented evidence that 29 C.F.R. § 1926.451(f)(3) was intended to protect employees from the hazard of scaffolding collapsing or slipping while they were working on it, by requiring that a competent person inspect the scaffolding before the work shift, and that a fall from the scaffolding due to collapse or slipping could result in death or permanent disability. The Complainant also presented evidence that both Respondent's crew leader and Respondent knew or in the exercise of reasonable diligence could have known of this violation. The Respondent presented no evidence on this issue.

- e. Item 10 – Complainant presented evidence that 29 C.F.R. § 1926.452(c)(2) was intended to prevent scaffolding collapse resulting from braces that were not secure, which could result in employees’ death or permanent disability, and that the crew leader and Respondent knew or in the exercise of reasonable diligence could have known of this violation. The Respondent contested this violation, arguing that the Complainant’s evidence showed that the finger pin was rotated sufficiently to prevent the brace from becoming unsecured.

Proposed Penalties

21. As to the proposed penalties to which Respondent objected -- Citation 1, Items 1a, 2, 3, 4, 5a, 6, 7a, 8, 9a and 10 -- the Complainant’s CSHO testified that
 - a. As to Items 1a, 3 – the recommended penalty for each violation pursuant to the N.C. OSH Field Operations Manual was \$6500 but the Complainant applied a 70% reduction for size of the employer, 10% reduction for history, and 10% reduction for good faith, so that the proposed penalty for each violation was \$750, which was the lowest sum authorized under North Carolina law;
 - b. As to Items 2, 4, 5a, and 8 – the recommended penalty for each violation pursuant to the N.C. OSH manual was \$10,000 but the Complainant applied a 70% reduction for size of the employer, 10% reduction for history, and 10% reduction for good faith, so that the proposed penalty for each violation was \$1,000;
 - c. Items 6, 7a, 9a, and 10 – the recommended penalty for each violation pursuant to the N.C. OSH Manual was \$14,502, but the Complainant applied a 70% reduction for size of the employer, and a 10% reduction for history, but was unable to apply a 10% reduction for good faith due to the severity and probability of “high” or greater,” so that the total reduction was 80%, and the proposed penalty for each violation was \$2,900.40.

Proposed Abatement Dates

22. The Complainant’s CSHO testified that Citation 1, Item 2 was abated during the inspection by the employees putting on helmets, and that Items 3-10 were abated by completion of the project a week later, when the work was completed and the scaffolding was taken down. The abatement dates for Citation 1, Items 1a-1c expired prior to the Respondent submitting his Notice of Contestment; the Complainant presented no evidence that these Items remained unabated at the time of hearing.

Hardship

23. During the hearing, the Respondent was open and frank about the various citations and his presentation dealt almost exclusively with the total amount of the penalty, the disproportionate amount of the penalty in relation to the payment he received for the job (\$9,060), his offer to pay the Complainant the total amount he received for the job, and the hardship that would result if the full penalty were imposed, stating that it would put him out of business.

Respondent's sentiments were sincerely expressed and Complainant did not dispute any of the Respondent's statements.

24. During the hearing, the Respondent testified that he was careful, and in his years of operation since 1997, he had never had an employee fall from scaffolding, although he did have an employee fall from a 4' ladder approximately 3-4 years prior to the hearing which he believed was reported to the Complainant.

Based on the foregoing, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or these Conclusions of Law constitute 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). The foregoing Findings of Fact are incorporated by reference to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions of the North Carolina Occupational Safety and Health Act, N.C.Gen.Stat. § 95-126 *et seq.* (the Act), and the standards promulgated thereunder.

3. The Review Commission acquired jurisdiction of this matter upon the Respondent's submission of a Notice of Contest challenging the Complainant's citation. N.C.Gen.Stat. § 95-135(b), (i).

4. To establish a violation of a specific OSHA standard, Complainant must prove the following elements by a preponderance of the evidence: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation.

5. To establish that the violation was serious the Complainant must also establish that the hazard created the possibility of an accident and that the substantially probable result of an accident could be death or serious bodily injury. N.C.Gen.Stat. § 95-127(19). Serious bodily injury includes (but is not limited to) loss of a body part, concussion, broken bones, internal injuries; cuts, laceration or punctures that involve significant bleeding or require sutures; and chemical burns. NC OSH Field Operations Manual, chapter IV at pp. 21-23.

6. Respondent waived his challenges to Citation 1, Items 1b, 1c, 5b, 7b, and 9b, and those Citation Items are each affirmed as charged.

7. Respondent admitted the violations set out in Citation 1, Items 1a and 3, and those violations are affirmed as charged.

8. Respondent admitted the violations and classifications in Citation 1, Items 4, 5a, 6, 8 and 9a, and those violations and classifications are affirmed as charged.

9. As to Citation 1, Item 2 and 7a, the Complainant proved the violation by a preponderance of the evidence, as well as the classification of each violation as “serious.”

10. As to Citation 1, Item 10, the Complainant failed to establish by a preponderance of the evidence that the Respondent failed to secure braces that were present. Although the Complainant presented evidence that pins holding vertical supports together were missing, vertical supports are not braces, and are dealt with in 29 C.F.R. § 1926.452(c)(3), (4), which was not charged. Moreover, the undersigned agrees with Respondent that, while the finger pin showed in Comp. EXH. 24 was not fully rotated, it was rotated sufficiently to prevent the brace from becoming unsecured.

11. Although the Respondent waived his challenge to Citation 1, Item 9c, the Complainant presented evidence proving by a preponderance of the evidence that Respondent’s employee stood on a pail placed on the scaffolding to reach a higher area, but failed to establish by a preponderance of the evidence that either crew leader Torres or Respondent knew, or in the exercise of reasonable diligence could have known, that the employee was doing this.

12. As to the violations alleged in Citation 1, Items 1a, 2, 3, 6, 7a, 8, and 9a the Complainant proved by a preponderance of the evidence that it correctly followed its procedures in classifying each violation as serious, and that there was evidence to support each classification, as outlined above, and those classifications are accordingly affirmed.⁴

13. As to Citation 1, Items 1a, 2, 3, 4, 5a, 6, 7a, 8, and 9a, the Complainant proved by a preponderance of the evidence that the proposed penalties for each of those Items was properly calculated, but the cumulative effect of the separate penalties assessed for Items 4, 5a, 7a, 8, and 9a are unreasonable and punitive under the circumstances described above.

14. Penalties imposed under the Act are not intended to punish; they are intended primarily to provide an incentive toward correcting violations voluntarily prior to an enforcement inspection. NC OSH Field Operations Manual, Chapter VI at p. 2. The amount of a penalty should be sufficient to serve as an effective deterrent to violations. *Brooks v. Wickes Component Manufacturers*, OSHANC No. 81-888, 1 NCOSH Dec. 1007, 1012 (Jan. 25, 1983).

15. The Complainant has discretion to group violations that are so closely related as to constitute a single hazardous condition, and having a single method of abatement. Cf. NC OSH Field Operations Manual, Ch. IV, p. 5. *See also* U.S. Dept. of Labor, OSHA Mem. (1/26/23) (grouping appropriate when same abatement measures correct multiple violations and/or when substantially similar violative conditions giving rise to the violations is involved), available online at <https://www.osha.gov/memos/2023-01-26/exercising-discretion-when-not-to-group-violations>.

16. The Complainant’s decision in this case not to group violations that were so closely related as to constitute a single hazardous condition, with a single method of abatement, resulted in penalties totaling \$17,101.60.

⁴ That the Complainant allowed Respondent to continue operations without correcting the violations stated in Items 003-9a for an additional week is disturbing, but insufficient to reject the classification of these Items as “serious.”

17. Grouping all violations relating to the scaffolding that were abated when the scaffolding was taken down a week after the inspection would have reduced the total penalty by more than 68%:

	Item	Standard	Description	Hazard	Abatement Date	Penalty	Revised Penalty
1	001a	1910.1200 (e)(1)	written hazard comm program		17-Apr-23	\$750.00	\$ 750.00
	001b	1910.1200 (g)(8)	SDS for each hazardous chem		17-Apr-23	\$0.00	
	001c	1910.1200 (h)(1)	effective info/training hazard chem		24-Mar-23	\$0.00	
2	2	1926.100 (a)	Helmets	head injury	Corrected During Inspection	\$1,000.00	\$ 1,000.00
3	3	1926.102 (a)(1)	eye/face protection	injury to eyes/face	Corrected During Inspection	\$750.00	\$ 750.00
4	4	1926.451 (a)(6)	scaffolds in accord with design	collapse/fall	Corrected During Inspection	\$1,000.00	\$ 2,900.40
	005a	1926.451 (b)(1)(i)	planks/decks/ platforms installed without spaces	Fall	Corrected During Inspection	\$1,000.00	
	005b	1926.451 (b)(4)	end extend over support centerline 6 inches	collapse/fall	Corrected During Inspection	\$0.00	
	6	1926.451 (e)(1)	Lack of ladder	slip/fall	Corrected During Inspection	\$2,900.40	
	007a	1926.451 (f)(3)	inspection before shift	collapse/fall	Corrected During Inspection	\$2,900.40	
	007b	1926.451 (c)(2)(i)	footings support scaffold without settling or displacement	collapse/fall	Corrected During Inspection	\$0.00	
	8	1926.451 (f)(7)	scaffold erected - competent person	collapse/fall	Corrected During Inspection	\$1,000.00	
	009a	1926.451 (g)(4)(i)	guardrails on open sides/ends of platforms	Fall	Corrected During Inspection	\$2,900.40	
	009b	1926.451 (e)(5)(i)	ramps/walkways must have guardrail systems	Fall	Corrected During Inspection	\$0.00	
	009c	1926.451 (f)(14)	Makeshift devices shall not be used	fall	Corrected During Inspection	0	
10	1926.452 (c)(2)	braces that secure vertical members together laterally	collapse/fall	Corrected During Inspection	\$2,900.40		
						\$17,101.60	\$ 5,400.40

18. Under the above grouping analysis, treating Item 6 -- which did not relate to the construction or condition of the scaffolding, but was also abated when the scaffolding was taken down -- as non-grouped would have increased the total penalty to \$8,300.80.

19. The grouping chosen by the Complainant resulted in an impermissibly punitive total penalty, and did not serve the primary purposes of providing an incentive to voluntarily correct violations or providing deterrence to future violations.

20. The undersigned has discretion to reduce a penalty when imposition of the penalty would impose a substantial financial hardship on an employer.

The Respondent has satisfactorily established hardship that justifies reduction of the total penalty.

21. The Respondent's challenge to the abatement dates in the Complainant's Citation is moot.

ORDER

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED:**

- (1) Each Item of the Complainant's Citation is affirmed as a serious violation, except Items 9c and 10, which are dismissed;
- (2) The Respondent is directed to pay to the Complainant the total reduced sum of \$8,300.76 in twelve (12) equal monthly installments of \$691.73, beginning thirty (30) days after the filing of this Order. The Respondent may pre-pay any portion of these installments prior to their due date, if he is able to do so.

This the 6th day of June, 2024.



Digitally signed by Laura J. Wetsch
DN: cn=Laura J. Wetsch, o=N.C. OSH Review
Commission, ou=Hearing Examiner,
email=lwetsch@winslow-wetsch.com, c=US
Date: 2024.06.06 18:08:02 -04'00'

Laura J. Wetsch
Hearing Examiner
lwetsch@winslow-wetsch.com

CERTIFICATE OF SERVICE

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

**ADAN DIAZ
PROFESSIONAL STUCCO DESIGN
324 BROKEN SADDLE LANE
KERNERSVILLE, NC 27284**

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:

**JONATHAN D. JONES
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602**

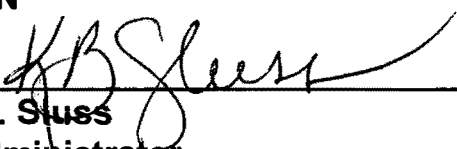
By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

**NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101
carla.rose@labor.nc.gov**

via email.

THIS THE 12 DAY OF June 2024.

**PAUL E. SMITH
CHAIRMAN**



**Karissa B. Stuss
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**