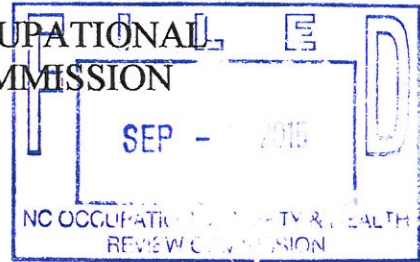


BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2014-5649
OSHA INSPECTION NO: 317837730
CSHO ID: K2333

vs.

RED HAWK CONTRACTING INC
and its successors

ORDER

Respondent.

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on May 12, 2015, at the Lee House, 2nd Floor Hearing Room, 422 North Blount Street, Raleigh, North Carolina 27601.

The Complainant was represented at the hearing by Assistant Attorney General Rory Agan, North Carolina Department of Justice, and the Respondent was pro se. Present at the hearing for Complainant was Alta Cuzman, SCO II, and Victoria Voight, Special Deputy Attorney General and present for Respondent was Tommy Brogden, President at Red Hawk, James Poole, Red Hawk's residential foreman and Daniel Cavaugan.

After reviewing the record file, the evidence presented at the hearing, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 *et. seq.*, the Occupational Safety and Health Act of North Carolina (the “Act”).
2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about November 5, 2014, contesting a citation issued on September 9, 2014, to Respondent, Red Hawk Contracting, Inc. (“Red Hawk”).
3. Respondent, a construction company, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina, subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent maintains a place of business in Stem, North Carolina, and employs 10 workers overall; and 3 people were employed at the worksite at the time of the inspection.
4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
5. On August 20, 2014, Compliance Safety and Health Officer II, Alta Guzman (“SCO Guzman”) inspected Respondent’s worksite at 1804 Hemlock Hill Drive, Durham, North Carolina, (“site”) pursuant to a Special Emphasis Program comprehensive inspection.
6. SCO Guzman properly entered the site and received consent to the inspection by Mr. James Poole, Respondent’s foreman (“Poole”) and conducted an opening conference with Poole.

7. SCO Guzman took pictures at the site and conducted interviews with several witnesses.
8. SCO Guzman conducted a closing conference with Mr. Poole the same day, and she recommended that citations be issued.
9. As a result of the recommendations of the compliance officer, on September 9, 2014, the Complainant issued serious citations to Respondent as follows:

Citation 1 Item 1: Serious

Citation 1, Item 1, alleges a serious violation of 13 NCAF 07F.202: "The employer did not require the wearing of appropriate personal protective equipment in all operations where there was an exposure to hazardous conditions or where this part indicated the need for using such equipment to reduce the hazards to the employees.

Citation 1 Item 2a: Serious

Citation 1, Item 2a, alleges a serious violation of 29 CFR 1926 .95(a): Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, was not provided, used or maintained in a sanitary and reliable condition wherever it was necessary by reason of hazards or processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact.

10. On the day of the inspection, Red Hawk workers were clearing the site to build a house in Durham, North Carolina.

11. They arrived at the site at 7:30am, began working at 8:00am, and were expected to finish working about noon.
12. In addition to the residential foreman, Poole, three workers were on the site; Modesto Gomez Chavez, chainsaw operator, Catalino Molina Abonza, backhoe operator, and Gilberto Gomez Zambrano, laborer.
13. Chavez and Abonza had been employed for Red Hawk several years and it was the 1st day of the job for laborer, Zambrano.
14. SCO Guzman was riding in the new Durham subdivision about 1:00pm, when she saw a backhoe and proceeded to drive toward the site.
15. By the time SCO Guzman arrived at the site, there were no other trees still standing on the site and the back hoe operator, Abonza was raking the debris.
16. When SCO Guzman drove up she began taking pictures of the site.
17. C-1 was taken across the street from the site when SCO Guzman first drove up to the site. It depicts one employee in the back hoe (Abonza) and two other employees (Chavez and Zambrano) standing a distance from the back hoe, without PPE, one turned toward the camera and the other facing the back hoe. The photo also shows 2 chainsaws on the ground near the two employees standing at the site.
18. C-2 depicts both Chavez and Zambrano walking away from the backhoe carrying the chainsaws.
19. They were walking to an area to eat lunch. (see R-1)
20. SCO Guzman testified that through employee interviews, Chavez and Zambrano both told her they were using the chainsaw in the morning.

21. Consistent with their statements to SCO Guzman, both Poole and Tommy Bragdon, President of Red Hawk, testified that laborer Zambrano utilized the chainsaw in the morning to assess his ability to operate the chainsaw.
22. Poole testified that the laborer Zambrano was on the chainsaw in the morning to “see what he could do”, but when he realized Zambrano couldn’t do it, the use of the chainsaw was “put to an end”.
23. Zambrano’s responsibilities were to drag limbs, sweep debris to side, and sweep the road.
24. Only one Red Hawk employee, Chavez, operated the chainsaw to trim the limbs at the site on the day of the inspection.
25. The chainsaw was used to trim tree limbs that were too big to fit in the dump truck that hauled the debris and limbs away.
26. The dump truck was not on the site at the time of the inspection, but was expected to return within an hour after leaving the site to dump the tree limbs and debris collected.
27. Foreman Poole was at lunch when SCO Guzman arrived at the site. The PPE depicted in C-4 was located in Poole’s truck and provided to SCO Guzman upon request.
28. C-4 depicts the PPE required when operating the chainsaw; helmet, face mask, ear muffs and chaps.
29. Poole testified that Red Hawk employees were required to wear helmet, face mask, ear muffs and chaps when operating the chainsaw.
30. One of the two chainsaws at the site was there as a “backup” and sometimes Red Hawk has 3 on site.

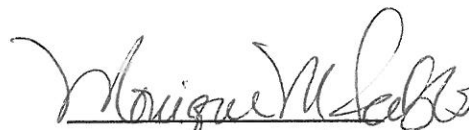
31. Bragdon testified that it is common practice to have multiple chainsaws on site in case one breaks so the whole job is not shut down.
32. Poole testified that he was on site the entire time prior to leaving for lunch and that no one operated the chainsaw without using PPE.
33. Two sets of PPE were not required where only one Red Hawk employee at the site operated the chainsaw at a time; Zambrano during the “assessment”, and Chavez throughout the morning to trim tree limbs.

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 subject to the provisions and jurisdiction of the Act.
3. Complainant failed to prove by a preponderance of the evidence that Citation 1, Item 1, was a serious violation of 13 NCAF 07F.202 in that Red Hawk required employees operating chainsaws to wear appropriate personal protective equipment.
4. Complainant failed to prove by a preponderance of the evidence that Citation 1 , Item 2, was a serious violation of 29 CFR 1926 .95(a) in that the Red Hawk chainsaw operator cutting tree limbs at the site wore appropriate personal protective equipment while operating the chainsaw.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED, ADJUDGED, AND DECREED** that all of the citations and penalties are hereby dismissed.

This the 27 day of August, 2015.

A handwritten signature in black ink, appearing to read "Monique M. Peebles". The signature is written in a cursive style with a horizontal line underneath the name.

Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

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

TOMMY BROGDEN
RED HAWK CONTRACTING, INC.
4107 RANGE ROAD
STEM, NC 27581

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

RORY AGAN
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 2nd DAY OF September 2015.

OSCAR A. KELLER, JR.
CHAIRMAN


Karissa B. Sluss

Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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