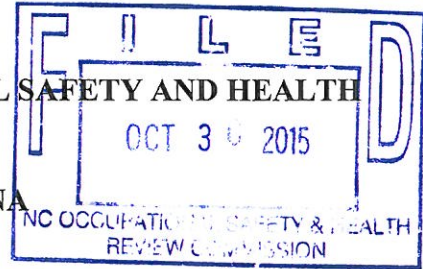


BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

RALEIGH, NORTH CAROLINA



COMMISSIONER OF LABOR FOR )  
THE STATE OF NORTH CAROLINA )  
 )  
COMPLAINANT, )  
 )  
v. )  
 )  
WEEKLEY HOMES, LLC, )  
 )  
RESPONDENT. )  
\_\_\_\_\_ )

ORDER

OSHANC NO. 2014-5651  
INSPECTION NO. 317840601  
CSHO ID NO. 11173

THIS MATTER was duly scheduled for hearing and was heard by the undersigned on August 12, 2015 in Charlotte, North Carolina.

The complainant is represented by Jill Cramer, Assistant Attorney General; the respondent is represented by Phillip VanHoy.

There were no preliminary matters or motions to consider and counsel for the parties made no opening statements or closing arguments. Instead, counsel for the parties agreed to obtain a transcript and submit post-hearing briefs.

After hearing and receiving the evidence and considering the post-hearing briefs, the undersigned makes the following

**FINDINGS OF FACT**

1. The complainant as Commissioner of Labor is charged by law with responsibility for compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").
2. The respondent is a limited liability company licensed as a general contractor in the State of North Carolina.
3. On September 15, 2014, Ted R. Hendrix, a health compliance officer for the complainant, conducted a "drive by" inspection of the Eagle Park subdivision under construction in Belmont, North Carolina, pursuant to the complainant's special emphasis program for fall hazards in Gaston County, North Carolina.
4. As Mr. Hendrix drove into the subdivision from Eagle Road, a public road, he observed a concrete pumping truck in use and then a new residence under

construction at 2308 Lexington Street, where a scaffold was erected and installation of exterior siding was ongoing.

5. Mr. Hendrix arrived in the subdivision about 9:30 am on Monday morning. He observed a pump jack scaffold being used at the 2308 Lexington Street construction site.

6. Upon nearer and closer inspection, Mr. Hendrix observed a worker on the scaffold. The worker was about 13 feet above the ground. The scaffold had no guardrails and had two walkboards tied together to extend the length. There were no mudsill or foundation plates for the pump jack poles. The worker was in the process of installing exterior siding and trim. Another worker was standing on the ground. There was no indication of harnesses or other personal fall arrest on the jobsite.

7. Mr. Hendrix took a number of photographs of the scaffold and jobsite, all of which were admitted into evidence.

8. Mr. Hendrix's conducted an opening conference, during which he learned that the respondent was the general contractor in this subdivision. S&P Siding was the siding subcontractor for the 2308 Lexington Street house.

9. He also learned that S&P Siding had subcontracted its work on the 2308 Lexington Street house to Clara Hilario Aguirre ("Aguirre"). The two workers on the jobsite when Mr. Hendrix arrived were Aguirre employees. No other persons were on the jobsite.

10. At the time of the inspection, the respondent had eight houses under construction in the Eagle Park subdivision. It normally had three employees on site, each of whom was responsible for certain houses under construction. The respondent had a construction trailer in the subdivision. This trailer was not physically close (5 blocks or about 900 feet) away from the 2308 Lexington Street house and such house could not be seen from the construction trailer.

11. Senior Builder/Supervisor Roger Wentz was the employee of respondent responsible for the 2308 Lexington Street house. He was in the construction trailer at the time of Mr. Hendrix's arrival but came to the jobsite that morning.

12. Mr. Wentz was in the subdivision on the preceding Friday but left about 2:00 pm to attend to personal business. Neither he nor any employee of S&P Siding or Aguirre worked on the 2308 Lexington Street jobsite over the intervening weekend.

13. The Aguirre employees did not speak English, so Mr. Hendrix used the telephone interpreter service provided by the State of North Carolina to interview the Aguirre employees. Mr. Hendrix apparently learned through these interviews that the scaffold was erected on Friday, September 12, 2014 in the morning. There was no evidence to determine how early on Friday that the scaffold was actually used.

14. The respondent objected to the admissibility of Mr. Hendrix's testimony concerning the witness interviews. Rule .0513 of the Safety and Health Review Commission allows consideration of hearsay testimony. The weight to be given to hearsay testimony is left to the undersigned.

15. The complainant offered no written witness statements concerning the date, time and configuration of the scaffold on Friday such as to make it persuasive from an evidentiary perspective that the respondent knew or reasonably could have known that there was a scaffold on the 2208 Lexington Street jobsite that was noncompliant with the Act.

16. No person with the respondent admitted to actual knowledge of the time of erection, configuration or use of the scaffold on that Friday. No employee of the respondent created the cited hazards and no employee of the respondent was exposed to these hazards.

17. There is no evidence of how often Mr. Wentz (or any employee of respondent) visited the 2308 Lexington Street jobsite or how often such an employee should be required to visit such a jobsite in order to have constructive knowledge of the issues with this scaffold or of Act violations generally on a jobsite.

18. Mr. Wentz testified that part of his duties as a senior builder/supervisor involved "paperwork" that could only be reasonably performed in the construction trailer. This included payment paperwork for subcontractors on a weekly basis, which usually occurred on Fridays.

19. There is no dispute about the defective condition of the scaffold relative to the provisions of the Act as of the time of the inspection by Mr. Hendrix. Also, there is no dispute that two employees of Aguirre were exposed to this hazard, based on the way it was configured and then used.

20. There is no dispute that violations of the Act as generally reflected in the Citation items occurred and that the proposed penalties were properly calculated pursuant to the Field Operations Manual, if it could be established that the respondent violated the provisions of the Act.

21. Citations relating to this scaffold on this jobsite were issued by the complainant to S&P Siding and to Aguirre.

22. The respondent conducted monthly meetings with its subcontractors in this subdivision, which meetings included safety topics. Aguirre was not a part of these meetings because it was not a regular subcontractor used in this subdivision. S&P Siding did not notify respondent it was using Aguirre to perform siding work on the 2308 Lexington Street house.

Based on the foregoing Findings of Fact, the undersigned makes the following

## 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. The respondent is subject to the provisions of the Act.
3. The burden of proof is on the complainant to prove by the greater weight of the evidence that respondent had either constructive or actual knowledge of the scaffold condition and violations and that it violated the cited provisions of the Act.
4. The complainant has failed to prove by the greater weight of the evidence that respondent had constructive or actual knowledge of the scaffold violations of Aguirre and S&P Siding for which it has been cited in this case.

## DISCUSSION


Under the Act, a general contractor's duties extend to the safety and health of employees of subcontractors on jobsites controlled by the general contractor. However, the general contractor's duty in such situation is a reasonable duty and the general contractor is only liable for violations create by its subcontractors if it could reasonably have been expected to detect the violation. Commissioner of Labor v Weekly Homes, L.P., 169 N.C. App 17, 609 S.E. 2d 407, rev. denied, 359 N.C. 629, 616 S.E. 2d 227 (2005).

There is no dispute that respondent as general contractor was the controlling employer on the 2308 Lexington Street house. That said, the window of time for respondent to have discovered a scaffold violation was short (essentially part of one working day). Moreover, there was no evidence the respondent had actual notice of the violations. There was little evidence that the respondent had constructive notice of the violations, which was not enough for complainant to carry its burden of proof of a violation of the cited standards by the respondent.

## DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED that the Citations and all Items proposed in this matter are DISMISSED.

This 28<sup>th</sup> day of October, 2015.

  
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RICHARD M. KOCH  
HEARING EXAMINER