

**FINAL ORDERS OF THE VIRGINIA COURTS
IN CONTESTED CASES ARISING UNDER THE
VIRGINIA OCCUPATIONAL SAFETY AND HEALTH ACT
2021**

Cesar Aviles (Sole Proprietor), C. Ray Davenport, Commissioner of Labor and Industry v. Case No. CL2020-12477 (Circuit Court of the County of Fairfax)

CoastCon, LLC d/b/a ITC Conglobal, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL20003265-00 (Circuit Court of the City of Portsmouth)

Dunavant Engineering and Construction, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL20000666-00 (Circuit Court of the County of Halifax)

Furnace Associates, Inc. and Envirosolutions, Inc., and its successors, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL2020-13318-00 (Circuit Court of the County of Fairfax)

Georgia Pacific and GP Big Island, LLC, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL18002393-00 (Circuit Court of the County of Bedford)

Gilbane Building Company, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL20003945-00 (Circuit Court of the City of Richmond)

Godsey & Son, Inc., C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL19005736-00 (Circuit Court of the County of Henrico)

Hamer & Hamer, DDS, P.C., C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL20000511-00 (Circuit Court of the City of Charlottesville)

Mark A. Bergman Builder, Inc., C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL20000736-00 (Circuit Court of the County of Rockingham)

Momentum Earthworks, LLC, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL18004044-00 (Circuit Court of the County of Rockingham)

Perdue Foods, LLC, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL20000299-08 (Circuit Court of the County of Accomack)

T.D. Fraley and Sons, Incorporated, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL2021-3202 (Circuit Court of the County of Fairfax)

United Parcel Service, Inc., C. Ray Davenport, Commissioner of Labor and Industry v. Case No. CL20002094-00 (Circuit Court of the County of Albemarle)

United Parcel Service, Inc., C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL20003633-00 (Circuit Court of the County of Chesterfield)

Virginia Manufacturers Association, et al. v. C. Ray Davenport, Commissioner of Labor and Industry, et al., Case No. CL20004521-00 (Circuit Court of the City of Richmond)

Virginia Manufacturers Association, et al. v. C. Ray Davenport, Commissioner of Labor and Industry, et al., Record No. 0316-21-2 (Court of Appeals of Virginia)

Whitley/Service Roofing and Sheet Metal Company v. C. Ray Davenport, Commissioner of Labor and Industry, et al., Case No. CL20009088-00 (Circuit Court of the County of Henrico)

Wolverine Advanced Materials, LLC, C. Ray Davenport, Commissioner of Labor and Industry, et al., Case No. CL20001240-00 (Circuit Court of the County of Montgomery)

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

C. RAY DAVENPORT,)
Commissioner of Labor and Industry,)
Plaintiff,)

v.)

CL2020-12477

CESAR AVILES (SOLE PROPRIETOR))
1504 Margaret Street)
Woodbridge, Virginia 22191)
Defendant.)

ORDER ON DEFAULT JUDGMENT

This cause came to be heard upon Commissioner Davenport's Motion for Default Judgment against Cesar Aviles (Sole Proprietor), declaring that \$6,090.00 in proposed civil penalties arising from a contested Virginia Occupational Safety and Health (VOSH) citation, identified by VOSH Inspection Number 1235690 and as attached to the Commissioner's Complaint be upheld.

UPON CONSIDERATION WHEREOF, it appearing to the Court that more than twenty-one (21) days have elapsed since service of process on the Defendant and that no responsive pleadings have been filed by the Defendant, nor has an appearance been made in this action on its behalf, it is therefore

ADJUDGED, ORDERED, and DECREED that Plaintiff be awarded judgment by default in this cause against the Defendant, Cesar Aviles (Sole Proprietor), and affirming that Cesar Aviles (Sole Proprietor), be held liable for payment to the Commonwealth of Virginia of \$6,090.00 in civil penalties, arising from a contested Virginia Occupational Safety and Health (VOSH) citation as set out in Inspection No. 1235690. It is also ADJUDGED, ORDERED, and

No enr 12/23/20 c1 Judgment

DECREED that the Clerk of this Court shall strike this matter from the docket and place it among the ended civil cases.

The Clerk shall mail certified copies of this order to Defendant, Cesar Aviles (Sole Proprietor), at 1504 Margaret Street, Woodbridge, Virginia 22191. Pursuant to *Rule 1:13*, endorsement shall be dispensed with.


JUDGE: 

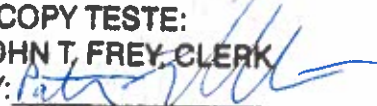
ENTER: 12/18/20

Daniel E. Ortiz

I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

By: 
Adolfo D. Lopez (VSB No. 94409)
Special Assistant Commonwealth's Attorney
Fairfax County
C/O Department of Labor and Industry
600 East Main Street, Ste. 207
Richmond, Virginia 23219
(804) 786-0610
adolfo.lopez@doli.virginia.gov

A COPY TESTE:
JOHN T. FREY, CLERK
BY: 
Deputy Clerk
Date: 4-28-2021
Original retained in the office of
the Clerk of the Circuit Court of
Fairfax County, Virginia
Patricia E. Leukhardt



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

C. RAY DAVENPORT,
Commissioner of Labor and Industry,

Plaintiff.

Case No. CL20003265-00

v.

COASTCON, LLC d/b/a ITC CONGLOBAL,

Defendant.

JOINT MOTION AND FINAL ORDER OF DISMISSAL

This matter comes before the Court on the Joint Motion of Plaintiff C. Ray Davenport, Commission of Labor and Industry, and Defendant Coastcon, LLC, advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as **Exhibit A** pursuant to 16 Va. Admin. Code § 25-60-340(F), and

IT APPEARING that as part of said settlement agreement, the Defendant withdraws its notice of contest of the citations at issue; and therefore the parties seek dismissal with prejudice of Plaintiff's Complaint.

Having considered the Joint Motion, and for good cause shown, it is

ADJUDGED, ORDERED and DECREED that the Joint Motion to Dismiss is GRANTED and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

The Clerk is directed to mail a certified copy of this order to counsel of record.

Entered this 9th day of April, 2021.

David C. Spuy
Judge

We ask for this:



Alex W. West, Esq. (VSB # 84607)
Special Assistant Commonwealth's Attorney
City of Portsmouth
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, VA 23219
Telephone: (804) 371-2631
Email: alex.west@doli.virginia.gov

Counsel for the Commissioner

Seen and agreed:



Samantha L. Brooks, Esq. (VSB # 91928)
SEYFARTH SHAW, LLP
975 F Street, N.W.
Washington, DC 20004-1454
Telephone: (202) 463-2400
Email: sbrooks@seyfarth.com

Mark A. Lies, II, Esq. (admitted *pro hac vice*)
Adam R. Young, Esq. (admitted *pro hac vice*)
SEYFARTH SHAW, LLP
233 South Wacker Drive, Suite 8000
Chicago, IL 60606-6448
Telephone: (312) 460-5000
Email: mlies@seyfarth.com
Email: ayoung@seyfarth.com

Counsel for the Defendant

C. RAY DAVENPORT
Commissioner of Labor and Industry

COASTCON, LLC d/b/a ITC CONGLOBAL

Inspection Number 1327998

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into by C. Ray Davenport, Commissioner of Labor and Industry (Commissioner) and Coastcon, LLC d/b/a ITC Conglobal (Employer).

WHEREAS, on or about December 17, 2018, the Commissioner issued citations to the employer alleging two Serious violations and two Other-than-Serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for General Industry. A total of \$11,000.00 in penalties was proposed by the Commissioner along with the violation. (Copy of the citation attached by reference hereto).

WHEREAS, the Employer filed a notice of contest of all violations contained in the citations within 15 working days from the date of the receipt of the citations, as provided by § 40.1-49.4 of the Code of Virginia;

WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations pursuant to Va. Code § 40.1-49.4(E) in the City of Portsmouth Circuit Court, case number CL20003265-00 (the "Litigation"); and

WHEREAS, the parties desire to settle these cases in a manner that will further, protect and promote the safety and health of the employees of the Employer and avoid the time and expense of court proceedings;

NOW, THEREFORE, the parties agree to the following:

TERMS AND CONDITIONS OF AGREEMENT

1. Upon full execution of the agreement, the Commissioner will modify the citations as follows:
 - a. Serious Citation 1, Item 1 is reduced from Serious to Other-than-Serious, for settlement purposes only, with a reduced penalty of \$4,000.00.
 - b. Serious Citation 1, Item 2 is reduced from Serious to Other-than-Serious, for settlement purposes only, with a reduced penalty of \$4,000.00.
 - c. Other-than-Serious Citation 2, Items 1 and 2 are vacated.

2. Upon execution of this Agreement in full, the Commissioner will file a motion to dismiss the Litigation. The Employer agrees to endorse such an order as "seen and agreed" and to take no steps to hinder the entry of such an order. Pursuant to 16 Va. Admin. Code § 25-60-340(F), this Agreement shall be made an exhibit and incorporated into the dismissal order.
3. The Employer represents that it is entering into this agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid litigation. This agreement shall not be construed as an admission by the defendant of civil or criminal liability for any violation or penalty alleged by the Commonwealth. By entering into this agreement, the defendant does not admit the truth of any alleged facts, any of the characterization of defendant's alleged conduct or any conclusions set forth in the citations issued in this matter. Neither this agreement nor the defendant's consent to entry of a final order of the Commissioner pursuant to this agreement shall constitute an admission by the defendant of violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations or standards promulgated thereunder. The defendant is entering into this agreement without any prejudice to its right to assert in any subsequent action or proceeding that any future existing conditions identical or similar to those alleged in the original citations do not violate the VOSH laws, regulations or standards promulgated thereunder.
4. The Employer certifies, pursuant to Va. Code § 40.1-51.4:2, that (a) the accepted violations alleged in this agreement have been abated, and (b) the Employer, including its assignees or successors in interest, no longer operates the cited worksite located at 809 Chautauqua Avenue, Portsmouth, VA (the "Worksite") and there are no plans to reestablish this Worksite in the future.
5. The Employer agrees to notify the appropriate VOSH regional office within thirty (30) days of starting operation of any workplace in Virginia. "Appropriate" means the VOSH regional office embracing the county or city in which any such workplace is located, according to the DOLI website accessible at <http://www.doli.virginia.gov/about/doli-offices-statewide/>, or if the website does not contain this information at the time operations begin, by notifying the Department of Labor and Industry via email to webmaster@doli.virginia.gov. "Starting operation" means employing any employees who work in Virginia, as those terms are defined by Va. Code § 40.1-49.3, but does not include employing employees who are based at a worksite owned and operated by the Virginia Port Authority.
6. As consideration for the modification of the terms of the original citations, the Employer agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this agreement.
7. Unless otherwise provided in this agreement or in a separate penalty installment payment agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the

Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

8. This Agreement compromises and settles the above contested claims. Under Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party.

9. All citations and penalties, as modified above, including all new obligations contained in this settlement agreement, are a final order of the Commissioner of Labor and Industry.

10. This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, and shall also bind and inure to the benefit of any successor in interest of the Employer, except that the Employer may not assign any right or obligation flowing from this Agreement.

11. This Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Agreement constitutes the entire agreement between the parties concerning the aforesaid settlement and citation(s), and all prior negotiations, offers, and agreements, whether written or oral, are either superseded or merged in this document. This agreement cannot be amended except by a writing signed by the parties.

12. A court's ruling rendering any provision(s) of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.

13. Each person signing this Agreement hereby represents and warrants that he or she has the authority to bind the entity on behalf of which he or she has signed.

14. This Agreement may be executed in any number of copies, each of which shall be deemed a counterpart original.

{remainder of page intentionally left blank; signature page to follow}

COASTCON, LLC
d/b/a ITC CONGLOBAL

By: *Paul Kleppetsch* (SEAL) 3/31/21
Date

Name: Paul Kleppetsch
Its: VP & General Counsel

State of Illinois, City/County of DuPage;
to wit:

The foregoing instrument was acknowledged before me this 31st day of March 2021 by
Paul Kleppetsch on behalf of Coastcon, LLC

Brandy A. Sickler
Notary Public

My commission expires: 2/8/2025



C. RAY DAVENPORT
COMMISSIONER OF LABOR AND INDUSTRY

By: *Ron Graham* (SEAL) 4/1/21
Date
Ron Graham
Director, Occupational
Health Compliance



2021 APR -8 AM 11:59

COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

C. Ray Davenport
COMMISSIONER

Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
PHONE (804) 371-2327
FAX (804) 371-6524

April 2, 2021

Hon. Cynthia P. Morrison, Clerk
Portsmouth Circuit Court
1345 Court Street
Portsmouth, VA 23705-1217

RE: *C. Ray Davenport, Commissioner v. Coastcon, LLC d/b/a ITC Conglobal*
Case number CL20003265-00 – Joint Motion and Proposed Order of Dismissal

Dear Madam Clerk:

Enclosed please find a Joint Motion and proposed Order of Dismissal of the above-referenced case, as it has settled. I ask that it be forwarded to the Court for entry. Please let me know if anything else is required, including any hearing.

Thank you for your usual time and attention to this matter.

With warm regards,

A handwritten signature in black ink, appearing to read "Alex W. West".

Alex W. West
Special Assistant Commonwealth's Attorney

Enclosures

cc: Samantha L. Brooks, Esq., by email and mail
Mark A. Lies, II, Esq., by email and mail
Adam R. Young, Esq., by email and mail

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF HALIFAX

**C. RAY DAVENPORT,
Commissioner of Labor and Industry,**

Plaintiff.

Case No. CL20000666-00

v.

DUNAVANT ENGINEERING AND CONSTRUCTION,

Defendant.

FINAL ORDER

This matter came before the Court for a trial without a jury on the Commissioner's Complaint in the above-captioned action to affirm contested Virginia Occupational Safety and Health ("VOSH") citation number 1412051 on May 21, 2021.

After consideration of the pleadings, the evidence admitted at trial, arguments of counsel, and for other good cause shown, the Court makes the following findings of fact and conclusions of law pursuant to Va. Code § 40.1-49.4(E):

FINDINGS OF FACT

Plaintiff, the Commissioner of Labor and Industry, issued one VOSH Citation to the Defendant, alleging a Serious violation of VOSH regulation § 1926.453(b)(2)(v), as a result of an inspection by VOSH Compliance Officer Monty Beasley, at a worksite located in Halifax County, Virginia. An employee of the Defendant was observed working in the basket of an elevated aerial lift without a body belt or lanyard attached to the boom or basket. A total penalty of \$600.00 was proposed pursuant to the VOSH Field Operations Manual. The Defendant contested the citation and proposed penalty, and the matter was set for trial without a jury and argued before this Court.

CONCLUSIONS OF LAW

The court **FINDS** a violation by the Defendant, as alleged in the Commissioner's citation in inspection number 1412051, as attached to the Complaint as Exhibit A, of VOSH regulation § 1926.453(b)(2)(v); and the court further

AFFIRMS the violation to as a Serious violation, as defined by Va. Code § 40.1-49.3 and 16 Va. Admin. Code § 25-60-10; and as to the proposed penalty of \$600.00 the court hereby

AFFIRMS the \$600.00 proposed penalty amount, but

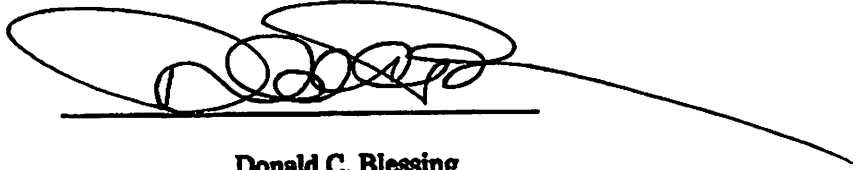
SUSPENDS the \$600.00 penalty for a period of five years from the date of this order, and **ORDERS** that following that date, if the Defendant has not committed any further violations of the VOSH Act (Va. Code § 40.1-49.3, *et seq.*), or any VOSH regulations enforced by the Commissioner during that five year period, then the penalty and this monetary judgment will be deemed vacated.

Should the Defendant commit any such violations within five years of the date of this order, and such violations are embodied in a final order of the Commissioner or a court of appropriate jurisdiction, the Court enters **JUDGMENT** in the amount of **SIX HUNDRED DOLLARS** and no cents (\$600.00) against Defendant, such judgment amount to be due and payable upon the effective date of the final order for the subsequent violation. In that event, payment shall be made to the Commissioner by check or money order, payable to the Commonwealth of Virginia.

Pursuant to Va. Code § 40.1-51.1(C) and 16 Va. Admin. Code § 25-60-40, the Defendant shall post a copy of this Order for ten consecutive working days, beginning from the date of entry of this Order, at its workplaces in Virginia in a conspicuous location where notices of its employees are generally posted.

The Clerk of the Court is directed to send certified copies of this Order to counsel for the parties at their addresses as they appear below.

Entered this 21st day of June, 2021.

A handwritten signature in black ink, appearing to read 'Donald C. Blessing', is written over a horizontal line. The signature is highly stylized and cursive.

**Donald C. Blessing
Circuit Court Judge
10th Judicial Circuit**

Seen and agreed:

Alex West

Alex W. West, Esq. (VSB # 84607)
Special Assistant Commonwealth's Attorney for Halifax County
c/o Virginia Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, VA 23219
(804) 371-2631
(804) 371-6524 (fax)
Email: alex.west@doli.virginia.gov
Counsel for the Commissioner

Seen and

objected to
J.E. Greenbacker

John E. Greenbacker, Esq. (VSB #)
J.E. GREENBACKER & SON, PLLC
15 South Main Street
Halifax, VA 24558
(434) 476-6523
Email: greenlaw@pure.net
Counsel for the Defendant

Halifax County Circuit Court, VA

Cathy M. Cosby, Clerk

A copy teste

Sarah P. Tanner

Clerk
 Dep. Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

C. RAY DAVENPORT,)	
Commissioner of Labor and Industry,)	
<i>Plaintiff,</i>)	
v.)	Case No. CL2020-13318
)	
FURNACE ASSOCIATES, INC.)	
and)	
ENVIROSOLUTIONS, INC. and its successors)	
<i>Defendants.</i>)	

8/4/21 cc: P. Atty / Δ Atty

AGREED ORDER

WHEREAS, on or about October 13, 2017, plaintiff C. Ray Davenport, Commissioner of Labor and Industry ("Commissioner") issued a citation to co-defendant, Furnace Associates, Inc. ("Furnace"), alleging one Serious violation of the Virginia Occupational Safety and Health ("VOSH") Standards, and proposing a \$12,470.00 civil penalty; and

WHEREAS, Furnace filed within fifteen (15) working days from the date of the receipt of the citation, a written notice contesting the violation and proposed penalty, as provided for in § 40.1-49.4, of the *Code of Virginia*; and

WHEREAS, the parties now wish to settle this matter by agreement, in a way that will further protect and promote the safety and health of Furnace employees and avoid the time and expense of further litigation.

Therefore, upon agreement of the parties and for good cause shown, it is hereby now ADJUDGED, ORDERED, and DECREED as follows:

1. That the VOSH citation, attached as Exhibit "A," is affirmed as issued and upheld with the penalty of \$12,470.00;

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry



Alfred B. Albiston (VSB No. 29851)
Special Assistant Commonwealth's Attorney
Fairfax County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219
(804) 786-6760
(804) 786-8418 Fax
Alfred.Albiston@doli.virginia.gov

Counsel for plaintiff

SEEN AND AGREED:

FURNACE ASSOCIATES, INC.



Eugene E. Mathews, III (VSB No. 36384)
Brogan S. Chubb (VSB No. 95727)
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
Tel: (804) 775-1313
Tel: (804) 775-4337
emathews@mcguirewoods.com
bchubb@mcguirewoods.com

Counsel for defendant

A COPY TESTE:
JOHN T. FREY, CLERK

BY: Yongchee Lee
Deputy Clerk

Date: 8/4/21
Original retained in the office of
the Clerk of the Circuit Court of
Fairfax County, Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

C. RAY DAVENPORT,
Commissioner of Labor and Industry,
Plaintiff,

v.

FURNACE ASSOCIATES, INC.
Co-Defendant.

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Case No. CL2020-13318

AGREED ORDER'S EXHIBIT A

VOSH inspection number 1286674, citation issued July 2, 2018

Virginia Department of Labor and Industry
Virginia Occupational Safety and Health (VOSH) Compliance
9400 Innovation Drive, Suite 120
Manassas, VA 20110

Inspection Number: 1286674
Inspection Date: 01/08/2018-
01/08/2018
Issuance Date: 07/02/2018



Citation and Notification of Penalty

Company Name: Enviro Solutions Inc.
Inspection Site: 10001 Furnace Road Lorton, VA 22079

Citation 1 Item 1

Type of Violation: Serious

16VAC25-60.120: At this establishment, the employer did not comply with the manufacturer's specifications and limitations applicable to the operation and use of the equipment.

On January 08, 2018, located at 10001 Furnace Road, Lorton, Virginia 22079, an employee of GDC Contractors Inc. that was sub-contracted to Enviro Solutions Inc. to operate a Caterpillar, Model 973C, Track Loader to move debris at the Lorton Landfill, was operating the 973C, Track Loader in a reverse direction when the rear of the equipment struck an employee of GM Transport LLC, while he was attempting to secure the trailer doors on his truck. The GM Transport LLC employee received a fatal injury. The employee has operated the 973C, Track Loader at the Lorton Landfill under the direction and control of Enviro Solutions Inc. for approximately one year without reading and understanding the operation manual before operating the equipment.

Enviro Solutions Inc. failed to ensure that the equipment operators were adequately trained to operate the equipment in accordance with the manufacturer's specifications. Page 6 of the Operation and Maintenance Manual for the 973C Track-Type loader states, "Do not operate or work on this machine unless you have read and understand the instructions and warnings on the Operation and Maintenance Manuals. Failure to follow the instructions or heed the warnings could result in injury or death."

Date by Which Violation Must Be Abated:

Proposed Penalty:

Corrected During Inspection

\$12470.00

A handwritten signature in black ink, appearing to read "D. Wells", written over a horizontal line.

Daniel Wells
Regional Safety Director

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

C. RAY DAVENPORT,
Commissioner of Labor and Industry,
Plaintiff,

v.

GEORGIA PACIFIC,
Defendant.

Civil No. CL18-2393

12-2-21

AGREED ORDER

THIS DAY CAME the parties, C. Ray Davenport, Commissioner of Labor and Industry and GP Big Island, LLC (incorrectly identified as "Georgia Pacific, LLC"), moving that the Court enter this Agreed Order embodying the settlement as agreed to by the parties.

The Court FINDS that pursuant to Virginia Administrative Code 16VAC§25-60-340.F, it has authority to approve a settlement of this action embodied in a court order.

The Court further FINDS that the parties have reached a settlement of this action and have agreed to the terms set forth below.

Upon agreement of the parties and for good cause shown, it is hereby ADJUDGED, ORDERED AND DECREED as follows:

1. This court retains jurisdiction over the parties and this action to enforce the terms of this Order.
2. The court hereby amends the Defendant's name in this action to be "GP Big Island, LLC."

3. In settlement of the matters alleged in this action, the citations and penalties issued to Defendant attached to the Complaint are hereby amended as follows:

- a. Serious citation 1, item 1, is affirmed with a penalty of \$7,000.00.
- b. Serious citation 1, item 2, is affirmed with a penalty of \$7,000.00.
- c. Willful citation 2, item 1, is amended to serious and affirmed with a penalty of \$70,000.00.

4. GP Big Island, LLC ("Georgia Pacific") shall pay the sum of \$84,000.00 to the Commonwealth within thirty days of the entry of this Order (the "Final Order Date"). The check or money order will be made payable to the "Treasurer of Virginia," with VOSH inspection number 1193325 noted on the payment.

5. Georgia Pacific agrees to undertake and complete at its Big Island site within one year of the entry of this Order a safety improvement project consisting of the removal of the existing ladder access to the top of the Line Mill Starch Silo and installation of a catwalk with guardrails to access the top of the silo associated with Paper Machine #4.

6. Georgia Pacific will submit an abatement plan for the safety improvement project in accordance with 16VAC25-60-307(F) within thirty (30) days of the effective date of this agreement and comply with VOSH employee notification, abatement verification, and certification requirements contained in 16VAC25-60-307. When the safety improvement project is complete, Georgia Pacific shall submit abatement verification documentation to DOLI. The abatement verification documentation shall be consistent with 16VAC25-60-307(E) demonstrating that abatement is complete, such as video or photographic evidence of abatement, evidence of purchase of repair equipment., or other

written records. The documentation shall be provided to:

Russel Bambarger
VOSH Southwest Regional Safety Director
Virginia Department of Labor and Industry
Brammer Village
3013 Peters Creek Road
Roanoke, Virginia 24019

The Commissioner reserves the right to make final decisions concerning the adequacy of abatement documentation provided in accordance with 16VAC25-60-307.

7. If not already provided, the Employer agrees to provide to the Commissioner within thirty (30) days of the effective date of this agreement documentation verifying abatement of all other violations affirmed in this agreement. The documentation shall comply with 16VAC25-60-307.E.2 of the Virginia Occupational Safety and Health (VOSH) Administrative Regulations Manual, which states that "Documents demonstrating that abatement is complete may include, but are not limited to, evidence of purchase or repair of equipment, photographic or video evidence of abatement, or other written records." The documentation shall be provided to Russel Bambarger, VOSH Southwest Regional Safety Director at the address above in Paragraph 5.

The correction/abatement documentation for the violations affirmed in this agreement shall comply with VOSH abatement verification and certification requirements contained in 16VAC25-60-307.

The Commissioner reserves the right to make final decisions concerning the adequacy of abatement documentation provided in accordance with 16VAC25-60-307.

8. Nothing in this agreement shall be construed to limit the Commissioner's enforcement authority under Title 40.1 of the Code of Virginia to conduct inspections in

accordance with Va. Code § 40.1-49.8 at Georgia Pacific's Big Island site during or after the pendency of this agreement.

9. This court retains jurisdiction over the parties and this action to enforce the terms of this Order. Should either party believe that the other party has materially failed to comply with any term thereof or to have failed to comply with this Order in good faith, the aggrieved party shall provide written notice to the other party stating the nature of the alleged non-compliance. The parties agree that the alleged noncompliance will be addressed through good faith negotiations. If the parties cannot thereafter resolve their disagreement, said dispute and its accompanying written record may be submitted to this court for resolution.

10. Given the complexity of the safety improvement project required in paragraph 4, the Commissioner may not challenge Georgia Pacific's good faith efforts to complete the project until at least twelve (12) months have passed from the date of this Order.

11. The parties recognize that due to unforeseen circumstances, and despite substantial compliance by both parties with the terms of this agreement, that completion of the safety improvement project required in paragraph 4 might exceed the 12 month time period specified for completion. In that event, the parties agree that Georgia Pacific will follow the procedures established for filing a petition for Extension of Abatement Time in accordance with 16VAC25-60-320.

12. If, upon motion by the Commissioner, the Court determines that Georgia Pacific has not met its good faith obligation to complete the safety improvement project in paragraph 4 within the agreed upon time period of 12 months or within any Extension

of Abatement Time approved by the Commissioner pursuant to 16VAC25-60-320, the classification for Citation 2, Item 1 shall immediately revert to the original willful classification.

13. As consideration for the modification of the terms of the original violations, penalties and abatement dates for the inspections covered by this agreement, Georgia Pacific agrees to withdraw its original notice of contest filed with respect to the above styled case and waives its right to contest the remaining terms contained in this agreement.

14. Georgia Pacific represents that it is entering into this agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid litigation. This agreement shall not be construed as an admission by Georgia Pacific of civil or criminal liability for any violation or penalty alleged by the Commissioner. By entering into this agreement, Georgia Pacific does not admit the truth of any alleged facts, any of the characterization of Georgia Pacific's alleged conduct or any conclusions set forth in the citation(s) issued in this matter. Neither this agreement nor Georgia Pacific's consent to entry of a final order of the Commissioner pursuant to this agreement shall constitute an admission by Georgia Pacific of violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations or standards promulgated thereunder. Georgia Pacific is entering into this agreement without any prejudice to its right to assert in any subsequent action or proceeding that any future existing conditions identical or similar to those alleged in the original citation do not violate the VOSH laws, regulations or standards promulgated thereunder.

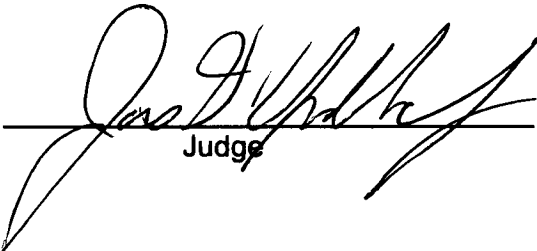
15. Pursuant to Va. Code § 40.1-51.3:2, the fact of an issuance of a citation,

the voluntary payment of a civil penalty by a party or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party, in which it is alleged that an employer acted in violation of or failed to act in accordance with any provision of Chapter 3 of Title 40.1 of the Code of Virginia, or any state or federal occupational safety and health law, standard or regulation. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

16. Each party will bear its own costs in this matter.

17. The Clerk shall certify copies of this order to both counsels of record.

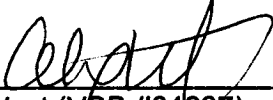
Entered this 2nd day of December, 2021.



Judge

We ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

By:  _____
Alex W. West (VSB #84607)
Bedford Special Assistant Commonwealth's Attorney
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219
804-371-2631, Fax 804-371-6524

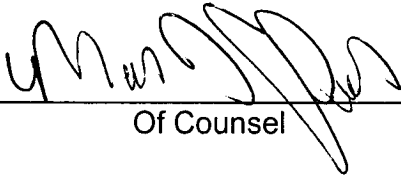
11/22/2021
Date

Counsel for Plaintiff

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Seen and agreed:

GP Big Island, LLC

By: 
Of Counsel

10/23/21
Date

Mark D. Loftis
Woods Rogers PLC
10 South Jefferson Street, Suite 1800
Roanoke, VA 24011
540-983-7618, Fax: 540-322-3749


Benjamin D. Briggs
Seyfarth Shaw LLP
1075 Peachtree Street, N.E.
Suite 2500
Atlanta, Georgia 30309-3958
404-803-1420, Fax: 404-724-1713

Counsel for Defendant

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Seen and agreed:

Office of the Attorney General

By: 
Donald D. Anderson
Deputy Attorney General
Heather Hays Lockerman
Senior Assistant Attorney General/Section Chief
Office of the Attorney General
202 N. 9th Street
Richmond, VA 23219
804-786-2071 (telephone)
804-692-1647 (facsimile)

10/5/2021

Date

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Ce: 11-8-21
West
Loffis
Anderson
Briggs

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

C. RAY DAVENPORT,
Commissioner of Labor and Industry,

Plaintiff.

v.

Case No. CL20003945-00 - 1

GILBANE BUILDING COMPANY,

Defendant.

JOINT MOTION AND FINAL ORDER OF DISMISSAL

This matter comes before the Court on the Joint Motion of Plaintiff C. Ray Davenport, Commission of Labor and Industry, and Defendant Gilbane Building Company, advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as **Exhibit A** pursuant to 16 Va. Admin. Code § 25-60-340(F), and

IT APPEARING that as part of said settlement agreement, the Defendant withdraws its notice of contest of the citations at issue; and therefore the parties seek dismissal with prejudice of Plaintiff's Complaint.

Having considered the Joint Motion, and for good cause shown, it is
ADJUDGED, ORDERED and DECREED that the Joint Motion to Dismiss is GRANTED
and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

The Clerk is directed to mail a certified copy of this order to counsel of record.

Entered this 15th day of April, 2021.

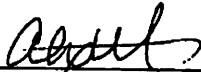

Judge

A Copy

Teste: EDWARD F. JEWETT, CLERK

BY:  D.C.

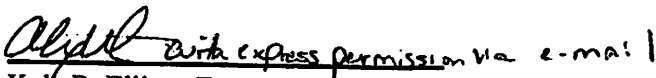
We ask for this:



Alex W. West, Esq. (VSB # 84607)
Special Assistant Commonwealth's Attorney
City of Richmond
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, VA 23219
Telephone: (804) 371-2631
Email: alex.west@doli.virginia.gov

Counsel for the Commissioner

Seen and agreed:



Kyle R. Elliott, Esq.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
901 East Byrd Street, Suite 1300
Richmond, VA 23219
Telephone: (804) 663-2350
Email: kyle.elliott@ogletreedeakins.com

Counsel for the Defendant

C. RAY DAVENPORT
Commissioner of Labor and Industry

GILBANE BUILDING COMPANY

Inspection Number 1305867

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into by C. Ray Davenport, Commissioner of Labor and Industry (Commissioner) and Gilbane Building Company (Employer).

WHEREAS, on or about July 19, 2018, the Commissioner issued citations to the employer alleging four Serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry. A total of \$29,180.00 in penalties was proposed by the Commissioner along with the violation. (Copy of the citation attached by reference hereto).

WHEREAS, the Employer filed a notice of contest of all violations contained in the citations within 15 working days from the date of the receipt of the citations, as provided by § 40.1-49.4 of the Code of Virginia;

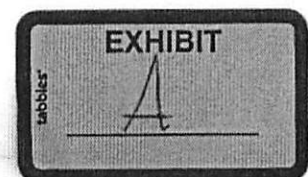
WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations pursuant to Va. Code § 40.1-49.4(B) in the Richmond City Circuit Court, case number CL20003945-00 (the "Litigation"); and

WHEREAS, the parties desire to settle these cases in a manner that will further, protect and promote the safety and health of the employees of the Employer and avoid the time and expense of court proceedings;

NOW, THEREFORE, the parties agree to the following:

TERMS AND CONDITIONS OF AGREEMENT

1. Upon full execution of the agreement, the Commissioner will modify the citations as follows:
 - a. Serious Citation 1, Item 1 is vacated for settlement purposes only.
 - b. Serious Citation 1, Item 2a is reclassified to Other-than-Serious with a penalty as proposed of \$7,295.00.
 - c. Serious Citation 1, Item 2b is vacated.
 - d. Serious Citation 1, Item 3 is vacated.



e. Serious Citation 1, Item 4 is vacated.

2. Within thirty (30) days from the execution of this agreement, pursuant to 16 Va. Admin. Code § 25-60-307, the Employer will provide documentation proving the accepted violation alleged has been abated to the following address:

Deonna Hargrove
Regional Health Director
Virginia Department of Labor and Industry
1570 East Parham Road
Richmond, VA 23228

3. Upon execution of this Agreement in full, the Commissioner will file a motion to dismiss the Litigation. The Employer agrees to endorse such an order as "seen and agreed" and to take no steps to hinder the entry of such an order. Pursuant to 16 Va. Admin. Code § 25-60-340(F), this Agreement shall be made an exhibit and incorporated into the dismissal order.

4. The Employer represents that it is entering into this agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid litigation. This agreement shall not be construed as an admission by the defendant of civil or criminal liability for any violation or penalty alleged by the Commonwealth. By entering into this agreement, the defendant does not admit the truth of any alleged facts, any of the characterization of defendant's alleged conduct or any conclusions set forth in the citations issued in this matter. Neither this agreement nor the defendant's consent to entry of a final order of the Commissioner pursuant to this agreement shall constitute an admission by the defendant of violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations or standards promulgated thereunder. The defendant is entering into this agreement without any prejudice to its right to assert in any subsequent action or proceeding that any future existing conditions identical or similar to those alleged in the original citations do not violate the VOSH laws, regulations or standards promulgated thereunder.

5. As consideration for the modification of the terms of the original citations, the Employer agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this agreement.

6. The Employer will post a copy of this Settlement Agreement for a period of fifteen (15) days at the worksite in a conspicuous location where notices to its employees are generally posted.

7. Unless otherwise provided in this agreement or in a separate penalty installment payment agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the

Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

8. This Agreement compromises and settles the above contested claims. Under Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party.

9. All citations and penalties, as modified above, including all new obligations contained in this settlement agreement, are a final order of the Commissioner of Labor and Industry.

10. This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, and shall also bind and inure to the benefit of any successor in interest of the Employer, except that the Employer may not assign any right or obligation flowing from this Agreement.

11. This Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Agreement constitutes the entire agreement between the parties concerning the aforesaid settlement and citation(s), and all prior negotiations, offers, and agreements, whether written or oral, are either superseded or merged in this document. This agreement cannot be amended except by a writing signed by the parties.

12. A court's ruling rendering any provision(s) of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.

13. Each person signing this Agreement hereby represents and warrants that he or she has the authority to bind the entity on behalf of which he or she has signed.

14. This Agreement may be executed in any number of copies, each of which shall be deemed a counterpart original.

{remainder of page intentionally left blank; signature page to follow}

Signed by Kristin Provas
Assistant Secretary
Katherine G. Mansel, Esq.
2020-03-02 10:57 AM MT-04:00

GILBANE BUILDING COMPANY



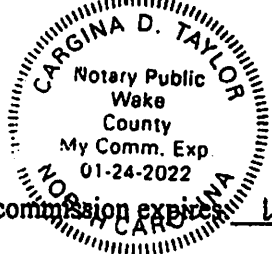
By: *Paul Sullivan*

3/29/2021
Date

Name: Paul Sullivan
Its: Senior Vice President

State of North Carolina, City/County of Wake ;
to wit:

The foregoing instrument was acknowledged before me this 29th day of MARCH, 2021 by
PAUL SULLIVAN on behalf of GILBANE BUILDING COMPANY.



Cargina D. Taylor
Notary Public

My commission expires 1/24/2022

**C. RAY DAVENPORT
COMMISSIONER OF LABOR AND INDUSTRY**

By: *Ron Graham* (SEAL)
Ron Graham
Director, Occupational
Health Compliance

4/1/21
Date

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

C. RAY DAVENPORT)	
Commissioner of Labor and Industry,)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. CL19-5736
)	
GODSEY & SON INC.)	
<i>Defendant.</i>)	

AGREED ORDER

WHEREAS, on or about October 13, 2017, plaintiff C. Ray Davenport, Commissioner of Labor and Industry ("Commissioner") issued a citation to defendant, Godsey & Son Inc. ("Godsey"), alleging one Serious violation of the Virginia Occupational Safety and Health ("VOSH") Standards for the Construction Industry, and proposing a \$2,375.00 civil penalty; and

WHEREAS, Godsey filed within 15 working days from the date of the receipt of the citation, a written notice contesting the violation and proposed penalty, as provided for in § 40.1-49.4, of the *Code of Virginia*;

Upon agreement of the parties and for good cause shown, it is hereby now ADJUDGED, ORDERED, and DECREED as follows:

1. That the VOSH citation, attached as Exhibit "A" is hereby amended as follows:
Citation 1, Item 1 is amended from a "Serious" to "Other-Than-Serious" classified violation and otherwise upheld with an amended penalty of \$1,187.50;
2. That Godsey will pay the agreed civil penalty of one thousand one hundred

EW

eighty-seven dollars and fifty cents (\$1,187.50) within thirty (30) days of the date of entry of this Order. Payment shall be made by check or money order, payable to the Treasurer of Virginia, with the VOSH inspection number 1251433 noted on the payment. It is expressly understood that all VOSH Citation modifications in this Agreed Order are contingent upon Godsey's full and timely payment of the penalty as agreed. Godsey's failure to substantially comply with the terms of this Order, or to pay the affirmed penalty by the due date constitutes a breach of this Order. Any breach shall mean that the originally proposed violation and penalty shall be reinstated and affirmed as a final order, and all unpaid amounts shall become due and payable 15 calendar days following the breach;

3. That as required by *Va. Rule 16 VAC 25-60-40*, Godsey will post a copy of this Agreed Order for ten (10) working days at its workplaces in Virginia in a conspicuous location where it generally posts notices to its employees;

4. That Godsey certifies the cited violation has been abated; and if not previously provided, agrees to provide the Commissioner within thirty (30) days of this Order documentation verifying abatement of the affirmed violation in this agreement. Such documentation shall comply with *Va. Rule 16VAC25-60-307.E.2*, stating, "Documents demonstrating that abatement is complete may include, but are not limited to, evidence of purchase or repair of equipment, photographic or video evidence of abatement, or other written records." The documentation shall be provided to:

Mr. Harvey Trice
VOSH Central Regional Safety Director
Virginia Department of Labor and Industry
1570 East Parham Road, Henrico, VA 23228

5. That Godsey withdraws its original notice of contest, and hereby waives its right

to contest the remaining terms contained in this Order;

6. That this Order shall be construed to advance the purpose of Va. Code § 40.1-3, and that no third party shall hereby have any right of action for breach of any provision of this title unless otherwise specifically provided;

7. That, under Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the *Code of Virginia* shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party;

8. That this agreement shall not be construed as an admission by Godsey of civil or criminal liability for any violation or penalty alleged by the Commissioner; and that each party shall bear its own costs in this matter.

It is further ORDERED, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court. The Clerk shall send an attested copy of this Order to the Commissioner's and Godsey's legal counsel at the addresses provided below.

Entered this 13th day of Sept. ~~August~~, 2021.

Richard A. Waccus
Judge

A COPY TESTE:
HEIDI S. BARSHINGER, CLERK
HENRICO CIRCUIT COURT

Dnenda Garrison
DEPUTY CLERK

[Endorsement page follows]³

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry



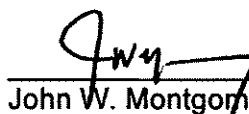
Holly E. Trice (VSB No. 82735)
Alfred B. Albiston (VSB No. 29851)
Special Assistant Commonwealth's Attorney
Henrico County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219

(804) 786-2641
(804) 786-8418 Fax
Holly.Trice@doli.virginia.gov
Alfred.Albiston@doli.virginia.gov

Counsel for plaintiff

SEEN AND AGREED:

GODSEY & SON INC.



John W. Montgomery, Jr., Esquire (VSB No. 37149)
Ellwood V. Elliott, Esquire (VSB No. 18766)
TRAYLOR, MONTGOMERY & ELLIOT, P.C.
130 East Wythe Street
Petersburg, VA 23803

Phone: (804) 861-1122
Fax: (804) 733-6022
jmontgomery@jtande.com
eelliott@tmande.com

Counsel for defendant

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

C. RAY DAVENPORT)	
Commissioner of Labor and Industry,)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. CL19-5736
)	
GODSEY & SON INC.)	
<i>Defendant.</i>)	

AGREED ORDER'S EXHIBIT A

VOSH inspection number 1251433, citation issued October 13, 2017

Virginia Department of Labor and Industry
Virginia Occupational Safety and Health (VOSH) Compliance
North Run Business Park,
1570 E. Parham Road
Richmond, VA 23228

Inspection Number: 1251433
Inspection Date: 08/01/2017-
10/10/2017
Issuance Date: 10/13/2017



Citation and Notification of Penalty

Company Name: Godsey & Son Inc.
Inspection Site: 5101 Dickens Road Henrico, VA 23228

Citation Item 1 Type of Violation: Serious

1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

At this job site, on 08/01/2017, employees were working in an excavation measuring approximately 70 feet long by 9 feet deep by 25-30 feet wide, were not provided with a ladder, acceptable sloped earth ramp, or other safe means of egress.

Date by Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$2375.00

A handwritten signature in black ink, appearing to read "Stanley J. Dykstra".

Stanley J. Dykstra
VOSH Regional Safety Director

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

C. RAY DAVENPORT,
Commissioner of Labor and Industry,

Plaintiff.

Case No. CL20000511-00

v.

HAMER & HAMER, DDS, P.C.,

Defendant.

JOINT MOTION AND FINAL ORDER OF DISMISSAL

This matter comes before the Court on the Joint Motion of Plaintiff C. Ray Davenport, Commissioner of Labor and Industry, and Defendant Hamer & Hamer, DDS, P.C., advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as Exhibit A pursuant to 16 Va. Admin. Code § 25-60-340(F), and


IT APPEARING that as part of said settlement agreement, the Defendant withdraws its notice of contest of the citations at issue; and therefore the parties seek dismissal with prejudice of Plaintiff's Complaint.

Having considered the Joint Motion, and for good cause shown, it is

ADJUDGED, ORDERED and DECREED that the Joint Motion to Dismiss is GRANTED and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

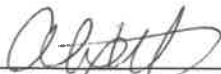
The Clerk is directed to mail a certified copy of this order to counsel of record.

Entered this 1st day of March, 2021.



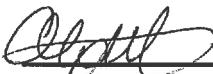
Judge

We ask for this:


Alex W. West, Esq. (VSB # 84607)
Special Assistant Commonwealth's Attorney
City of Charlottesville
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, VA 23219
(804) 371-2631
aerlex.west@doli.virginia.gov

Counsel for Commissioner

Seen and agreed:

 with permission by email
Travis W. Vance, Esq. (VSB # 79764)
FISHER & PHILLIPS, LLP
227 West Trade Street, Suite 2020
Charlotte, NC 28202
(704) 778-4164
tvance@fisherphillips.com

Counsel for Defendant

C. RAY DAVENPORT
Commissioner of Labor and Industry

HAMER & HAMER, D.D.S, P.C.

Inspection Number 1333594

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into by C. Ray Davenport, Commissioner of Labor and Industry (Commissioner) and Hamer & Hamer, D.D.S., P.C. (Employer).

WHEREAS, on or about October 4, 2018, the Commissioner issued citations to the employer alleging two grouped Serious violations and one Other than Serious violation of the Virginia Occupational Safety and Health (VOSH) Standards for General Industry. A total of \$3,020.00 in penalties was proposed by the Commissioner along with the violation. (Copy of the citation attached by reference hereto).

WHEREAS, the Employer filed a notice of contest of all violations contained in the citations within 15 working days from the date of the receipt of the citations, as provided by § 40.1-49.4 of the Code of Virginia;

WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations pursuant to Va. Code § 40.1-49.4(E) in the City of Charlottesville Circuit Court, case number CL20000511-00 (the "Litigation"); and

WHEREAS, the parties desire to settle these cases in a manner that will further, protect and promote the safety and health of the employees of the Employer and avoid the time and expense of court proceedings;

NOW, THEREFORE, the parties agree to the following:

TERMS AND CONDITIONS OF AGREEMENT

1. Upon full execution of the agreement, the Commissioner will modify the citations as follows:
 - a. Serious Citation 1, Item 1a is reclassified as Other than Serious, with the monetary penalty of \$1,510.00 to be affirmed.
 - b. Serious Citation 1, Item 1b is reclassified as Other than Serious with no monetary penalty.
 - c. Serious Citation 1, Item 2a is reclassified as Other than Serious with the monetary penalty of \$1,510.00 to be affirmed.

- d. Serious Citation 1, Item 2b is reclassified as Other than Serious with no monetary penalty.
- e. Serious Citation 1, Items 2c is reclassified as Other than Serious with no monetary penalty.
- f. Other than Serious Citation 2, Item 1 is affirmed with no monetary penalty.

2. Within thirty (30) days from the execution of this agreement, pursuant to 16 Va. Admin. Code § 25-60-307, the Employer will provide documentation proving the violations alleged have been abated to the following address:

Elizabeth Tomlin
Regional Health Director
Virginia Department of Labor and Industry
201 Lee Highway
Verona, Virginia 24482

The failure to abate may be the subject of a separate inspection and citation for such failure. See Va. Code § 40.1-49.4(C).

3. Upon execution of this Agreement in full, the Commissioner will file a motion to dismiss the Litigation. The Employer agrees to endorse such an order as "seen and agreed" and to take no steps to hinder the entry of such an order. Pursuant to 16 Va. Admin. Code § 25-60-340(F), this Agreement shall be made an exhibit and incorporated into the dismissal order.

4. The Employer represents that it is entering into this agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid litigation. This agreement shall not be construed as an admission by the defendant of civil or criminal liability for any violation or penalty alleged by the Commonwealth. By entering into this agreement, the defendant does not admit the truth of any alleged facts, any of the characterization of defendant's alleged conduct or any conclusions set forth in the citations issued in this matter. Neither this agreement nor the defendant's consent to entry of a final order of the Commissioner pursuant to this agreement shall constitute an admission by the defendant of violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations or standards promulgated thereunder. The defendant is entering into this agreement without any prejudice to its right to assert in any subsequent action or proceeding that any future existing conditions identical or similar to those alleged in the original citations do not violate the VOSH laws, regulations or standards promulgated thereunder.

5. As consideration for the modification of the terms of the original citations, the Employer agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this agreement.

6. The Employer will post a copy of this Settlement Agreement for a period of fifteen (15) days at the worksite in a conspicuous location where notices to its employees are generally

posted.

7. Unless otherwise provided in this agreement or in a separate penalty installment payment agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

8. This Agreement compromises and settles the above contested claims. Under Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party.

9. All citations and penalties, as modified above, including all new obligations contained in this Settlement agreement, are a final order of the Commissioner of Labor and Industry.

10. This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, and shall also bind and inure to the benefit of any successor in interest of the Employer, except that the Employer may not assign any right or obligation flowing from this Agreement.

11. This Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Agreement constitutes the entire agreement between the parties concerning the aforesaid settlement and citation(s), and all prior negotiations, offers, and agreements, whether written or oral, are either superseded or merged in this document. This agreement cannot be amended except by a writing signed by the parties.

12. A court's ruling rendering any provision(s) of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.

13. Each person signing this Agreement hereby represents and warrants that he or she has the authority to bind the entity on behalf of which he or she has signed.

14. This Agreement may be executed in any number of copies, each of which shall be deemed a counterpart original.

{remainder of page intentionally left blank; signature page to follow}

HAMER & HAMER, D.D.S., P.C.

By: [Signature] (SEAL) 2/16/2021
Date

Name: David Hamer
Its: _____

State of Virginia, City/County of Charlottesville
to wit:

The foregoing instrument was acknowledged before me this 16 day of February 2021 by David Hamer on behalf of Hamer & Hamer DDS PC.

[Signature]
Notary Public

My commission expires: 7/31/2021



C. RAY DAVENPORT
COMMISSIONER OF LABOR AND INDUSTRY

By: [Signature] (SEAL) 2/22/21
Date
Ron Graham
Director, Occupational
Health Compliance

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ROCKINGHAM

C. RAY DAVENPORT,
Commissioner of Labor and Industry,

Plaintiff.

Case No. CL20000736-00

v.

MARK A. BERGMAN BUILDER, INC.,

Defendant.

JOINT MOTION AND FINAL ORDER OF DISMISSAL

This matter comes before the Court on the Joint Motion of Plaintiff C. Ray Davenport, Commission of Labor and Industry, and Defendant Mark A. Bergman Builder, Inc., advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as **Exhibit A** pursuant to 16 Va. Admin. Code § 25-60-340(F), and

IT APPEARING that as part of said settlement agreement, the Defendant withdraws its notice of contest of the citations at issue; and therefore the parties seek dismissal with prejudice of Plaintiff's Complaint.

Having considered the Joint Motion, and for good cause shown, it is

ADJUDGED, ORDERED and DECREED that the Joint Motion to Dismiss is GRANTED and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

The Clerk is directed to mail a certified copy of this order to counsel of record.

Entered this 7TH day of April, 2021.



Judge

4/7/21

We ask for this:



Marsha L. Garst, Esq.

Commonwealth's Attorney for Rockingham County/City of Harrisonburg
53 Court Square, Suite 210
Harrisonburg, VA 22801
Telephone: (540) 564-3352
Fax: (540) 433-9161

Counsel for the Commissioner

Seen and agreed:



Travis W. Vance, Esq. (VSB # 79764)
FISHER & PHILLIPS LLP
227 West Trade Street, Suite 2020
Charlotte, NC 28202
Telephone: (704) 778-6164
Email: tvance@fisherphillips.com

Counsel for the Defendant

C. RAY DAVENPORT,
Commissioner of Labor and Industry

Mark A. Bergman Builder, Inc.

VOSH Inspection No. 1304616

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the Agreement) is made and entered into this 23 day of November, 2020 (the "effective date" of this Agreement), by and between C. Ray Davenport, Commissioner of Labor and Industry ("Commissioner") and Mark A. Bergman Builder, Inc. ("Bergman") (collectively, the "Parties").

RECITALS

WHEREAS, the Commissioner issued a Citation and Notification of Penalty for Inspection Number 1304616 ("Citation") to "Mark A. Bergman, Inc. and its successors", on or about, May 15, 2018, alleging two (2) serious violations of the Virginia Occupational Safety and Health ("VOSH") law and regulations, with proposed civil penalties of \$1,780.00 (copy of VOSH Citation attached); and

WHEREAS, Bergman filed within 15 working days from the date of its receipt of the citation, a written notice contesting all violations and proposed penalties, as provided for in §40.1-49.4, of the *Code of Virginia*; and

WHEREAS, the parties desire to settle this case short of trial in a manner that will further protect and promote the safety and health of Bergman's employees, and to avoid the further time and expense of court proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. Upon full execution of the agreement the Commissioner will modify the citation, items in the following manner:

a. Item 1 of Citation 1 for Inspection No. 1304616 shall be vacated.

2. In exchange for and recognition of this action, Bergman agrees that Bergman will provide the Commissioner with written documentation of written safety procedures and proof that Bergman has

a. Trained its current employees in CPR and first-aid and provide proof of employee certification,

b. Trained its current employees in fall protection and provide proof of employee certification;

c. Furthermore, Bergman accepts Item 2 of Citation 1 as Serious and pays the full penalty of \$1010.00,

d. Bergman will provide the Commissioner with a written record of the employee training and certification concerning the required safety training procedures mentioned in subsections (a), (b), and (c) no later than **April 1, 2021**.

3. Bergman upon execution of this settlement agreement, will pay to the Commonwealth one thousand ten dollars (\$1,010.00). Payment of one thousand ten dollars (\$1,010.00) shall be made no later than **December 16, 2020**. **Payment will be made in the form of a check or money order, payable to the "Treasurer of Virginia", with the VOSH inspection number 1304616, listed on the check.**

4. The check shall be mailed or hand-delivered to the Accounting Dept. of the Virginia Department of Labor and Industry, Main Street Centre 600 E. Main Street, Suite

207 Richmond, Virginia 23219.

5. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

6. Bergman hereby withdraws its original notice of contest, and certifies that the violation affirmed as amended, and referenced in paragraph 1 of this Agreement, has been corrected and abated.

SETTLEMENT OF CLAIMS

7. This Agreement is meant to settle the above contested claims, and is not to be considered an admission of liability by Bergman. Pursuant to *Va. Code* §40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the *Code of Virginia* shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party.

8. No part of the foregoing or following agreements, statements, findings and actions taken by Bergman shall be deemed an admission by Bergman of a violation of the Code or any other law or an admission of the allegations contained within the citation or notification of penalty in this matter. Rather, the agreements, statements,

findings, and actions taken herein are made solely for the purpose of compromising and settling this matter amicably, to avoid protracted and expensive litigation, and shall not be used in any judicial or administrative forum for any purpose whatsoever, except the Commissioner reserves its right to issue Repeat violations pursuant to Virginia law for the citation item affirmed as amended in paragraph 1 above. It is specifically understood by both Bergman and the Commissioner that the settlement of this matter is not intended to and shall not constitute an admission or finding of civil liability or responsibility of any kind in any civil personal injury or wrongful death action (or any indemnification action related to a civil personal injury or wrongful death action) and such civil liability or responsibility is specifically denied by Bergman.

9. Nothing in this agreement shall be construed to restrict in any way Bergman's right in future VOSH inspections to argue that its procedures comply with the applicable standards.

10. Nothing in this agreement shall be construed to restrict in any way the Commissioner's right under the same or similar factual circumstances, to issue citations to Bergman or any other employer in future VOSH inspections for violations of the cited VOSH regulation affirmed as amended in paragraph 1 above.

11. The citations and penalty, as modified above and any new obligations contained in this agreement, are a final order of the Commissioner of Labor and Industry.

Mark A. Bergman Builder, Inc.

BY: [Signature]
Agent

11/23/2020
Date

Commonwealth of Virginia,

County/City of Rockingham, to wit:

I, the undersigned Notary Public in and for the jurisdiction aforesaid, do hereby certify that Mark Bergman, whose name is signed to the foregoing as a(n) president for Mark A. Bergman Builder, Inc., has acknowledged the same before me as his/her true and voluntary act on behalf of said corporation.

Given under my hand this 23rd day of November, 2020.

[Signature]
Notary Public

My commission expires: 3-31-21

Registration No.: 7299670

JOHN TRAVIS RHODES
NOTARY PUBLIC
REGISTRATION # 7299670
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
MARCH 31, 2021

C. RAY DAVENPORT,
Commissioner of Labor and Industry

By:  _____
Marta Fernandes
VOSH Safety Compliance Director
Department of Labor and Industry

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ROCKINGHAM

C. RAY DAVENPORT,
Commissioner of Labor and Industry,

Plaintiff.

Case No. CL18004044-00

v.

MOMENTUM EARTHWORKS, LLC,

Defendant.

JOINT MOTION AND FINAL ORDER OF DISMISSAL

This matter comes before the Court on the Joint Motion of Plaintiff C. Ray Davenport, Commission of Labor and Industry, and Defendant Momentum Earthworks, LLC, advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as **Exhibit A** pursuant to 16 Va. Admin. Code § 25-60-340(F), and

IT APPEARING that as part of said settlement agreement, the Defendant withdraws its notice of contest of the citations at issue; and therefore the parties seek dismissal with prejudice of Plaintiff's Complaint.


Having considered the Joint Motion, and for good cause shown, it is

ADJUDGED, ORDERED and DECREED that the Joint Motion to Dismiss is GRANTED and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

The Clerk is directed to mail a certified copy of this order to counsel of record.

Entered this 29TH day of MARCH, 2021.

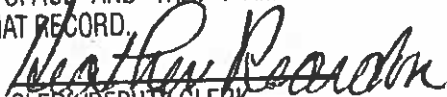
3/29/21



Judge

I CERTIFY THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THE ROCKINGHAM COUNTY CIRCUIT COURT CLERK'S OFFICE AND THAT I AM THE CUSTODIAN OF THAT RECORD.

3/29/21
DATE


CLERK/DEPUTY CLERK

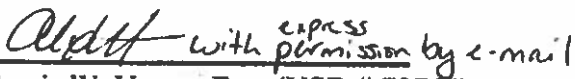
We ask for this:



Alex W. West, Esq. (VSB # 84607)
Special Assistant Commonwealth's Attorney
Rockingham County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, VA 23219
Telephone: (804) 371-2631
Email: alex.west@doli.virginia.gov

Counsel for the Commissioner

Seen and agreed:



Travis W. Vance, Esq. (VSB # 79764)
FISHER & PHILLIPS, LLP
227 West Trade Street, Suite 2020
Charlotte, NC 28202
Telephone: (704) 778-6164
Email: tvance@fisherphillips.com

Counsel for the Defendant

C. RAY DAVENPORT
Commissioner of Labor and Industry

MOMENTUM EARTHWORKS, LLC

Inspection Number 1178982

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into by C. Ray Davenport, Commissioner of Labor and Industry (Commissioner) and Momentum Earthworks, LLC (Employer).

WHEREAS, on or about December 2, 2016, the Commissioner issued citations to the employer alleging three Serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry. A total of \$5,565.00 in penalties was proposed by the Commissioner along with the violation. (Copy of the citation attached by reference hereto).

WHEREAS, the Employer filed a notice of contest of all violations contained in the citations within 15 working days from the date of the receipt of the citations, as provided by § 40.1-49.4 of the Code of Virginia;

WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations pursuant to Va. Code § 40.1-49.4(E) in the Rockingham County Circuit Court, case number CL18004044-00 (the "Litigation"); and

WHEREAS, the parties desire to settle these cases in a manner that will further, protect and promote the safety and health of the employees of the Employer and avoid the time and expense of court proceedings;

NOW, THEREFORE, the parties agree to the following:

TERMS AND CONDITIONS OF AGREEMENT

1. Upon full execution of the agreement, the Commissioner will modify the citations as follows:
 - a. Serious Citation 1, Item 1 is vacated for settlement purposes only.
 - b. Serious Citation 1, Item 2 is vacated for settlement purposes only.
 - c. Serious Citation 1, Item 3 is reclassified to Other-than-Serious, with a penalty of \$1,155.00.
2. Within forty-five (45) days from the execution of this agreement, the Employer will provide a copy of documentation showing it has provided training, at no cost to the employee, to

all employees of the Employer, regarding trenching and excavation safety, to include the requirements of Subpart P of Part 1926 of the VOSH-incorporated regulations.

3. Within forty-five (45) days from the execution of this agreement, the Employer will provide documentation showing it has provided training, at no cost to the employee, to all employees of the Employer, regarding ladder safety, including but not limited to, specifically addressing the standard cited in Citation 1, Item 3.

4. Any required abatement documentation, and the documentation required by paragraphs 2-3 will be sent to the following address:

Elizabeth Tomlin
Regional Director
Virginia Department of Labor and Industry
201 Lee Highway
Verona, Virginia 24482

5. Upon execution of this Agreement in full, the Commissioner will file a motion to dismiss the Litigation. The Employer agrees to endorse such an order as "seen and agreed" and to take no steps to hinder the entry of such an order. Pursuant to 16 Va. Admin. Code § 25-60-340(F), this Agreement shall be made an exhibit and incorporated into the dismissal order.

6. The Employer represents that it is entering into this agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid litigation. This agreement shall not be construed as an admission by the defendant of civil or criminal liability for any violation or penalty alleged by the Commonwealth. By entering into this agreement, the defendant does not admit the truth of any alleged facts, any of the characterization of defendant's alleged conduct or any conclusions set forth in the citations issued in this matter. Neither this agreement nor the defendant's consent to entry of a final order of the Commissioner pursuant to this agreement shall constitute an admission by the defendant of violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations or standards promulgated thereunder. The defendant is entering into this agreement without any prejudice to its right to assert in any subsequent action or proceeding that any future existing conditions identical or similar to those alleged in the original citations do not violate the VOSH laws, regulations or standards promulgated thereunder.

7. As consideration for the modification of the terms of the original citations, the Employer agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this agreement.

8. The Employer will post a copy of this Settlement Agreement for a period of fifteen (15) days at the worksite in a conspicuous location where notices to its employees are generally posted.

9. Unless otherwise provided in this agreement or in a separate penalty installment payment agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any

modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

10. This Agreement compromises and settles the above contested claims. Under Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party.

11. All citations and penalties, as modified above, including all new obligations contained in this settlement agreement, are a final order of the Commissioner of Labor and Industry.

12. This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, and shall also bind and inure to the benefit of any successor in interest of the Employer, except that the Employer may not assign any right or obligation flowing from this Agreement.

13. This Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Agreement constitutes the entire agreement between the parties concerning the aforesaid settlement and citation(s), and all prior negotiations, offers, and agreements, whether written or oral, are either superseded or merged in this document. This agreement cannot be amended except by a writing signed by the parties.

14. A court's ruling rendering any provision(s) of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.

15. Each person signing this Agreement hereby represents and warrants that he or she has the authority to bind the entity on behalf of which he or she has signed.

16. This Agreement may be executed in any number of copies, each of which shall be deemed a counterpart original.

{remainder of page intentionally left blank; signature page to follow}

MOMENTUM EARTHWORKS, LLC

By: [Signature] (SEAL)

3-17-21

Date

Name: Hans Hanna

Its: [Signature]

State of Virginia, City/County of Rockingham
to wit:

The foregoing instrument was acknowledged before me this 17th day of March, 2021 by
Hans Hanna on behalf of Momentum Earthworks, LLC.



My commission expires 03/23/21

[Signature]
Notary Public

**C. RAY DAVENPORT
COMMISSIONER OF LABOR AND INDUSTRY**

By: [Signature] (SEAL)

03/23/21

Date

María Fernandes
Director, VOSH Safety Program

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ACCOMACK

C. RAY DAVENPORT,
Commissioner of Labor and Industry,

Plaintiff.

Case No. CL20000299-00

v.

PERDUE FOODS, LLC,

Defendant.

JOINT MOTION AND FINAL ORDER OF DISMISSAL

This matter comes before the Court on the Joint Motion of Plaintiff C. Ray Davenport, Commission of Labor and Industry, and Defendant Perdue Foods, LLC, advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as Exhibit A pursuant to 16 Va. Admin. Code § 25-60-340(F), and

IT APPEARING that as part of said settlement agreement, the Defendant withdraws its notice of contest of the citations at issue; and therefore the parties seek dismissal with prejudice of Plaintiff's Complaint.

Having considered the Joint Motion, and for good cause shown, it is

ADJUDGED, ORDERED and DECREED that the Joint Motion to Dismiss is GRANTED and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

The Clerk is directed to mail a certified copy of this order to counsel of record.

Entered this 22nd day of MARCH, 2021.

Accomack County Circuit Court

I certify that the document in which this authentication
is affixed is a true copy of a record filed in the
Accomack County Circuit Court, Virginia.

TESTE: SAMUEL H. COOPER, JR.

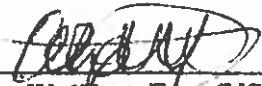
W. Revell Lewis III

Judge

W. Revell Lewis, III

BY Samuel H. Cooper, Jr. Deputy Clerk

We ask for this:



Alex W. West, Esq. (VSB # 84607)
Special Assistant Commonwealth's Attorney
Accomack County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, VA 23219
Telephone: (804) 371-2631
Email: alex.west@doli.virginia.gov

Counsel for the Commissioner

Seen and agreed:



Melissa A. Bailey, Esq.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
1909 K Street NW, Suite 1000
Washington, DC 20006
Telephone: (202) 263-0265
Email: Melissa.bailey@ogltreedeakins.com

Kyle R. Elliott, Esq.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
901 East Byrd Street, Suite 1300
Richmond, VA 23219
Telephone: (804) 663-2350
Email: kyle.elliott@ogltreedeakins.com

Counsel for the Defendant

C. RAY DAVENPORT
Commissioner of Labor and Industry

PERDUE FOODS, LLC

Inspection Numbers 1301308 & 1305456

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into by C. Ray Davenport, Commissioner of Labor and Industry ("Commissioner") and Perdue Foods, LLC ("Employer").

WHEREAS, on or about June 11, 2018, the Commissioner issued citations to the Employer stemming from a safety inspection alleging three Serious violations (not including grouped violations) of the Virginia Occupational Safety and Health (VOSH) Standards for General Industry ("Safety Citation" or "Inspection no. 1301308"). The Commissioner proposed a total of \$29,365.00 in penalties. A copy of the citation for Inspection no. 1301308 is attached by reference hereto;

WHEREAS, on or about July 27, 2018, the Commissioner issued citations to the Employer stemming from a health inspection alleging two Serious violations (not including grouped violations) and one Other-Than-Serious violation of the Virginia Occupational Safety and Health (VOSH) Standards for General Industry ("Health Citation" or "Inspection no. 1305456"). The Commissioner proposed a total of \$18,785.00 in penalties. A copy of the citation for Inspection no. 1305456 is attached by referenced hereto;

WHEREAS, the Employer filed a notice of contest of all violations in both the Safety Citation and the Health Citation contained in the citations within 15 working days from the date of the receipt of the citations, as provided by § 40.1-49.4 of the Code of Virginia;

WHEREAS, pursuant to Va. Code § 40.1-49.4(E), the Commissioner caused a Complaint to be filed in Accomack County Circuit Court, styled *C. Ray Davenport, Commissioner of Labor and Industry v. Perdue Foods, LLC* (case number CL20000299-00) (the "Litigation") seeking to affirm the contested citations; and

WHEREAS, the parties desire to settle these cases short of litigation in a manner that will further, protect and promote the safety and health of the employees of the Employer and avoid the time and expense of court proceedings;

NOW, THEREFORE, the parties agree to the following:

TERMS AND CONDITIONS OF AGREEMENT

1. Upon full execution of the agreement, and Employer's compliance with paragraphs 4, 5, and 6, the Commissioner will modify the citation items in Inspection no. 1301308 as follows:

- a. Serious Citation 1, Item 1 is reduced to Other-Than-Serious with a penalty as proposed of \$9,070.00.
- b. Serious Citation 1, Items 2a and 2b are reduced to Other-Than-Serious with a penalty as proposed for Item 2a of \$9,070.00.
- c. Serious Citation 1, Item 3 is affirmed as Serious, modified to a violation of § 1910.212(a)(3)(ii), with a penalty as proposed of \$11,225.00, with the first paragraph of the alleged violation description modified as follows:

"1910.212(a)(3)(ii): The point of operation of machines whose operation exposes an employee to injury shall be guarded. The guarding shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."

2. Upon full execution of the agreement, and Employer's compliance with paragraphs 4, 5, and 6, the Commissioner will modify the citation items in Inspection no. 1305456 as follows:

- a. Serious Citation 1, Item 1a, 1b, and 1c are reduced to Other-Than-Serious violations with a reduced penalty associated with Item 1c of \$7,857.00.
- b. Serious Citation 1, Items 2a and 2b are vacated.
- c. Serious Citation 1, Item 2c is affirmed as Serious, with a penalty originally proposed for Item 2a of \$7,560.00 assessed.
- d. Other-Than-Serious Citation 2, Item 1 is affirmed with no penalty.

3. The total penalty for Inspection number 1301308 equals \$29,365.00. The total penalty for Inspection number 1305456 equals \$15,417.00. Total penalties for both Inspection nos. 1301308 and 1305456 equal \$44,782.00.

4. In addition to providing abatement documentation otherwise required by law, within thirty (30) days from the execution of this agreement, the Employer will provide a copy of a machine-specific lock out/tag out (LOTO) procedure for the chicken paw machine of the type involved in Inspection no. 1301308 that the Commissioner concludes, in his sole discretion, is compliant with applicable and relevant standards.

5. In addition to providing abatement documentation otherwise required by law, within thirty (30) days from the execution of this agreement, the Employer will provide documentation proving that additional guarding has been installed on the chicken paw machines in Employer's Accomac facility of the type involved in Inspection no. 1301308 to address the gap that resulted in the amputation injury in Inspection no. 1301308.

6. In addition to providing abatement documentation otherwise required by law, on or before April 15, 2021, the Employer will provide (a) documentation of a revised emergency response plan or emergency action plan (ERP or EAP) that the Commissioner, in his sole discretion, finds compliant with the applicable and relevant standards, including but not limited to a revised procedure for sounding the alarm for an evacuation that includes, at a minimum, notification to employees via a public address system audible at a decibel level above background noise, and a backup system as required by the standards, and (b) documentation of training on the revised ERP or EAP provided to all employees at Employer's Accomac facility, at no cost to the employees, specifically to include information about how employees are notified of evacuations.

7. Any abatement documentation not already provided, and the documentation required by paragraphs 4, 5, and 6 will be sent to the following address:

For Inspection no. 1301308

Virginia Department of Labor and Industry
ATTN: Jeannie Buckingham, Regional Safety Director
6363 Center Drive, Suite 101
Norfolk, VA 23502

For Inspection no. 1305456

Virginia Department of Labor and Industry
ATTN: Maryella Mitchell, Regional Health Director
6363 Center Drive, Suite 101
Norfolk, VA 23502

8. Upon execution of this agreement by all parties, the Commissioner will take all necessary steps to move the Accomack County Circuit Court to dismiss the Litigation by entry of a Final Order of dismissal with prejudice ("Final Order"), and such Final Order shall incorporate this agreement pursuant to 16 Va. Admin. Code § 25-60-340(F). Employer agrees to endorse such a Final Order as seen and agreed, and otherwise to take no steps to frustrate the entry of this Final Order.

9. The Employer represents that it is entering into this agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid litigation. This agreement shall not be construed as an admission by the defendant of civil or criminal liability for any violation or penalty alleged by the Commonwealth. By entering into this agreement, the defendant does not admit the truth of any alleged facts, any of the characterization of defendant's alleged conduct or any conclusions set forth in the citations issued in this matter. Neither this agreement nor the defendant's consent to entry of a final order of the Commissioner pursuant to this agreement shall constitute an admission by the defendant of violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations or standards promulgated thereunder. The defendant is entering into this agreement without any prejudice to its right to assert in any subsequent action or proceeding that any future existing conditions identical or similar to those alleged in the original citations do not violate the VOSH laws, regulations or standards promulgated thereunder.

10. As consideration for the modification of the terms of the original citations, the Employer agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this agreement.

11. The Employer will post a copy of this Settlement Agreement for a period of fifteen (15) days at the worksite in a conspicuous location where notices to its employees are generally posted.

12. Unless otherwise provided in this agreement or in a separate penalty installment payment agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

13. This Agreement compromises and settles the above contested claims. Under Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party.

14. All citations and penalties, as modified above, including all new obligations contained in this settlement agreement, are a final order of the Commissioner of Labor and Industry.

15. This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, and shall also bind and inure to the benefit of any successor in interest of the Employer, except that the Employer may not assign any right or obligation flowing from this Agreement.

16. This Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Agreement constitutes the entire agreement between the parties concerning the aforesaid settlement and citation(s), and all prior negotiations, offers, and agreements, whether written or oral, are either superseded or merged in this document. This agreement cannot be amended except by a writing signed by the parties.

17. A court's ruling rendering any provision(s) of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.

18. Each person signing this Agreement hereby represents and warrants that he or she has the authority to bind the entity on behalf of which he or she has signed.

19. This Agreement may be executed in any number of copies, each of which shall be deemed a counterpart original.

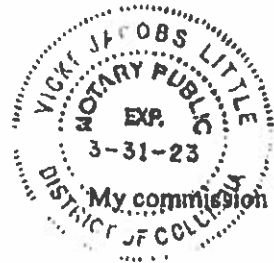
PERDUE FOODS, LLC

By: Maria (SEAL) 2-23-21
Date

Name: _____
Its: _____

State of District of Columbia City/County of _____
to wit:

The foregoing instrument was acknowledged before me this 23rd day of February 2020 by Melissa Bailey on behalf of Perdue Foods



Vicki Jacobs Little
Notary Public

My commission expires: _____
VICKI JACOBS LITTLE
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires March 31, 2023

**C. RAY DAVENPORT,
COMMISSIONER OF LABOR AND INDUSTRY**

By: Marta Ferrandis (SEAL) 2/23/22
Date
Marta Ferrandis
Director, Occupational
Safety Compliance

By: Ron Graham (SEAL) 2/23/22
Date
Ron Graham
Director, Occupational
Health Compliance


The Clerk shall mail certified copies of this order to Defendant's registered agent, Edward D. Hubacher, at 3333 Duke Street, Alexandria, Virginia 22314. Pursuant to *Rule 1:13*, endorsement shall be dispensed with.

JUDGE: 

ENTER: 6/25/21

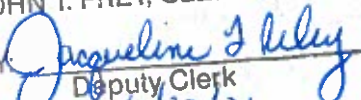
I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

By: 
Alfred B. Albiston (VSB No. 29851)
Special Assistant Commonwealth's Attorney
Fairfax County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219-2430

(804) 786-6760
(804) 786-8418 fax
alfred.albiston@doli.virginia.gov

A COPY TESTE:
JOHN T. FREY, CLERK

BY: 
Deputy Clerk

Date: 6/30/21
Original retained in the office of
the Clerk of the Circuit Court of
Fairfax County, Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

C. RAY DAVENPORT,)	
Commissioner of Labor and Industry,)	
<i>Plaintiff,</i>)	
v.)	Case # CL20002094-00
)	
UNITED PARCEL SERVICE, INC.)	
<i>Defendant.</i>)	

AGREED ORDER

WHEREAS, on or about September 20, 2019, plaintiff C. Ray Davenport, Commissioner of Labor and Industry ("Commissioner") issued two citations to defendant, United Parcel Service, Inc. ("UPS"), alleging one Serious and one Other-Than-Serious violation of Virginia Occupational Safety and Health ("VOSH") Standard §§ 1910.37(a)(3) and 1910.151(b), respectively, and proposing \$9,955.00 in civil penalties; and

WHEREAS, UPS filed within 15 working days from the date of the receipt of the citation, a written notice contesting the violation and proposed penalty, as provided for in *Va. Code* § 40.1-49.4;

Upon agreement of the parties and for good cause shown, it is hereby now **ADJUDGED, ORDERED, and DECREED** as follows:

1. That VOSH Serious citation Item 1-1, attached as Exhibit "A," is hereby affirmed as a Serious violation, and its accompanying civil penalty of \$8,785.00 is upheld.

2. That VOSH Other-Than-Serious citation Item 2-1, with its proposed civil penalty of \$1,170.00 is vacated.
2. That UPS will pay the agreed civil penalty of eight thousand seven hundred eighty-five dollars (\$8,785.00) within thirty (30) days of the date of entry of this Order. Payment shall be made by check or money order, payable to the Treasurer of Virginia, with the VOSH inspection number 1420792 noted on the payment.
4. That UPS withdraws its original notice of contest and hereby waives its right to contest the remaining terms in this Agreed Order.
5. That any citation modifications in this Agreed Order are contingent upon UPS's full and timely payment of the penalty as agreed. Any failure by UPS to substantially comply with the terms of this Order or to make a timely penalty payment constitutes a breach of this Order. Any breach shall mean that the originally proposed violations and penalties shall be reinstated and affirmed as a final order, and the unpaid amount shall become due and payable 15 calendar days following the breach; UPS's responsibilities and duties under this Agreed Order shall otherwise continue until the agreed amount has been paid in full and no further payment is due;
6. That as required by *Va. Rule 16 VAC 25-60-40*, UPS will deliver a copy to any authorized employee representative, and will post a copy of this settlement agreement for ten (10) working days at its 2440 Hunter's Way, Charlottesville, Virginia workplace, in a conspicuous location where it generally posts notices to its employees;
7. That both parties agree the violation upheld was corrected and abated during the VOSH inspection.
8. That this Order shall be construed to advance the purpose of *Va. Code § 40.1-3*,

and that no third party shall hereby have any right of action for breach of any provision of this title unless otherwise specifically provided;

9. That, under *Va. Code* § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the *Code of Virginia* shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party;

10. That this agreement shall not be construed as an admission by UPS of civil or criminal liability for any violation or penalty alleged by the Commissioner; and

11. That each party shall bear its own costs in this matter.

It is further ORDERED, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court. The Clerk is directed to provide notice of this Order to all counsel of record.

Entered this 9th day of September, 2021.

Claus V. Womack Jr

Judge

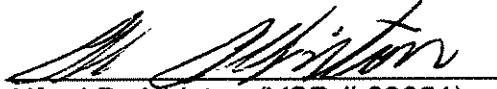
a true copy TESTE:

JON R. ZUG, CLERK

by: *Stacey Brandt*
Deputy Clerk

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry



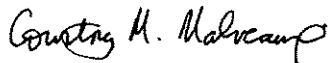
Alfred B. Albiston (VSB # 29851)
Special Assistant Commonwealth's Attorney
Albemarle County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219

(804) 786-6760
(804) 786-8418 Fax
Alfred.Albiston@doli.virginia.gov

Counsel for plaintiff

SEEN AND AGREED:

UNITED PARCEL SERVICE, INC.



Courtney M. Malveaux (VSB No. 51064)
Jackson Lewis P.C.
701 E. Byrd Street, 17th Floor
Richmond, Virginia 23219
(804) 649-0404
(8904) 649-0403 Fax
Courtney.Malveaux@jacksonlewis.com

Counsel for defendant

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

C. RAY DAVENPORT,)	
Commissioner of Labor and Industry,)	
<i>Plaintiff,</i>)	
v.)	Case # CL20002094-00
)	
UNITED PARCEL SERVICE, INC.)	
<i>Defendant.</i>)	

AGREED ORDER'S EXHIBIT A

VOSH inspection number 1420792, citation issued September 20, 2019

Virginia Department of Labor and Industry
Virginia Occupational Safety and Health (VOSH) Compliance
201 Lee Highway,
P.O. Box 77
Verona, VA 24482

Inspection Number: 1420792
Inspection Date: 07/19/2019-
07/19/2019
Issuance Date: 09/20/2019



Citation and Notification of Penalty

Company Name: United Parcel Service
Inspection Site: 2440 Hunter's Way Charlottesville, VA 22901

Citation 1 Item 1 **Type of Violation: Serious**

1910.37(a)(3): Exit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route. The exit access must not go through a room that can be locked, such as a bathroom, to reach an exit or exit discharge, nor may it lead into a dead-end corridor. Stairs or a ramp must be provided where the exit route is not substantially level.

On July 19, 2019 located on the South side of the Charlottesville UPS facility, where employees were engaged in sorting and loading delivery vehicles with packages for that day's delivery, access to an emergency exit was obstructed with an overflow of packages that had not been shipped out with the morning work flow.

Date by Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$8785.00

Citation 2 Item 1 **Type of Violation: Other-than-Serious**

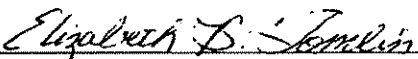
1910.151(b): In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available.

On July 19, 2019, located at the UPS Charlottesville facility where employees are engaged in work using conveyor systems and forklifts to load and unload packages to and from trucks for delivery, the employer did not train any person to provide first aid to injured employees.

Note: The nearest treatment facility is the UVA Medical Center approximately 6 miles from the UPS facility.

Date by Which Violation Must Be Abated:
Proposed Penalty:

October 25, 2019
\$1170.00


Elizabeth B. Tomlin
NoVA Regional Health Director

VIRGINIA:

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

C. RAY DAVENPORT,)	
Commissioner of Labor and Industry,)	
<i>Plaintiff,</i>)	
v.)	Case # CL20003633-00
UNITED PARCEL SERVICE, INC.)	
<i>Defendant.</i>)	

AGREED ORDER

WHEREAS, on or about August 13, 2020, plaintiff C. Ray Davenport, Commissioner of Labor and Industry ("Commissioner") issued a citation to defendant, United Parcel Service, Inc. ("UPS"), alleging one Other-Than-Serious violation of Virginia Occupational Safety and Health ("VOSH") Standard § 1910.303(g)(1)(i), and proposing a \$910.00 civil penalty; and

WHEREAS, UPS filed within 15 working days from the date of the receipt of the citation, a written notice contesting the violation and proposed penalty, as provided for in *Va. Code* § 40.1-49.4;

Upon agreement of the parties and for good cause shown, it is hereby now ADJUDGED, ORDERED, and DECREED as follows:

1. That the VOSH citation, attached as Exhibit "A" is hereby affirmed as an Other-Than-Serious violation, together with an amended civil penalty of \$455.00.
2. That UPS will pay the agreed civil penalty of four hundred fifty-five dollars (\$455.00) within thirty (30) days of the date of entry of this Order. Payment shall be

made by check or money order, payable to the Treasurer of Virginia, with the VOSH inspection number 1480073 noted on the payment.

4. That UPS withdraws its original notice of contest and hereby waives its right to contest the remaining terms in this Order.

5. That any citation modifications in this Agreed Order are contingent upon UPS's full and timely payment of the penalty as agreed. Any failure by UPS to substantially comply with the terms of this Order or to make a timely penalty payment constitutes a breach of this Order. Any breach shall mean that the originally proposed violation and penalty shall be reinstated and affirmed as a final order, and the unpaid amount shall become due and payable 15 calendar days following the breach; UPS's responsibilities and duties under this Agreed Order shall otherwise continue until the agreed amount has been paid in full and no further payment is due;

6. That as required by *Va. Rule 16 VAC 25-60-40*, UPS will deliver a copy to any authorized employee representative, and will post a copy of this settlement agreement for ten (10) working days at its 3941 Thirlane Road workplace in a conspicuous location where it generally posts notices to its employees;

7. That UPS certifies the cited violation has been abated; and if not previously provided, agrees to provide the Commissioner within thirty (30) days of this Order documentation verifying abatement of the affirmed violation in this agreement. The documentation shall comply with 16VAC25-60-307.E.2. of the VOSH Administrative Regulations Manual, stating that "Documents demonstrating that abatement is complete may include, but are not limited to, evidence of purchase or repair of equipment, photographic or video evidence of abatement, or other written records." The

documentation shall be provided to:

Mr. Harvey Trice
VOSH Central Regional Safety Director
Virginia Department of Labor and Industry
1570 East Parham Road, Richmond, VA 23228

8. That this Order shall be construed to advance the purpose of *Va. Code* § 40.1-3, and that no third party shall hereby have any right of action for breach of any provision of this title unless otherwise specifically provided;
9. That, under *Va. Code* § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the *Code of Virginia* shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party;
10. That this agreement shall not be construed as an admission by UPS of civil or criminal liability for any violation or penalty alleged by the Commissioner; and
11. That each party shall bear its own costs in this matter.

It is further ORDERED, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court. The Clerk is directed to provide notice of this Order to all counsel of record.

Entered this 18th day of March, 2021.


The Hon. David E. Johnson, Judge

COPY TESTE:
WENDY S. HUGHES, CLERK
BY: 
Kim Krefolk, Deputy Clerk

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry



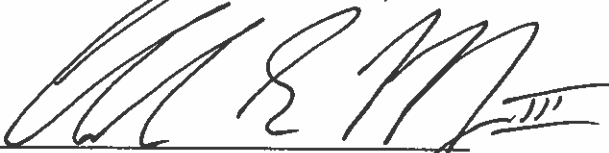
Alfred B. Albiston (VSB # 29851)
Special Assistant Commonwealth's Attorney
Chesterfield County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219

(804) 786-6760
(804) 786-8418 Fax
Alfred.Albiston@doli.virginia.gov

Counsel for plaintiff

SEEN AND AGREED:

UNITED PARCEL SERVICE, INC.



Charles G. Meyer, III (VSB No. 84146)
Patrick Callahan (VSB No. 87366)
O'HAGAN MEYER
411 E. Franklin St., Suite 500
Richmond, Virginia 23219
(804) 403-7100 (telephone)
(804) 403-7110 (fax)
cmeyer@ohaganmeyer.com

Ashley D. Brightwell (*pro hac vice*)
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000 (telephone)
(404) 881-7777 (fax)
Ashley.brightwell@alston.com

Counsel for defendant

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

C. RAY DAVENPORT,)	
Commissioner of Labor and Industry,)	
<i>Plaintiff,</i>)	
v.)	Case # CL20003633-00
)	
UNITED PARCEL SERVICE, INC.)	
<i>Defendant.</i>)	

AGREED ORDER'S EXHIBIT A

VOSH inspection number 1480073, citation issued August 13, 2020

Virginia Department of Labor and Industry
Virginia Occupational Safety and Health (VOSH) Compliance
North Run Business Park,
1570 E. Parham Road
Richmond, VA 23228

Inspection Number: 1480073
Inspection Date: 06/23/2020-
08/12/2020
Issuance Date: 08/13/2020



Citation and Notification of Penalty

Company Name: United Parcel Service
Inspection Site: 9601 Coach Road Richmond, VA 23237

Citation Item 1

Type of Violation: Other-than-Serious

1910.303(g)(1)(i): Working space for equipment likely to require examination, adjustment, servicing, or maintenance while energized shall comply with the following dimensions, except as required or permitted elsewhere in is subpart

At this job site, on or about June 23, 2020, adjacent the east box line, the working space at the front of the Eaton (PF3:1) and Square D (M2-F1-2) switch disconnects was blocked with boxes and packages, in lieu of maintaining a clear space of at least 36 inches in front of the electrical equipment.

Date by Which Violation Must Be Abated:

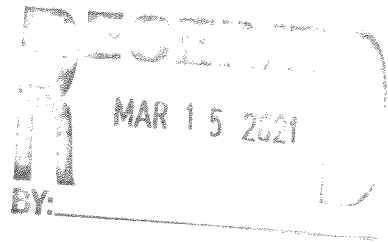
September 08, 2020

Proposed Penalty:

\$910.00

A handwritten signature in black ink, appearing to read 'D. Wells'.

Daniel Wells
Acting Central Region Safety Director



VIRGINIA:

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING**

VIRGINIA MANUFACTURERS
ASSOCIATION, et al.,

Plaintiffs,

v.

RALPH S. NORTHAM, in his official
capacity as Governor of Virginia, et al.,

Defendants.

:
:
:
: Case No: CL200004521 *7*
:
:
: Hon. Judge W. Reilly Marchant
:
:
:

ORDER GRANTING MOTION TO DISMISS

On February 16, 2021, the parties appeared by Counsel on: (1) Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint; (2) Defendants’ Motion to Strike Plaintiffs’ Second Amended Complaint and Defendants’ Renewed Motion to Dismiss; and (3) Defendants’ Motion to Dismiss as Moot Count II of the Second Amended Complaint. Upon consideration of the arguments of the parties and the record in this case, the Court hereby **DENIES** Defendants’ Motion to Strike Plaintiff’s Second Amended Complaint. Upon consideration of the arguments of the parties and the record in this case, the Court hereby **DENIES** the Defendants’ Motion to Dismiss with respect to standing; finding instead that the Plaintiffs have pled sufficient allegations to establish standing.

The Court, however, **GRANTS** Defendants’ Motion to Dismiss and Motion to Dismiss as Moot Count II of the Second Amended Complaint. The Court hereby **ORDERS** that:

1. Count I of the Second Amended Complaint, which is an appeal pursuant to the Virginia Administrative Process Act (“VAPA”), is **HEREBY DISMISSED** for the reasons stated on the record at the February 16, 2021 hearing and because the VAPA does not apply to

Emergency Executive Orders and because Virginia Code Section 40.1-22(6a) expressly exempts the Emergency Temporary Standard from the VAPA.

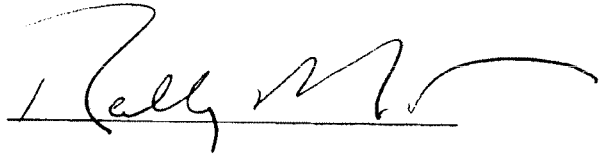
2. Count II of the Second Amended Complaint, which is a petition for a declaratory order pursuant to Virginia Code Section 40.1-22(7), is **HEREBY DISMISSED** for the reasons stated on the record at the February 16, 2021 hearing and because: (i) the Emergency Temporary Standard has expired; (ii) the Emergency Temporary Standard was adopted pursuant to Virginia Code Section 40.1-22(6a) and all of the requirements of that code provision has been met; and (iii) Virginia Code Section 40.1-22(7) does not apply to the Emergency Executive Orders.
3. Count III of the Second Amended Complaint, which is brought pursuant to the Virginia Religious Freedom Restoration Act, Virginia Code Section 57-2.02, is **HEREBY DISMISSED** for the reasons stated on the record at the February 16, 2021 hearing and because, applying the definition of “substantial burden” articulated in *Horen v. Commonwealth*, 23 Va. App. 735 (1997), the Plaintiffs have failed to ^{Sufficiently allege} establish a substantial burden on their exercise of religion. (RM)
4. Count IV of the Second Amended Complaint, which asserts certain constitutional claims, including a violation of the separation of powers and a violation of Plaintiffs’ freedom of assembly, is **HEREBY DISMISSED** for the reasons stated on the record at the February 16, 2021 hearing and because: (i) the Defendants passed each of the Emergency Executive Orders challenged by the Plaintiffs and the Emergency Temporary Standard pursuant to explicit statutory authority to do so; therefore, there is no separation of powers violation; and (ii) any curtailment of the Plaintiffs’ freedom of assembly has a “real or substantial relation” to the public health crisis of COVID-19 and does not rise to the level of “a plain, palpable

invasion of rights secured by the fundamental law.” See *Tigges v. Northam*, Memorandum Order at ¶¶ 17-19, Civil Action No. 3:20-cv-410, Dkt. No. 19 (E.D. VA. July 21, 2020) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020)).

The Clerk is directed to forward a certified copy of this Order to the parties.


It is so **ORDERED**.

Enter: 3 1 4 1 2 1



W. Reilly Marchant, Chief Judge

Seen and Agreed:


Jerald R. Hess

Mark R. Herring
Attorney General of Virginia

Donald D. Anderson
Deputy Attorney General

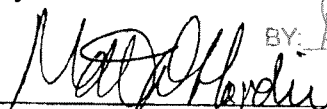
*Paul Kugelman, Jr. (VSB No. 41624)
Senior Assistant Attorney General, Section
Chief

*Jerald R. Hess (VSB No. 78584)
Assistant Attorney General
*Counsel of Record

Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
(804) 225-2307 (telephone)
(804) 786-2650 (fax)
JHess@oag.state.va.us
Counsel for the Defendants

Seen and objected to for the reasons stated in
Plaintiffs' briefs, during oral argument, and for
the reasons stated in the Claimants' Statement
of Objections:

Teste: EDWARD F. JEWETT, CLERK

BY:  D.C.

Matthew D. Hardin, VSB#87482
1725 I Street NW, Suite 300
Washington, DC 20006
Phone: (202) 802-1948
Email: MatthewDHardin@protonmail.com

Nandan Kenkeremath, *pro hac vice*
2707 Fairview Court
Alexandria, VA 22311
Email: nandank@comcast.net

Counsel for Plaintiffs

COURT OF APPEALS OF VIRGINIA

PUBLISHED

Present: Chief Judge Decker, Judges Humphreys and O'Brien
Argued by videoconference

VIRGINIA MANUFACTURERS ASSOCIATION,
JON TIGGES, ZION SPRINGS, LLC,
GRACE CHURCH OF FREDERICKSBURG,
JOSH TIGGES, DAVE LaROCK,
ANNE WAYNETTE ANDERSON,
SPONSOR HOUNDS, LLC,
RIVER ROCK ENTERTAINMENT, INC., LINDA PARK,
FUJIYA HOUSE, INC., HEIDI BUNDY (INDIVIDUALLY
AND ON BEHALF OF "A LITTLE BIT HAPPY"),
JEFFREY FREDERICK AND BREW REPUBLIC BIERWORKS

v. Record No. 0316-21-2

OPINION BY
JUDGE MARY GRACE O'BRIEN
DECEMBER 7, 2021

RALPH S. NORTHAM, GOVERNOR OF VIRGINIA,
M. NORMAN OLIVER, STATE HEALTH COMMISSIONER,
C. RAY DAVENPORT, STATE COMMISSIONER OF LABOR
AND INDUSTRY AND VIRGINIA SAFETY AND HEALTH
CODES BOARD, C/O CHARLES L. STIFF, CHAIR

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
W. Reilly Marchant, Judge

Nandan Kenkeremath (Matthew D. Hardin; Joseph J. Traficanti;
Celsius GC, PLC, on briefs), for appellants.

Jerald R. Hess, Assistant Attorney General (Mark R. Herring,
Attorney General; Donald D. Anderson, Deputy Attorney General;
David C. Grandis, Senior Assistant Attorney General/Section Chief,
on brief), for appellees.

The Virginia Manufacturers Association and other parties (collectively, "appellants") appeal a circuit court order dismissing their complaint challenging executive actions taken in response to the COVID-19 pandemic: Executive Order ("EO") 63, which required patrons to wear face coverings inside buildings; EO 67, which placed Virginia in "Phase Three" of its reopening plan; and the Virginia Safety and Health Codes Board's Emergency Temporary Standard ("ETS"), which

provided certain workplace requirements designed to prevent the spread of disease to and among employees and employers. The EOs received separate numbers as Orders of Public Health Emergency (“OPHE”) and were signed by Governor Ralph Northam and Health Commissioner M. Norman Oliver. EO 63 is also numbered as OPHE 5, and EO 67 is also numbered as OPHE 7.

Appellants challenged the EOs and ETS in a four-count complaint against Governor Northam, Health Commissioner Oliver, Commissioner of Labor and Industry C. Ray Davenport, and the Virginia Safety and Health Codes Board (collectively, “appellees”).

Count I alleged that the EOs and OPHEs violated the Virginia Administrative Process Act (“VAPA”); Count II requested a declaratory order setting aside the ETS; Count III alleged that the EOs, OPHEs, and the ETS imposed restrictions that violated the Virginia Religious Freedom Restoration Act (“VRFRA”); and Count IV alleged that these restrictions violated the separation of powers provisions of the Virginia Constitution and impermissibly infringed on rights of assembly and association and the free exercise of religion.

Appellants assert eight assignments of error on appeal. In the first two, appellants contend the court erred by dismissing Count I and holding that VAPA does not apply to “rules” that are “written into” the EOs. In the third assignment of error, appellants argue the court erred by dismissing the request for declaratory relief in Count II and holding that a vote by the Virginia Safety and Health Codes Board regarding the need for the ETS “satisfied all applicable legal standards and precluded judicial review.” The fourth assignment of error also challenges the court’s dismissal of Count II on mootness grounds.

In the fifth assignment of error, appellants contend the court used the wrong standard for reviewing a demurrer and based the dismissal of Count III on an “incorrect interpretation of the threshold statutory standard in VRFRA.”

The sixth and seventh assignments of error challenge the court’s determination that Count IV failed to state a legally cognizable separation of powers claim as to either the Governor or the Health Commissioner. In the eighth assignment of error, appellants argue the court erred by dismissing Count IV claiming infringement of fundamental rights, “including in the context of religious service,” by not properly addressing allegations of infringement nor identifying proper legal standards.

BACKGROUND

On February 7, 2020, Health Commissioner Oliver declared COVID-19 a “Communicable Disease of Public Health Threat for Virginia” as defined in Code § 32.1-48.06.

On March 12, 2020, Governor Northam issued EO 51 stating that the “anticipated effects of COVID-19 constitute a disaster” and declaring a state of emergency pursuant to the Virginia Emergency Services and Disaster Law (“Virginia Emergency Law”), Code §§ 44-146.13 through 44-146.29:3.

The Governor subsequently issued a series of EOs designed to slow the spread of COVID-19 in Virginia. These EOs limited public and private gatherings, restricted restaurant and retail businesses, directed schools to cease in-person instruction, and required most recreational and entertainment businesses to temporarily close. Subsequent EOs began a multi-phase reopening process.

A. EO 63 and EO 67

Appellants primarily challenge EO 63 and EO 67. The EOs, signed by the Governor and co-signed by the Health Commissioner, are prefaced with the following statement of statutory authority:

Therefore, by virtue of the authority vested in me by Article V of the Constitution of Virginia, by § 44-146.17 of the Code of Virginia, by any other applicable law, and in furtherance of Amended Executive

Order 51 (2020), and by virtue of the authority vested in the State Health Commissioner pursuant to §§ 32.1-13, 32.1-20, and 35.1-10 of the Code of Virginia, the following is ordered:

EO 63, first issued May 26, 2020, required face coverings for all patrons (over age ten) of certain types of businesses, as well as for employees of essential retail businesses whenever working in customer-facing areas. Violations were punishable as Class 1 misdemeanors pursuant to Code § 32.1-27, and the Health Commissioner was also authorized to seek injunctive relief to enforce the EO under Code § 32.1-27.

EO 67, first issued June 30, 2020, moved Virginia to Phase Three of its reopening plan and eased many restrictions from prior EOs. EO 67 imposed certain obligations on businesses, including requirements to space patrons six feet apart and ensure that employees working in customer-facing areas wore “face coverings over their nose and mouth at all times.” Businesses that could not comply with the requirements were required to close. EO 67 limited all public and private gatherings to 250 people. EO 67 also restricted “religious services” by requiring non-family members to sit six feet apart and mandating single-serving containers for food and drink.

EO 67 imposed additional restrictions on restaurants, farmers’ markets, exercise facilities, and public beaches. EO 67 removed prior maximum-capacity limits for restaurants but still required that tables be spaced six feet apart and “[b]ar seats and congregating areas of restaurants . . . [be closed] except for through-traffic.” Violations of EO 67 also were punishable as Class 1 misdemeanors and subject to injunctive relief.

EO 63 and EO 67 were amended at various times during the state of emergency declared by Governor Northam. The state of emergency expired on June 30, 2021, and all EOs imposing COVID-19 restrictions ceased to have any effect.

B. Emergency Temporary Standard

On July 15, 2020, the Virginia Safety and Health Codes Board (“Board”) adopted the ETS pursuant to Code § 40.1-22(6a).¹ See 16 VAC 25-220-10(C). The statute authorizes the Board to issue an “emergency temporary standard” lasting no longer than six months, and it specifically exempts the initial adoption of an emergency temporary standard from VAPA. See Code § 40.1-22(6a) (“The Board shall provide, without regard to the requirements of Chapter 40 ([Code] § 2.2-4000 *et seq.*) of Title 2.2. [i.e., VAPA], for an emergency temporary standard . . .”).

The ETS took effect on July 27, 2020, and was set to expire “within six months of its effective date, upon expiration of the Governor’s State of Emergency, or when superseded by a permanent standard, whichever occurs first.” 16 VAC 25-220-20. See Code § 40.1-22(6a).

The ETS required employers to take one of two actions. Employers could either undertake certain safety and health precautions based on an assessment of their employees’ risk of contracting COVID-19, or employers could follow CDC guidelines. See 16 VAC 25-220-10(E), (G)(1). The ETS contained a process for requesting religious waivers from the required use of face coverings. 16 VAC 25-220-40(J).

The ETS expired on January 27, 2021, six months after it went into effect, and was replaced by a permanent standard with similar but not identical provisions. Before establishing the permanent standard, the Board conducted sixteen hours of public meetings, made available an online public comment forum from December 10, 2020, to January 9, 2021, and considered new scientific briefings. An economic impact analysis accompanied the permanent standard. On

¹ The ETS was set forth in 16 VAC 25-220-10 through -90. This administrative code section now contains the revised permanent standard. Here, unless otherwise noted, references to the ETS are from the prior version of the administrative code, which the Department of Labor and Industry maintains at its website. See <https://www.doli.virginia.gov/wp-content/uploads/2020/07/RIS-filed-RTD-Final-ETS-7.24.2020.pdf> (last visited Dec. 2, 2021).

September 8, 2021, a revised permanent standard took effect following another period for public notice and comment, another economic impact analysis, and review by the Governor.

The revised permanent standard addresses vaccines and updated CDC guidelines, and accordingly it modifies requirements for employers. See, e.g., 16 VAC 25-220-40 (effective Sept. 8, 2021). It contains new definitions of physical distancing, minimal occupational contact, and symptoms of COVID-19. See 16 VAC 25-220-30 (effective Sept. 8, 2021). Further, employers are no longer subject to enforcement actions for failing to provide personal protective equipment when they are making good-faith efforts to procure these supplies. See 16 VAC 25-220-10(C) (effective Sept. 8, 2021). In short, the revised permanent standard differs substantially from the ETS.

C. Pleadings

Appellants filed their initial complaint September 16, 2020. By agreed order, a first amended complaint adding three plaintiffs was filed on October 26, 2020.

Appellants asserted four counts against appellees. Count I sought judicial review of the EOs pursuant to Code § 2.2-4026 of VAPA. Count II requested a declaratory order setting aside the ETS based on allegations of both procedural and substantive deficiencies. Count III alleged that the restrictions on assembly and association violated VRFRA by substantially burdening the free exercise of religion. Count IV alleged that the EOs and ETS violated the separation of powers provision of the state constitution and infringed on rights of assembly, association, and religious exercise.

Appellees moved to dismiss on three grounds. First, they contended that appellants lacked standing regarding all four counts; second, they sought dismissal of Count I on the grounds that VAPA did not apply; third, they argued that the request for declaratory relief under Count II was legally deficient. At the hearing, the court took appellees' motion to dismiss under advisement and granted appellants leave to amend "but only as to factual allegations that relate to standing."

Appellants' second amended complaint "incorporate[d] by reference" the first amended complaint and added new factual allegations attempting to demonstrate how each party had been adversely affected by the executive actions. The second amended complaint also added allegations describing executive actions that had occurred after the filing of the first amended complaint in October 2020, stating that "[t]he facts relevant to standing, and some other matters, continue to change." Appellants added that the Governor and Health Commissioner had signed further EOs that were "progeny" of those EOs referenced in the earlier pleading. Specifically, appellants added references to amended versions of EO 63 and 67, as well as references to an entirely new executive order, EO 72, issued on December 14, 2020.

Appellees moved to strike the second amended complaint, arguing that it violated Rule 1:4(d)'s requirement to clearly state a party's claims. Further, they contended that appellants violated the court's instruction to amend only the factual allegations related to standing and the complaint now sought to "retroactively establish standing by alleging new injuries." Appellees also renewed their motion to dismiss on the same grounds stated in their prior motion.

D. The Court's Ruling

The court ruled that appellants had sufficiently alleged direct injury and therefore had standing to sue. The court also denied the motion to strike based on Rule 1:4(d), although it found the second amended complaint "somewhat confusing and extremely long and somewhat intertwining."

However, the court dismissed Count I because "VAPA doesn't apply to executive orders." It dismissed Count II as moot because the ETS had expired in January 2021 and appellants failed to state a claim that the ETS did not meet the requirements of Code § 40.1-22. The court dismissed Count III for failing to sufficiently allege a "substantial burden" on the free exercise of religion, as required by VRFRA, Code § 57-2.02(B). Finally, the court dismissed Count IV because appellees

acted pursuant to explicit statutory authority, and because any curtailment of appellants' freedom of assembly had a "real or substantial relation" to the COVID-19 public health crisis and did not rise to the level of a "plain, palpable invasion of rights secured by the fundamental law," quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).

ANALYSIS

A. Standard of Review

"Where, as here, 'no evidence [has been] taken with regard to [a] motion to dismiss[,] we treat the factual allegations . . . as we do on review of a demurrer.'" Bragg v. Bd. of Supervisors, 295 Va. 416, 423 (2018) (alterations in original) (quoting Va. Marine Res. Comm'n v. Clark, 281 Va. 679, 686-87 (2011), overruled in part on other grounds by Woolford v. Va. Dep't of Tax'n, 294 Va. 377, 390 n.4 (2017)). We accept "the truth of all material facts that are . . . expressly alleged, impliedly alleged, and which can be inferred from the facts alleged." Harris v. Kreutzer, 271 Va. 188, 195-96 (2006). This "inquiry encompasses 'not only the substantive allegations of the pleading attacked but also any accompanying exhibit mentioned in the pleading.'" Bragg, 295 Va. at 423 (quoting Flippo v. F & L Land Co., 241 Va. 15, 17 (1991)).

Accordingly, in reviewing the court's decision, we look solely to the allegations in the pleading and accompanying affidavits. See id. Additionally, because the sufficiency of appellants' pleading presents "pure questions of law, we do not accord a presumption of correctness to the judgment below, but review the issues *de novo*." Philip Morris USA Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 572 (2007); see also Bragg, 295 Va. at 423 ("We . . . review the circuit court's decision to dismiss the petition, and any corresponding issues of statutory interpretation, *de novo*.").

B. Assignments of Error 1 and 2: Judicial Review under VAPA

Appellants' first two assignments of error challenge the court's dismissal of Count I of the second amended complaint that alleged that EO 63 (also numbered as OPHE 5) and EO 67 (also numbered as OPHE 7) were issued in violation of VAPA. They argue that the court erred in determining that VAPA does not apply to the rules articulated in the EOs that were also issued as OPHEs.

The Governor issued EO 63 and EO 67 pursuant to Code § 44-146.17, a statute within the Virginia Emergency Law. According to its express legislative purpose, the Virginia Emergency Law reflects the General Assembly's intent "[t]o confer upon the Governor . . . emergency powers provided herein." Code § 44-146.14(a)(2). Code § 44-146.17 is cited in the EOs and provides in relevant part as follows:

The Governor shall be Director of Emergency Management. He shall take such action from time to time as is necessary for the adequate promotion and coordination of state and local emergency services relating to the safety and welfare of the Commonwealth in time of disasters.

The Governor shall have, in addition to his powers hereinafter or elsewhere prescribed by law, the following powers and duties:

(1) To proclaim and publish such rules and regulations and to issue such orders as may, *in his judgment*, be necessary to accomplish the purposes of this chapter

Executive orders, to include those *declaring a state of emergency* and directing evacuation, shall have the *force and effect of law* and the violation thereof shall be punishable as a Class 1 misdemeanor in every case where the executive order declares that its violation shall have such force and effect. . . .

(7) Whenever, in the opinion of the Governor, the safety and welfare of the people of the Commonwealth require the exercise of emergency measures due to a threatened or actual disaster, to declare a state of emergency to exist

Code § 44-146.17(1), (7) (emphasis added).

Therefore, the General Assembly expressly authorized the Governor to declare a state of emergency and conferred upon the Governor the broad authority to issue rules, regulations, and executive orders that “in his judgment” are necessary to protect public health and safety in an emergency. See id.; see also Boyd v. Commonwealth, 216 Va. 16, 18-19 (1975). In Boyd, the Supreme Court upheld an executive order declaring an emergency due to an “acute fuel shortage” and imposing a speed limit of fifty-five miles per hour on all state highways. 216 Va. at 16-17. In affirming the defendant’s speeding conviction, the Supreme Court rejected his argument that the fuel shortage “was not such a ‘disaster’ as contemplated by the [Virginia Emergency Law].” Id. at 19; see Code § 44-146.16 (defining “disaster”). Instead, the Supreme Court determined that the governor acted within the broad authority conferred by the legislature. Id. at 19-20. Construing the language of a prior but substantively similar version of the Virginia Emergency Law, the Supreme Court was “convince[d] . . . that the Governor acted within the limits of the authority delegated to him.” Id. at 19. “It is elementary that the health, safety[,] and welfare of the people of this Commonwealth depend upon an adequate supply of motor vehicle fuel. . . . Prompt action was required.” Id.

Here, on February 7, 2020, the Health Commissioner identified COVID-19 as a public health threat. The Governor then issued EO 51 stating that the anticipated effects of COVID-19 constituted a disaster and declaring a state of emergency. Subsequent EOs, including EO 63 and EO 67, initiated a response plan and reflected the Governor’s judgment concerning the actions necessary to accomplish the purposes of the Virginia Emergency Law.

Code § 44-146.17(1) grants the Governor broad emergency powers and commits the exercise of those powers to the Governor’s “judgment,” reflecting a legislative determination that the Governor must be able to respond immediately and effectively to emergency situations. It would be inconsistent for this broad authority to be limited by the procedural requirements of

VAPA for notice and public comment. See, e.g., Code § 2.2-4007.01(A) (requiring at least thirty days for public comment after notice of intended regulatory action by a state agency). Further, compliance with VAPA’s procedural requirements would forestall implementation of emergency rules designed to prevent the spread of disease and would thwart the purpose of the Virginia Emergency Law, to empower the Governor to take swift action to protect public health and safety. See Code § 44-146.14(a)(2).

Additionally, actions taken pursuant to the Virginia Emergency Law are required to be temporary and must be accompanied by notice to the legislature. See Code § 44-146.17(1) (providing that “no rule, regulation, or order issued under this section shall have any effect beyond June 30 next following the next adjournment of the regular session of the General Assembly”); Code § 44-146.17:1 (requiring the Governor to “cause copies of any order . . . proclaimed and published by him pursuant to Code § 44-146.17 to be transmitted forthwith to each member of the General Assembly”). These requirements ensure that the General Assembly is formally advised of the Governor’s actions during an emergency and the resulting concentration of authority in the Governor cannot last indefinitely. These parameters on the Governor’s emergency authority indicate that the General Assembly recognized the unique nature of emergency orders and designed a specific set of procedural safeguards to address the risks they present. Those safeguards operate in lieu of the measures VAPA imposes on agency action generally. See Wal-Mart Stores E., LP v. State Corp. Comm’n, 299 Va. 57, 70 (2020) (stating that courts “presume that the legislature chose, with care, the’ specific words of the statute” and that “[t]he act of choosing carefully some words necessarily implies others are omitted with equal care” (alteration in original) (quoting Rickman v. Commonwealth, 294 Va. 531, 540 n.3 (2017))).²

² We note that the General Assembly amended the Virginia Emergency Law after the Governor declared a state of emergency and began issuing EOs to address the COVID-19

Appellants contend that the EOs are subject to judicial review under VAPA because VAPA provides for emergency rulemaking in Code § 2.2-4011. We disagree. Code § 2.2-4011 is a general statute allowing state agencies to adopt emergency regulations after consultation with the Attorney General and only with approval “at the sole discretion of the Governor.” Code § 2.2-4011(A). Here, even assuming the Governor himself could issue emergency rules pursuant to Code § 2.2-4011, the Virginia Emergency Law confers authority to issue emergency EOs “in addition to [the Governor’s] powers . . . elsewhere prescribed by law.” Code § 44-146.17(1). Further, when “one statute speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling.” Conger v. Barrett, 280 Va. 627, 631 (2010) (quoting Viking Enter., Inc. v. County of Chesterfield, 277 Va. 104, 110 (2009)). Thus, VAPA’s general grant of emergency rulemaking authority to administrative agencies does not limit the Governor’s separate and specific authority to issue EOs under the Virginia Emergency Law. Nothing in Code § 2.2-4011 subjects the EOs to judicial review under VAPA.

Although the EOs set forth rules for wearing face coverings and maintaining physical distances in public areas, they did not therefore constitute agency regulations subject to VAPA. Nothing required appellants to pursue administrative remedies prior to filing their action in circuit court challenging the EOs, a prerequisite for judicial review under VAPA, and they in fact did not pursue any preliminary administrative remedies. See Foltz v. Dep’t of State Police, 55 Va. App. 182, 185-89 (2009) (finding that VAPA did not apply where the complaining party was not first required to pursue administrative remedies prior to filing suit). The EOs were issued pursuant to the

pandemic. The amendments relate to enforcement of EO violations by civil penalties and authorize the Governor to establish a program for purchasing and distributing personal protective equipment to private, nongovernmental entities. See 2020 Va. Acts chs. 14, 15, 17, 38. If the General Assembly wanted to impose limitations on the Governor’s authority to issue EOs, such as expressly ensure that they comply with VAPA, it could have done so. See Wal-Mart Stores E., LP, 299 Va. at 70.

Governor's delegated authority to take prompt action under the Virginia Emergency Law.

Requiring EOs to comply with VAPA would undermine the legislative purpose of the Virginia Emergency Law to confer exigent rulemaking authority upon the Governor.

Appellants also challenge the court's determination that VAPA does not apply to OPHEs. The EOs received OPHE numbers and were co-signed by the Health Commissioner pursuant to Code §§ 32.1-13, 32.1-20, and 35.1-10. Appellants contend that because the Health Commissioner issued the OPHEs pursuant to this statutory authority, he was "acting as an 'agency' as that term is defined under the VAPA" and therefore these orders were subject to VAPA's requirements.

However, the OPHEs are precisely the same documents as the EOs: EO 63 is subtitled as OPHE 5, and EO 67 is subtitled as OPHE 7. VAPA, which does not apply to EOs, does not automatically apply merely because the EOs were co-signed by the Health Commissioner and given separate OPHE numbers.

Emergency executive actions are not immune from judicial review. For example, in separate lawsuits filed in both state and federal court, many appellants sought to enjoin enforcement of the executive actions and received hearings on the merits of their claims. See, e.g., Tigges v. Northam, 473 F. Supp. 3d 559 (E.D. Va. 2020). However, a request for judicial review under VAPA is not the proper mechanism for challenging executive orders issued pursuant to the Virginia Emergency Law.

Therefore, because Count I sought judicial review under VAPA, the court did not err in finding that appellants failed to state a claim and dismissing that count.

C. Assignments of Error 3 and 4: ETS claims

Count II of the second amended complaint requested a declaratory judgment pursuant to Code § 40.1-22(7) that "the ETS is void." The court dismissed Count II both because the ETS was adopted in compliance with Code § 40.1-22(6a) and because it had already expired, rendering the

issue moot. Because we agree with appellees' contention that the issue was moot, we affirm the court's ruling on that basis.

Although Count II sought a declaration that "the ETS is void," the ETS expired January 27, 2021, and no longer had any effect when the parties appeared in court on appellees' motion to dismiss in February 2021. See Code § 40.1-22(6a) (stating that an emergency temporary standard expires after six months, or when replaced by a permanent standard, or when repealed, whichever comes first). Because the relief appellants were seeking had already occurred, the court dismissed Count II as moot, as an alternative basis to its other grounds for dismissing Count II.

Appellees now claim that their challenge to ETS is not moot because the Board's adoption of a permanent standard was a "form over substance change" and "most" of the ETS "remain[s] substantially 'on the books.'"

However, the permanent standard was both adopted and revised through a separate rulemaking process distinct from the procedure for adopting an ETS. The process for a permanent standard provides for a public notice and comment period, economic impact analysis, and public Board meetings to consider its substance. See, e.g., Code §§ 2.2-4007 to 2.2-4017 (prescribing process for promulgating regulations). The permanent standard is not a mere continuation of the ETS; it is a separate and substantively different regulation that replaced the ETS.

Appellants never challenged the permanent standard in the court below and are precluded from doing so for the first time on appeal. See Rule 5A:18. Appellants could conceivably initiate a new lawsuit seeking judicial review of the permanent standard under Code § 40.1-22(7), which would require the circuit court to consider the record of its adoption. But this Court is precluded from reviewing that record for the first time on appeal. See Rule 5A:18.

"Generally, a case is moot and must be dismissed when the controversy that existed between litigants has ceased to exist." Daily Press, Inc. v. Commonwealth, 285 Va. 447, 452 (2013). "No

matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute ‘is no longer embedded in any actual controversy about [appellants’] particular legal rights.’” Ingram v. Commonwealth, 62 Va. App. 14, 21-22 (2013) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013)).

There are limited exceptions to this mootness doctrine. For example, an issue is not moot when a proceeding is “short-lived by nature” or “when the underlying controversy is one capable of repetition, yet evading review.” Id. at 22 (first quoting Daily Press, Inc., 285 Va. at 452; and then quoting Va. Dep’t State Police v. Elliott, 48 Va. App. 551, 554 (2006)). In Ingram, an institutionalized defendant appealed an order requiring him to undergo psychiatric and mental treatment for 180 days. Id. at 20-21. This Court dismissed the appeal as moot after the 180-day order expired, stating that “[e]ven if a case is alive at the time of filing, ‘subsequent events can moot the claim.’” Id. at 22 n.1 (quoting Pashby v. Delia, 709 F.3d 307, 316 (4th Cir. 2013)).

Here, the ETS expired both by its express language and by statute, and therefore the precise relief requested by appellants — to declare the ETS void — is unavailable. Moreover, no exception to the mootness doctrine applies: the six-month duration of the ETS was adequate time for appellants to seek injunctive relief, and appellants’ claims are not “capable of repetition” because the ETS has been replaced by a substantively distinct permanent standard pursuant to VAPA’s requirements for public notice and comment. See id. There is no “reasonable expectation that the same complaining party [will] be subject to the same action again,” a requirement for this mootness exception to apply. See Spencer v. Kemna, 523 U.S. 1, 17 (1998) (alteration in original) (quoting Lewis v. Cont’l Bank Corp., 494 U.S. 472, 481 (1990)). Therefore, the court did not err in dismissing Count II as moot.

D. Assignment of Error 5: VRFRA claims

Appellants contend the court erred in dismissing Count III, which alleged that the restrictions imposed by EO 63 and EO 67 substantially burdened the free exercise of religion in violation of VRFRA. VRFRA provides in relevant part as follows:

No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.

Code § 57-2.02(B). The statute allows an aggrieved party to sue for declaratory or injunctive relief, Code § 57-2.02(D), and “[t]he decision . . . may be appealed by petition to the Court of Appeals of Virginia,” Code § 57-2.02(F).

In Count III, certain appellants alleged that the EOs impermissibly limited their religious practices. For example, they alleged that limitations on public gatherings and seating arrangements interfered with church attendance, created difficulties in ministering to families, and hampered weddings and funerals.

However, the state of emergency expired on June 30, 2021, and all EOs imposing COVID-19 restrictions terminated. Nevertheless, citing Commonwealth ex rel. State Water Control Board v. Appalachian Power Co., 12 Va. App. 73, 76 (1991) (*en banc*), appellants argue that although the restrictions challenged in Count III have expired, the harm involved falls under the “capable of repetition, but evading review” exception to the mootness doctrine. See Salvatierra v. City of Falls Church, 35 Va. App. 453, 456-57 (2001) (applying mootness exception when the defendant’s commitment to the Department of Juvenile Justice “was too short to fully litigate the issues through an appeal” and the ruling could impact his future probation status). Cf. Ingram, 62 Va. App. at 21-22. Further, the exception requires a “reasonable expectation that the same

complaining party [will] be subject to the same action again.” Spencer, 523 U.S. at 17 (alteration in original) (quoting Lewis, 494 U.S. at 481).

This exception to the mootness doctrine does not apply here. Count III challenged the substance of the EOs and alleged that they burdened the free exercise of religion. Because the EOs have expired by operation of law and are not currently in effect, we cannot speculate on how or whether the content of future EOs might substantively affect religious rights, if at all. To do so would be to render an impermissible advisory opinion. See Elliott, 48 Va. App. at 554 (noting the Court’s “duty ‘not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it’” (quoting Hankins v. Town of Virginia Beach, 182 Va. 642, 644 (1944))); see also Ingram, 62 Va. App. at 22 (“Advisory opinions represent an attenuate exercise of judicial power,’ . . . ‘one which we traditionally avoid in all but the most extenuating circumstances’” (first quoting Elliott, 48 Va. App. at 553, then quoting Pilson v. Commonwealth, 52 Va. App. 442, 446 (2008))).

Therefore, because the executive actions that appellants claimed violated VRFRA have expired by operation of law, and we cannot speculate on whether appellants will be subject to the same action again, see Spencer, 523 U.S. at 17, we dismiss assignment of error 5 as moot.

E. Assignments of Error 6, 7, and 8: Constitutional claims

Appellants’ remaining assignments of error challenge the court’s dismissal of Count IV, which alleged that the executive actions violated the separation of powers provisions of the state constitution and infringed on fundamental rights including the freedom of assembly and free exercise of religion. Appellants argue that the court erred in finding no legally cognizable constitutional claims in Count IV. However, our limited jurisdiction does not include the issues raised in assignments of error 6, 7, and 8.

Code § 17.1-405(1)(i) authorizes an aggrieved party to appeal to the Court of Appeals from “[a]ny final decision of a circuit court on appeal from . . . a decision of an administrative agency.”³ For an appeal to lie within this Court’s subject matter jurisdiction under this code section, appellants must have been required to “pursue administrative remedies prior to filing a civil action.” See Foltz, 55 Va. App. at 189. In Foltz, the plaintiff brought an action in circuit court seeking a declaratory judgment that his prior conviction for assault and battery against his wife did not render him ineligible to purchase a firearm under federal law. Id. at 183. The court sustained the demurrer of the Department of State Police (“DSP”), and the plaintiff appealed to this Court. Id. We ruled that the matter was not an administrative appeal within our subject matter jurisdiction and transferred the appeal to the Supreme Court under Code § 8.01-677.1. Id. at 189-90. The plaintiff was not appealing from a DSP case decision, and a separate statute expressly provided for bringing a “civil action” for “[c]ivil remedies” for violations of the “Criminal Justice Services” chapter of the Code. Id. at 186-88 & n.5. Nothing required the plaintiff to pursue administrative remedies before filing the civil action contesting the adverse decision regarding his eligibility to purchase a firearm. Id. at 189.

Likewise, nothing required appellants to pursue administrative remedies as a precursor to bringing the constitutional claims in Count IV, and they in fact did not pursue any. Therefore, it was not an “appeal” from an administrative agency’s decision within the meaning of Code § 17.1-405(1)(i). Rather, Count IV alleged that the executive actions exceeded the scope of authority delegated by the General Assembly and infringed on fundamental rights. Thus, the claims in Count IV do not fall within any category of the Court’s limited jurisdiction. See Code § 17.1-405. They are enforceable, if at all, as common law actions. See Gray v. Va. Sec’y of

³ This code section limiting the Court’s jurisdiction is effective until January 1, 2022.

Transp., 276 Va. 93, 106 (2008) (stating that “self-executing” constitutional provisions, such as the separation of powers, are “operative without the need for supplemental legislation” and are therefore “enforceable in a common law action”).

Accordingly, assignments of error 6, 7, and 8 are not subject to this Court’s statutory jurisdiction under Code § 17.1-405, and we transfer this portion of the appeal to the Supreme Court. See Code § 8.01-677.1.

CONCLUSION

We affirm the court’s decisions dismissing Count I because VAPA does not apply to emergency executive orders and dismissing Counts II and III as moot. Because this Court does not have jurisdiction to entertain appellants’ claims concerning Count IV, we transfer assignments of error 6, 7, and 8 to the Supreme Court of Virginia.

Affirmed in part, transferred in part.

VIRGINIA:

IN THE CIRCUIT COURT OF HENRICO COUNTY

C. RAY DAVENPORT,)	
Commissioner of Labor and Industry,)	
<i>Plaintiff,</i>)	
v.)	Civil Action No. CL20-9088
)	
WHITLEY/SERVICE ROOFING AND SHEET)	
METAL COMPANY)	
<i>Defendant.</i>)	

AGREED ORDER

WHEREAS, on or about May 29, 2019, plaintiff C. Ray Davenport, Commissioner of Labor and Industry ("Commissioner") issued a citation to defendant, Whitley/Service Roofing and Sheet Metal Company (Whitley/Service Roofing"), alleging one Serious and one Non-Serious violations of the Virginia Occupational Safety and Health ("VOSH") Standards for the Construction Industry, and proposing a \$3,700.00 civil penalty; and

WHEREAS, Whitley filed within 15 working days from the date of the receipt of the citation, a written notice contesting the violations and proposed penalty, as provided for in § 40.1-49.4, of the *Code of Virginia*;

Upon agreement of the parties and for good cause shown, it is hereby now ADJUDGED, ORDERED, and DECREED as follows:

1. That the VOSH citation, attached as Exhibit "A" is hereby amended as follows:
 - a) Citation 1, Item 1 is amended from a "Serious" to "Non-Serious" classified violation and otherwise upheld with its \$3,700.00 proposed penalty affirmed; and
 - b) Citation 2, Item 1, a "Non-Serious" classified violation with no proposed

penalty, is vacated;

2. That Whitley/Service Roofing will pay the agreed civil penalty of three thousand seven hundred dollars (\$3,700.00) within thirty (30) days of the date of entry of this Order. Payment shall be made by check or money order, payable to the Treasurer of Virginia, with the VOSH inspection number 1397084 noted on the payment. It is expressly understood that all VOSH Citation modifications in this Agreed Order are contingent upon Whitley/Service Roofing's full and timely payment of the penalty as agreed. Whitley/Service Roofing's failure to substantially comply with the terms of this Order, or to pay the affirmed penalty by the due date constitutes a breach of this Order. Any breach shall mean that the originally proposed violations and penalty shall be reinstated and affirmed as a final order, and all unpaid amounts shall become due and payable 15 calendar days following the breach;

3. That as required by *Va. Rule 16 VAC 25-60-40*, Whitley/Service Roofing will post a copy of this Agreed Order for ten (10) working days at its workplaces in Virginia in a conspicuous location where it generally posts notices to its employees;

4. That Whitley/Service Roofing certifies the cited violation has been abated; and if not previously provided, agrees to provide the Commissioner within thirty (30) days of this Order documentation verifying abatement of the affirmed violation in this agreement. Such documentation shall comply with *Va. Rule 16VAC25-60-307.E.2*, stating, "Documents demonstrating that abatement is complete may include, but are not limited to, evidence of purchase or repair of equipment, photographic or video evidence of abatement, or other written records." The documentation shall be provided to:

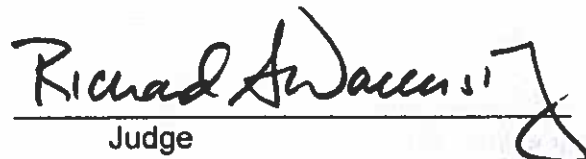
Mr. Harvey Trice
VOSH Central Regional Safety Director

Virginia Department of Labor and Industry
1570 East Parham Road, Henrico, VA 23228

5. That Whitley/Service Roofing withdraws its original notice of contest, and hereby waives its right to contest the remaining terms contained in this Order;
6. That this Order shall be construed to advance the purpose of *Va. Code* § 40.1-3, and that no third party shall hereby have any right of action for breach of any provision of this title unless otherwise specifically provided;
7. That, under *Va. Code* § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the *Code of Virginia* shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party;
8. That this agreement shall not be construed as an admission by Whitley/Service Roofing of civil or criminal liability for any violation or penalty alleged by the Commissioner; and that each party shall bear its own costs in this matter.

It is further ORDERED, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court. The Clerk shall send an attested copy of this Order to the Commissioner's and Whitley/Service Roofing's legal counsel at the addresses provided below.

Entered this 14th day of January, 2021.


Judge

A COPY TESTE:
HEIDI S. BARSHINGER, CLERK
HENRICO CIRCUIT COURT


DEPUTY CLERK

[Endorsement page follows] ³

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry



Alfred B. Albiston (VSB No. 29851)
Special Assistant Commonwealth's Attorney
Henrico County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219

(804) 786-6760
(804) 786-8418 Fax
Alfred.Albiston@doli.virginia.gov

Counsel for plaintiff

SEEN AND AGREED:

WHITLEY/SERVICE ROOFING AND SHEET METAL COMPANY



Dannel C. Duddy (VSB No. 72906)
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
P.O. Box 70280
Richmond, Virginia 23255
(804) 747-5200
(804) 747-6085 Fax
dduddy@hccw.com

Philip J. Siegel (pro hac vice pending)
HENDRICK PHILLIPS SALZMAN & SIEGEL PC
230 Peachtree St. NW, Ste. 2500
Atlanta, GA 30303-1515
(404) 469-9197
(404) 522-9545 Fax
pis@hpsslaw.com

Counsel for defendant

VIRGINIA:

IN THE CIRCUIT COURT OF HENRICO COUNTY

C. RAY DAVENPORT,
Commissioner of Labor and Industry,
Plaintiff,

v.

**WHITLEY/SERVICE ROOFING AND SHEET
METAL COMPANY**
Defendant.

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)
)
) Civil Action No. CL20-9088
)
)
)

AGREED ORDER'S EXHIBIT A

VOSH inspection number 1397084, citation issued May 29, 2019

RMOT

VIRGINIA:

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY

C. RAY DAVENPORT,
Commissioner of Labor and Industry,
Plaintiff,

v.

WOLVERINE ADVANCED MATERIALS, LLC
Defendant.

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Case No. CL20001240-00

AGREED ORDER

WHEREAS, on or about May 29, 2019, plaintiff C. Ray Davenport, Commissioner of Labor and Industry ("Commissioner") issued a citation to defendant, Wolverine Advanced Materials, LLC ("Wolverine"), alleging three Serious-Repeat violations of the Virginia Occupational Safety and Health ("VOSH") Standards for General Industry, and proposing \$174,284.00 in civil penalties; and

WHEREAS, Wolverine filed within 15 working days from the date of the receipt of the citation, a written notice contesting the violations and proposed penalty, as provided for in § 40.1-49.4, of the *Code of Virginia*;

Upon agreement of the parties and for good cause shown, it is hereby now **ADJUDGED, ORDERED, and DECREED** as follows:

1. That the VOSH citation, attached as Exhibit "A" is hereby amended as follows:
 - a) Repeat-Serious Citation 1, Item 1 is grouped with Citation 1, Item 2, and thereafter identified as Serious Item 1a and 1b, respectively, and the two associated civil penalties are combined and affirmed at \$47,030.00;
 - b) Repeat-Serious Citation 1, Item 2 is combined with Item 1, and affirmed as

amended in the preceding sub-paragraph; and

c) Repeat-Serious Citation 1, Item 3 and its accompanying civil penalty are vacated.

2. That Wolverine agrees to pay a civil penalty of forty-seven thousand thirty dollars (\$47,030.00) within thirty (30) days of the date of entry of this Order. Payment shall be made by check or money order, payable to the Treasurer of Virginia, with the VOSH inspection number 1344204 noted on the payment. It is expressly understood that all VOSH Citation modifications in this Agreed Order are contingent upon Wolverine's full and timely payment of the penalty as agreed. Wolverine's failure to substantially comply with the terms of this Order or to pay the affirmed penalty by the due date constitutes a breach of this Order—unless Wolverine demonstrates good cause for such failure. Any breach, unexcused by good cause, shall mean that the originally proposed violations and penalty shall be reinstated and affirmed as a final order, and all unpaid amounts shall become due and payable 15 calendar days following the breach;

3. That as required by *Va. Rule 16 VAC 25-60-40*, Wolverine will post a copy of this Agreed Order for ten (10) working days at its workplaces in Virginia in a conspicuous location where it generally posts notices to its employees;

4. That Wolverine certifies the cited and upheld violation has been abated; and if not previously provided, agrees to provide the Commissioner, within thirty (30) days of this Order, documentation verifying abatement of the affirmed violation in this agreement. Such documentation shall comply with *Va. Rule 16VAC25-60-307.E.2*, stating, "Documents demonstrating that abatement is complete may include, but are not limited to, evidence of purchase or repair of equipment, photographic or video evidence

of abatement, or other written records." The documentation shall be provided to:

Mr. Russell Bambarger
VOSH Western Regional Safety Director
Virginia Department of Labor and Industry
3013 Peters Creek Road, Roanoke, VA 24019

5. That Wolverine agrees within 120 days of this Order's entry, to have an independent party initiate an OSHAVOSH safety standards compliance audit covering all its facility at 3175 State Street, Christiansburg, VA 24060, and furthermore, agrees to forward both a complete copy of the independent auditor's findings and recommendations, and a written plan by Wolverine to implement the auditor's feasible recommendations, to the Commissioner's representative identified in Paragraph 4 above.

6. That Wolverine withdraws its original notice of contest, and hereby waives its right to contest the remaining terms contained in this Order;

7. That this Order shall be construed to advance the purpose of *Va. Code* § 40.1-3, and that no third party shall hereby have any right of action for breach of any provision of this title unless otherwise specifically provided;

8. That, under *Va. Code* § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the *Code of Virginia* shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party;

9. That no part of the foregoing or following agreements, statements, findings and actions taken by Wolverine shall be deemed an admission by Wolverine of a violation of the Code or any other law or an admission of the allegations contained within the

citation or notification of penalty in this matter; and shall not be construed as an admission by Wolverine of civil or criminal liability for any violation or penalty alleged by the Commissioner; and that each party shall bear its own costs in this matter.

It is further ORDERED, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court. The Clerk shall send an attested copy of this Order to the Commissioner's and Wolverine's legal counsel at the addresses provided below.


Entered this 2 day of ~~May~~^{JULY}, 2021.



Judge

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry


Alfred B. Albiston (VSB No. 29851)
Special Assistant Commonwealth's Attorney
Montgomery County
c/o Department of Labor and Industry
600 East Main Street, Suite 207
Richmond, Virginia 23219
(804) 786-6760
(804) 786-8418 Fax
Alfred.Albiston@doli.virginia.gov

Counsel for plaintiff

A Copy – Teste:

ERICA W. CONNER

Circuit Court Montgomery County, Virginia

By:  Deputy Clerk

SEEN AND AGREED:

WOLVERINE ADVANCED MATERIALS, LLC



Thomas E. Ullrich, Esquire (VSB # 28737)

Lucas I. Pangle, Esquire (VSB # 90963)

Wharton, Aldhizer & Weaver, PLC

100 South Mason Street

P. O. Box 20028

Harrisonburg, Virginia 22801

540-434-0316

540-434-5502

tullrich@wawlaw.com

lpangle@wawlaw.com

Counsel for defendant

Virginia Department of Labor and Industry
Virginia Occupational Safety and Health (VOSH) Compliance
Brammer Village
3013 Peters Creek Road
Roanoke, VA 24019

Inspection Number: 1344204
Inspection Date: 08/23/2018-
08/23/2018
Issuance Date: 02/04/2019



Citation and Notification of Penalty

Company Name: Wolverine Advanced Materials, LLC
Inspection Site: 3175 State Street Blacksburg, VA 24060

Citation 1 Item 1

Type of Violation: **Repeat-Serious**

1910.147(c)(4)(i): Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

The employer, Wolverine Advanced Materials, LLC, did not utilize the appropriate lockout/tagout procedure when their employees were working on CL6 Release Coater Rollers. The machine was not de-energized prior to maintenance being performed. The energy sources for the CL6 Release Coater Rollers were not guarded against with LOTO.

An accident occurred on August 16, 2018 where an employee was performing maintenance on the CL6 Release Coater Roller. The employee dropped a tool and attempted to catch it when his hand got caught in the roller interface leading to a partial amputation.

Wolverine Advanced materials, LLC was previously cited for a violation of this Occupational Safety and Health standard, 1910.147(c)(4)(i), which was contained in OSHA inspection number 1137024 citation number 1, item number 1 and was affirmed as final order on June 27, 2016, with respect to the workplace located at 201 Industrial Park Road SE, Blacksburg, VA 24060.

Date by Which Violation Must Be Abated:

February 14, 2019

Proposed Penalty:

\$25450.00

Citation 1 Item 2

Type of Violation: **Repeat-Serious**

1910.147(c)(7)(i)(A): Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.

The employer, Wolverine Advanced Materials, LLC, did not provide proper lockout/tagout training on the machine specific Roller Lines. Employees were not adequately trained to lock out the Roller Lines or determine what energy sources needed to be locked out.

An accident occurred on August 16, 2018 where an employee was performing maintenance on the CL6 Release Coater Roller. The employee dropped a tool and attempted to catch it when his hand got caught in the roller interface leading to a partial amputation.

Wolverine Advanced Materials, LLC was previously cited for a violation of this Occupational Safety and Health standard, 1910.147(c)(7)(i)(A), which was contained in OSHA inspection number 1137024 citation number 1, item number 2 and was affirmed as final order on June 27, 2016, with respect to the workplace located at 201 Industrial Park Road SE, Blacksburg, VA 24060.

Virginia Department of Labor and Industry
Virginia Occupational Safety and Health (VOSH) Compliance
Brammer Village
3013 Peters Creek Road
Roanoke, VA 24019

Inspection Number: 1344204
Inspection Date: 08/23/2018-
08/23/2018
Issuance Date: 02/04/2019



Citation and Notification of Penalty

Company Name: Wolverine Advanced Materials, LLC
Inspection Site: 3175 State Street Blacksburg, VA 24060

Date by Which Violation Must Be Abated:

February 14, 2019

Proposed Penalty:

\$21580.00

Citation 1 Item 3

Type of Violation: **Repeat-Serious**

1910.212(a)(1): Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks.

The employer, Wolverine Advanced Materials, LLC, failed to ensure that the point of operation where the material is processed was adequately guarded to prevent the operator from having any part of their body in the danger zone during the operating cycle. The ingoing nip points created by the rollers on CL6 Release Coater Roller should be guarded.

An accident occurred on August 16, 2018 where an employee was performing maintenance on the CL6 Release Coater Roller. The employee dropped a tool and attempted to catch it when his hand got caught in the roller interface leading to a partial amputation.

Wolverine Advanced Materials, LLC was previously cited for a violation of this Virginia Occupational Safety and Health standard 1910.212(a)(3)(ii) which was contained in VOSH inspection number 1153162, citation number 1, item number 1 and was affirmed as a final order on December 1, 2016 with respect to a workplace located at 3175 State Street, Blacksburg, VA 24060.


Wolverine Advanced Materials, LLC was previously cited for a violation of this Virginia Occupational Safety and Health standard or its equivalent standard 1910.212(a)(1) which was contained in VOSH inspection number 1101971, citation number 1, item number 1 and was affirmed as a final order on January 14, 2016 with respect to a workplace located at 3175 State Street, Blacksburg, VA 24060.

Date by Which Violation Must Be Abated:

February 14, 2019

Proposed Penalty:

\$127254.00



Russell (Rusty) Bambarger
VOSH Regional Safety Director