FINAL ORDERS OF THE VIRGINIA COURTS
IN CONTESTED CASES ARISING UNDER THE
VIRGINIA OCCUPATIONAL SAFETY AND HEALTH ACT
2009

Atlantic Coast Container Repair, LLC, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL09-672 (City of Suffolk Circuit Court)

Bergelectric Corporation, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL09-159 (Grayson County Circuit Court)

C. W. Wright Construction Company, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL-73518 (Prince William County Circuit Court)

Cenveo Corporation, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL09-959 (Henrico County Circuit Court)

Designline Remodelers, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL08-1951-01 (City of Richmond Circuit Court)

ECS Mid-Atlantic, LLC, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL08-1250 (Arlington County Circuit Court)

Fairfax County Department of Public Works and Environmental Services, C. Ray Davenport, Commissioner of Labor and Industry v.
Record No. 0745-09-4 (Virginia Court of Appeals)

Family Foot and Ankle Centers, PLLC, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL00056577-00 (Loudoun County Circuit Court)

Glover Enterprises, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL09-698 (Stafford County Circuit Court)

Gutter Goo-Rooz, Incorporated, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL07-03936T-01 (City of Newport News Circuit Court)

Hall & Wilson Construction, Inc., d/b/a Hall Construction, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. 04189-PT (City of Newport News Circuit Court)

Leseur-Richmond Slate Corporation, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL091111-41 (Buckingham County Circuit Court)

MC & P Builders, LLC, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL06-488 (City of Lynchburg Circuit Court)

MC & P Builders, LLC, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL09-698 (City of Lynchburg Circuit Court)

Nash's General Construction, Inc., d/b/a Nash Roofing Specialists, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL08-744 (Hanover County Circuit Court)

Special Renovations, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL08-280 (Pulaski County Circuit Court)

Tyson Foods, Incorporated, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CH05-229 (Accomack County Circuit Court)

Whiting Turner Contracting Company, The, C. Ray Davenport, Commissioner of Labor and Industry v.
Civil Action No. CL08-4828 (City of Norfolk Circuit Court)

William A. Hazel, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Case No. 2008-4354 (Fairfax County Circuit Court)

William A. Hazel, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Case No. 2008-4355 (Fairfax County Circuit Court)

William A. Hazel, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Case No. 2008-4356 (Fairfax County Circuit Court)

William A. Hazel, Inc., C. Ray Davenport, Commissioner of Labor and Industry v.
Case No. 2008-4357 (Fairfax County Circuit Court)

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

C. RAY DAVENPORT, Commissioner of Labor and Industry, *Plaintiff,*	)	
v.	)	Civil Action No. CL09-672
ATLANTIC COAST CONTAINER REPAIR, LLC	)	
Defendant.	)	

ORDER

This matter came before the Court on Commissioner C. Ray Davenport's ("Commissioner") Motion for Nonsuit as a matter of right pursuant to Va. Code § 8.01-380, and IT APPEARING that on August 17, 2009, the Commissioner filed a complaint against Atlantic Coast Container Repair, LLC, that no nonsuit has been taken to this cause, and that the defendant, Atlantic Coast Container Repair, LLC, has not filed a cross-claim, it is therefore ADJUDGED, ORDERED AND DECREED that the Commissioner's motion is GRANTED and that this matter be and hereby is nonsuited without prejudice as a matter of right pursuant to Va. Code § 8.01-380, it is FURTHERMORE ORDERED that the Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both parties.

Enter: _____
Judge

Date: October 29, 2009

TRUE COPY
I certify that the document to which this authentication is affixed is a true copy of a record in the Suffolk Circuit Court, that I have custody of the record, and that I am the custodian of that record.
TESTE: W. RANDOLPH CARTER, JR., CLERK
BY: _____ D.C.
DATE:

CL 09-672
3/11/58/33

I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

Robert B Feild

Robert B. Feild (VSB# 23864)
Special Assistant Commonwealth's Attorney
13 South Thirteenth Street
Richmond, VA 23219
804-786-4777, Fax 804-786-8418

VIRGINIA:

IN THE CIRCUIT COURT OF GRAYSON COUNTY

C. RAY DAVENPORT,	)	
Commissioner of Labor and Industry,	)	
Plaintiff,	)	
v.	)	Civil Action No. CL09-159
	)	
BERGELECTRIC CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This matter came before the Court on Commissioner C. Ray Davenport's ("Commissioner") Motion for Nonsuit as a matter of right pursuant to Va. Code § 8.01-380, and IT APPEARING that on July 30, 2009, the Commissioner filed a complaint against Bergelectric Corporation, that no nonsuit has been taken to this cause, and that the defendant, Bergelectric Corporation, has not filed a cross-claim, it is therefore ADJUDGED, ORDERED AND DECREED that the Commissioner's motion is GRANTED and that this matter be and hereby is nonsuited without prejudice as a matter of right pursuant to Va. Code § 8.01-380, it is FURTHERMORE ORDERED that the Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both parties.

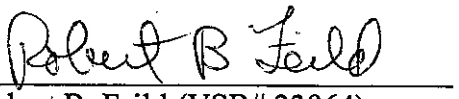
Enter: _____
Judge

Date: 11-20-09

A TRUE COPY, TESTE
SUSAN M. HERRINGTON, CLERK
Circuit Court of Grayson County, VA
By: Sharon A. Hale D.C.

I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry



Robert B. Feild (VSB# 23864)
Special Assistant Commonwealth's Attorney
13 South Thirteenth Street
Richmond, VA 23219
804-786-4777, Fax 804-786-8418

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

C. RAY DAVENPORT, Commissioner of Labor & Industry	)	
Plaintiff,	)	
v.	)	Case No. CL-73518
C. W. WRIGHT CONSTRUCTION COMPANY, INC.	)	
Defendant	)	

AGREED ORDER

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

1. In settlement of the matters alleged in this action, the citation attached to the Complaint is hereby amended as follows:

   a. Citation 1, Item 1 is vacated, along with the assessed penalty of $7,000.00; and

   b. Citation 2, item 1 is reduced to serious. The penalty of $70,000.00 is reduced to $35,000.00.

2. C. W. Wright shall pay the penalty of $35,000.00 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 VOSH inspection number 308582865 noted on the payment.

3. C. W. Wright certifies that the violation alleged in this agreement was abated.

4. As further consideration for the modification of the terms of the original citation, C. W. Wright agrees to withdraw its original notice of contest and waives its right to contest the remaining terms contained in this Order.

5. C. W. Wright shall post a copy of this Order for a period of thirty (30) days in a conspicuous location where notices to its employees are generally posted.

6. This Order is meant to settle the above contested claims, and is not to be considered an admission of liability by C. W. Wright. 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. This Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

7. The Clerk shall strike this matter from the docket of this Court, place it among the ended civil cases, and shall send an attested copy of this Order to both counsel of record.

Entered this 22nd day of December, 2009.

Judge

WE ASK FOR THIS:

C. Ray Davenport,
Commissioner of Labor and Industry

By: _____
Diane L. Duell (VSB No. 27285)
Special Assistant Commonwealth's Attorney
13 South 13th Street
Richmond, Virginia 23219-4101
804.786.4289
804.786.8418 (fax)

By: _____
A. James Kauffman (VSB No. 05600)
Taylor and Walker, P.C.
6800 Paragon Place, Suite 626
Richmond, Virginia 23230
804.673.0341
804.673.2001 (fax)

Counsel for C. W. Wright Construction Company, Inc.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

C. RAY DAVENPORT,	)	
Commissioner of Labor and Industry,	)	
Plaintiff,	)	
v.	)	Civil Action No. CL09-959
	)	
CENVEO CORPORATION,	)	
Defendant.	)	

AGREED ORDER

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

1. That the citations attached to the Complaint are hereby amended as follows:

a) Serious Citation 1, Item 1 is reduced to an other than serious citation with an assessed penalty of $765.00;

b) Other than Serious Citation 2, Item 1 is vacated;

c) Other than Serious Citation 2, Item 2 is vacated; and

d) Other than Serious Citation 2, Item 3 is vacated.

2. That the Defendant shall pay the total penalty of $765.00 within fifteen (15) business days of the date of entry of this order. Payment shall be made by check or money order, payable to the Commonwealth of Virginia, with VOSH inspection number 311664072 noted on the payment;

3. That the Defendant shall withdraw its original notice of contest, and hereby waives its right to contest the remaining terms contained in this Order;

4. That the Defendant hereby certifies that Citation 1, Item 1 has been abated;

5. That the Defendant shall post a copy of this Order for ten consecutive days, beginning from the date of entry of this Order, at its workplace in a conspicuous location where notices to its employees are generally posted;

6. That this Order shall be construed to advance the purpose of Virginia Code § 40.1-3;

7. That the Commissioner may use this Order in future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia, or any other authority;

8. That under Virginia 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. Except for these proceedings, and matters arising out of these proceedings, and any other subsequent VOSH proceedings between the parties, nothing in this agreement nor any foregoing statements, findings or actions taken by the Defendant shall be deemed an admission by the Defendant of the allegations of the citation, said allegations having been specifically denied. The agreements, statements, findings and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated.

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

It is ORDERED, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court.

Entered this 14 day of July 2009.

The Clerk shall send an attested copy of this Order to all counsel of record.

Judge

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry

A COPY TESTE:
YVONNE G. SMITH, CLERK
DEPUTY CLERK

Robert B. Field (Va. Bar No. 23864)
Special Assistant Commonwealth's Attorney
County of Henrico
13 South Thirteenth Street
Richmond, Virginia 23219
Telephone: (804) 786-4777
Facsimile: (804) 786-8418

Counsel for Commissioner Davenport

SEEN AND AGREED:

CENVEO CORPORATION

Jim Heinen, Jr. (Va, Bar No. 73022)
Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, MO, 63102.
Telephone: (314) 621-5070

Counsel for Cenveo Corporation

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

C. RAY DAVENPORT, Commissioner of Labor and Industry,	)	
Plaintiff,	)	
v.	)	CHANCERY NO. ~~04-1690-00-~~ CL08-1951-01
DESIGNLINE REMODELERS, INC.	)	
Defendant.	)	

AGREED ORDER

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

1. a. Serious Citation 1, Item 1a is redesignated as Other-than-serious Citation 2, Item 1 and affirmed with a penalty of $55.00;

b. Serious Citation 1, Item 1b is redesignated as Other-than-serious Citation 2, Item 2 and affirmed with a penalty of $55.00;

c. Serious Citation 1, Item 2 is redesignated as Other-than-serious Citation 2, Item 3 and affirmed with a penalty of $55.00;

d. Serious Citation 1, Item 3a is redesignated as Other-than-serious Citation 2, Item 4 and affirmed with a penalty of $55.00;

e. Serious Citation 1, Item 3b is redesignated as Other-than-Serious Citation 2, Item 5 and affirmed with a penalty of $55.00;

f. Serious Citation 1, Item 4a is redesignated as Other-than-serious Citation 2, Item 6 and affirmed with a penalty of $55.00;

g. Serious Citation 1, Item 4b is redesignated as Other-than-serious Citation 2, Item 7 and affirmed with a penalty of $55.00;

h. Serious Citation 1, Item 5a is redesignated as Other-than-serious Citation 2, Item 8 and affirmed with a penalty of $55.00;

i. Serious Citation 1, Item 5b is redesignated as Other-than-serious Citation 2, Item 9 and affirmed with a penalty of $55.00;

j. Serious Citation 1, Item 6a is redesignated as Other-than-serious Citation 2, Item 10 and affirmed with a penalty of $55.00;

k. Serious Citation 1, Item 6b is redesignated as Other-than-serious Citation 2, Item 11 and affirmed with a penalty of $55.00;

l. Serious Citation 1, Item 7a is redesignated as Other-than-serious Citation 2, Item 12 and affirmed with a penalty of $55.00;

m. Serious Citation 1, Item 7b is redesignated as Other-than-serious Citation 2, Item 13 and affirmed with a penalty of $55.00;

n. Serious Citation 1, Item 8a is redesignated as Other-than-serious Citation 2, Item 14 and affirmed with a penalty of $55.00;

o. Serious Citation 1, Item 8b is redesignated as Other-than-serious Citation 2, Item 15 and affirmed with a penalty of $55.00;

p. Serious Citation 1, Item 9a is redesignated as Other-than-serious Citation 2, Item 16 and affirmed with a penalty of $55.00;

q. Serious Citation 1, Item 9b is redesignated as Serious Citation 1, Item 1 and affirmed with a penalty of $120.00;

r. Serious Citation 1, Item 10 is vacated;

2. DesignLine Remodelers, Inc. shall pay the sum of $1,000.00 in the form of a check or money order, payable to the "Treasurer of Virginia," with inspection number 304774375 noted thereon, within 30 days of the date this order is entered.

3. DesignLine Remodelers, Inc. certifies that the violations affirmed in this Order have been abated;

4. As further consideration for the modification of the terms of the original citation, DesignLine Remodelers, Inc., agrees to withdraw its original notice of contest and waives its right to contest the remaining terms contained in this Order.

5. The violations affirmed in paragraph 1 may not be used as the basis for a repeat citation.

6. This Order is meant to settle the above contested claims, and none of the foregoing agreements, statements or actions taken by DesignLine Remodelers, Inc. shall be deemed an admission by the DesignLine Remodelers, Inc. of any of the allegations contained in VOSH Inspection Number 304774375. Under Virginia 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. The agreements, statements and actions taken herein are made solely for the purpose of settling this matter economically and amicably without further litigation and this Order shall not be used for any other purpose other than for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

7. The Clerk shall strike this matter from the docket of this Court, place it among the ended

chancery cases, and shall send an attested copy of this order to both counsel of record.

Entered this 24 day of February 2009.

Judge

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry

Robert B. Feild

2/24/09
Date

Robert B. Feild
Special Assistant Commonwealth's Attorney
City of Richmond
13 South Thirteenth Street
Richmond, Virginia 23219
Telephone: (804) 786-4777
Facsimile: (804) 786-8418

Copy,
Teste: BEVILL M. DEAN, CLERK
D.C.

Counsel for Commissioner Davenport

SEEN AND AGREED:

DESIGNLINE REMODELERS, INC.

Robert L. Wise VSB No. 42030
Bowman and Brooke, LLP
1111 East Main Street
Suite 2100
Richmond, VA 23219
Phone: 804.649.8200
Facsimile: 804.649.1762
Counsel for DesignLine Remodelers, Inc.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

C. RAY DAVENPORT, Commissioner of Labor and Industry, Plaintiff, v. **ECS MID-ATLANTIC, LLC**, Defendant.	)	Civil Action No.: CL08-1250

AGREED ORDER

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

1. That the citation attached to the Complaint is hereby amended as follows:

a) Willful Citation 1, Item 1 is amended to a serious violation with an assessed penalty of $6,300.00.

2. That the Defendant shall pay the total penalty of $6,300.00 within fifteen (15) 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 VOSH inspection number 310724489 noted on the payment;

3. That the Defendant shall withdraw its original notice of contest, and hereby waives its right to contest the remaining terms contained in this Order;

4. In consideration of paragraph 9, the Defendant, hereby certifies as of the date of this

Order that all violations, if any, have been abated;

5. That the Defendant shall post a copy of this Order for ten consecutive days, beginning from the date of entry of this Order, at its workplaces in Virginia in a conspicuous location where notices to its employees are generally posted;

6. That this Order shall be construed to advance the purpose of Virginia Code § 40.1-3;

7. That the Commissioner may use this Order in future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia, or any other authority;

8. That under Virginia 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. Except for these proceedings, and matters arising out of these proceedings, and any other subsequent VOSH proceedings between the parties, nothing in this agreement nor any foregoing statements, findings or actions taken by the Defendant shall be deemed an admission by the Defendant of the allegations of the citation, said allegations having been specifically denied. Furthermore, the parties agree that the citation, as amended, does not make any charges either, expressed or implied, that the conditions set forth were the cause or proximate cause of any accident or damages. The agreements, statements, findings and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated.

10. By agreeing to the entry of this Order, the Defendant is not waiving, and shall not be

deemed, to have waived its position that its role on the subject construction project, as testing engineer, did not obligate it to conduct any safety-related responsibilities or inspections beyond being responsible for its own employees on the job site. The Defendant maintains this position, and reserves all rights to maintain in any future enforcement proceeding that its role as testing engineer does not make it responsible under federal or state law for safety on any particular construction site beyond any responsibility it may have for its own employees.

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

It is ORDERED, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court.

Entered this 19th day of Oct 2009.

The Clerk shall send an attested copy of this Order to all counsel of record.

Judge

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry

Robert B. Feild

Robert B. Feild, VSB No. 23864
Special Assistant Commonwealth's Attorney
County of Arlington
13 South Thirteenth Street
Richmond, Virginia 23219
Telephone: (804) 786-4777
Facsimile: (804) 786-8418

Counsel for Commissioner Davenport

SEEN AND AGREED:

ECS Mid Atlantic LLC

K. Brett Marston, Esq., VSB No. 35900
Gentry, Locke, Rakes & Moore, LLP
P. O. Box 40013
Roanoke, VA 24022-0013
Telephone: (540) 983-9300
Facsimile: (540) 983-9400

Counsel for ECS Mid Atlantic LLC.

A COPY,
TESTE: PAUL FERGUSON
BY: DEPUTY CLERK

COURT OF APPEALS OF VIRGINIA

Present: Judges Kelsey, Haley and Powell
Argued at Alexandria, Virginia

FAIRFAX COUNTY DEPARTMENT OF
PUBLIC WORKS AND ENVIRONMENTAL
SERVICES

v. Record No. 0745-09-4

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

MEMORANDUM OPINION* BY
JUDGE CLEO E. POWELL
DECEMBER 22, 2009

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Dennis J. Smith, Judge

Brian S. Yellin (David P. Bobzien, County Attorney; Cynthia L. Tianti, Senior Assistant County Attorney; Law Office of Adele L. Abrams, P.C.; Office of the County Attorney, on brief), for appellant.

Crystal Y. Twitty, Assistant Attorney General (William C. Mims, Attorney General; Maureen Riley Matsen, Deputy Attorney General; Peter R. Messitt, Senior Assistant Attorney General, on brief), for appellee.

Fairfax County Department of Public Works and Environmental Services (DPWES) appeals a final order of the circuit court finding that substantial evidence supported all but two of the Virginia Occupational Safety and Health (VOSH) civil penalty citations issued by the Virginia Department of Labor and Industry (DOLI) for violations of the safety standards incorporated by the VOSH program. On appeal, DPWES contends that the circuit court erred by: 1) determining that substantial evidence proved that the confined space at issue here requires a permit; 2) concluding that the commissioner of DOLI met his burden of proving employer

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

knowledge by substantial evidence; 3) failing to address DPWES's affirmative defense of employee misconduct; and 4) classifying citation 2, item 3 as willful because this classification is not supported by substantial evidence. Finally, DPWES asserts that the commissioner of DOLI impermissibly withheld documents from DPWES that supported the commissioner's determination that several violations were willful. On cross-appeal, DOLI argues that the circuit court erred in vacating citation 2, item 4b where substantial evidence supported the commissioner's decision.

We hold that DPWES failed to preserve its objections that the circuit court erred by failing to address its affirmative defense of employee misconduct and the commissioner impermissibly withheld documentation from it that supported the willful violations because DPWES never made these arguments to the circuit court. Further, we affirm the circuit court's decision to uphold DOLI's determination that the space in question was a permit-required confined space, that there was substantial evidence proving employer knowledge, and that the classification of citation 2, item 3 as willful was supported by substantial evidence. Finally, we reverse the circuit court's decision to vacate citation 2, item 4b because there is substantial evidence in the record to support the commissioner's finding.

I. BACKGROUND[1]

As an inspector in the Storm Water Management Division of DPWES, Phillip Miley was responsible for inspecting the internal structures of private and public wet pond facilities, underground retention facilities, manholes, catch basins, and risers. He inspected the internal structures of these facilities for blockages, cracks, and other structural faults. On August 1, 2005, during the performance of his duties, Miley inspected a private wet pond facility in Fairfax

[1] Because the parties are fully conversant with the record in this case and this memorandum opinion carries no precedential value, we recite only those facts and incidents of the proceedings as are necessary to the parties' understanding of the disposition of this appeal.

County. Before entering the manhole at this location, Miley placed two cones near the manhole but did not place any barrier on the manhole. Miley then entered the manhole without an attendant present and, while inside, fell down a shaft that was ten feet, nine inches deep.[2] During the fall, Miley struck his head on a storm water valve and received cuts on the back of his head and abrasions on his right arm. Miley then crawled into another pipe, where he died from these injuries. Miley did not have any communications equipment with him and was, therefore, unable to summon any assistance.

Gregory Pappas, a compliance officer with DOLI, investigated the fatality and determined that the confined space that Miley was inspecting when he died contained or had the potential to contain several safety hazards: falls, engulfment, atmospheric, and other hazards (i.e., being struck by objects falling or being thrown into the open manhole). Pappas learned from DPWES employees, including safety analyst Dean Blackwell, that because DPWES had a program in place to evaluate potential hazards in confined spaces on public but not private land, the wet pond that Miley entered on August 1, 2005 was not inspected for hazards before or during his entry. Pappas's investigation revealed that Miley was not equipped to test for atmospheric hazards. Pappas further learned from Tim Fink, an engineering technician with DPWES, that prior to Miley's death, DPWES employees routinely "[broke] the plane" of confined spaces to take photographs, but employees received no training on how to do so. [3]

---

[2] Miley entered similar spaces at least twenty-two times in the year preceding his death, but the permits associated with those entries do not indicate that an attendant was present for all of those entries. Photographs taken during some of those entries and other records associated with those entries, however, reveal that an attendant was present for some entries.

[3] By "breaking the plane," these employees entered the confined space in violation of VOSH regulations as the regulations consider "entry" to have occurred as soon as any part of the entrant's body breaks the plane of an opening into the space.

Following Pappas's investigation, DOLI determined that DPWES violated the provisions of the VOSH standards and issued numerous serious and willful citations against DPWES on January 20, 2006. The DPWES requested an informal fact-finding conference, which was held on May 22 and 23, 2007 before Ellen Marie Hess, a hearing officer for DOLI. On August 17, 2007, Hess submitted the results and recommendations of her fact finding to the commissioner. Hess recommended that the commissioner vacate two violations, reduce three others from willful to serious, and uphold the remaining twenty violations. The DOLI vacated four additional violations. The commissioner accepted the results and recommendations as the final agency decision on September 12, 2007. In so doing, DOLI determined that the space Miley entered was a permit-required confined space, that DPWES knew or should have known that employees were entering permit-required confined spaces in violation of VOSH's regulations, that DPWES employees were not provided with required safety equipment, that DPWES policies and forms were deficient, and that the employees' proficiencies were not evaluated as required.

DPWES appealed the agency's final decision to the circuit court and alleged that DOLI's decisions lacked substantial evidence to support them. In a letter opinion, the circuit court held that "a reasonable mind would accept the facts set forth in the record as substantial evidence to support DOLI's conclusion regarding all of the violations" except two violations that the circuit court then vacated.

Specifically, the circuit court held that under 29 C.F.R. § 1910.146, a permit-required confined space is any space that has one or more of the following characteristics:

> (1) contains or has a potential to contain a hazardous atmosphere;
>
> (2) contains a material that has the potential for engulfing the entrant;

(3) has an internal configuration such that the entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or

(4) contains any other recognized safety or health hazard.

The court concluded that there was substantial evidence in the record to support the finding that the wet pond facility was a permit-required confined space. The court specifically cited Pappas's testimony that among the hazards present or potentially present at the site Miley entered were wild animals, slip hazards, engulfment hazards, fall hazards due to the unguarded shaft, and explosions due to flammable gasses. The court stated that, contrary to appellant's assertions, a reasonable mind could conclude that a fall hazard was not the only hazard present at the site. Thus, the circuit court held that there was substantial evidence to support the agency's determination that this space was a permit-required confined space.

The circuit court also found that interviews in which DPWES employees admitted violations they committed and knowledge of other employee violations revealed that DPWES failed to review permits that disclosed violations and provided substantial evidence that DPWES knew or should have known about the violations by employees. The circuit court held that there was substantial evidence supporting the characterization of citation 2, item 3 as willful because DPWES knew or should have known that employees entered permit-required confined spaces without an attendant present and that DPWES systematically failed to implement this standard. Finally, the circuit court vacated citation 2, item 4b because it found that there was not substantial evidence in the record to prove that Blackwell did not review the permit-required confined space program annually.

II. ANALYSIS

A. Preliminary Issues

DPWES presents five questions in this appeal. We will initially dispose of those questions presented that were not adequately preserved for appeal and, therefore, will not be considered. The rules of our Court provide that

> [n]o ruling . . . will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.

Rule 5A:18. This rule exists so that the circuit court is alerted to possible error and is afforded the opportunity to "consider the issue intelligently and take any corrective actions necessary to avoid unnecessary appeals, reversals and mistrials." Martin v. Commonwealth, 13 Va. App. 524, 530, 414 S.E.2d 401, 404 (1992) (citing Campbell v. Commonwealth, 12 Va. App. 476, 480, 405 S.E.2d 1, 2 (1991) (en banc)).

DPWES argues that the circuit court committed reversible error when it failed to address DPWES's affirmative defense of employee misconduct. DPWES also contends that the commissioner impermissibly withheld documentation from DPWES supporting the willful violations. Though DPWES made both of these arguments to the agency, DPWES did not make either of these arguments in its memorandum of law in support of its petition for appeal to the circuit court and the circuit court did not rule on either argument in its letter opinion. Therefore, we find that these issues were not properly preserved for appeal and we decline to consider them. Though this Court may invoke the ends of justice or good cause shown exceptions to consider a matter not raised below, DPWES does not ask us to do so and we will not do so *sua sponte*. Edwards v. Commonwealth, 41 Va. App. 752, 761, 589 S.E.2d 444, 448 (2003) (en banc).

B. Substantive Issues

1. Standard of Review

On appeal, we review "the facts in the light most favorable to sustaining" the agency's decision. Atkinson v. Virginia Alcoholic Beverage Control Commission, 1 Va. App. 172, 176, 336 S.E.2d 527, 530 (1985). To do so, we "take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted." Code § 2.2-4027. Review of an agency's factual findings "is limited to determining whether substantial evidence in the agency record supports its decision." Avante at Lynchburg, Inc. v. Teefey, 28 Va. App. 156, 160, 502 S.E.2d 708, 710 (1998). "[T]he burden is upon the appealing party to demonstrate error." Carter v. Gordon, 28 Va. App. 133, 141, 502 S.E.2d 697, 700-01 (1998); see also Code § 2.2-4027. "The reviewing court may reject the agency's findings of fact *only if*, considering the record as a whole, *a reasonable mind would necessarily come to a different conclusion*." Johnston-Willis v. Kenley, 6 Va. App. 231, 242, 369 S.E.2d 1, 7 (1988) (emphasis added).

"[W]here the question involves an interpretation which is within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the courts." Id. at 244, 369 S.E.2d at 8.

> The rationale of the statutory scheme is that the [administrative agency] shall apply expert discretion to matters coming within its cognizance, and judicial interference is permissible only for relief against the arbitrary or capricious action that constitutes a clear abuse of the delegated discretion. The reviewing judicial authority may not exercise anew the jurisdiction of the administrative agency and merely substitute its own independent judgment for that of the body entrusted by the Legislature with the administrative function.

Id. (quoting Virginia Alcoholic Beverage Control Commission v. York Street Inn, Inc., 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979)). The trial court may reverse the administrative agency's interpretation only if the agency's construction of its regulation is arbitrary and capricious or fails to fulfill the basic purpose of the law under which the agency acts. Id. at 246, 369 S.E.2d at 9.

2. Whether there is Substantial Evidence to Support the Finding that the Space Miley Entered was a Permit-Required Confined Space

Initially, DPWES contends that the record does not provide substantial evidence that the space that Miley entered was a permit-required confined space because the trial court relied on Pappas's "erroneous, unsubstantiated and speculative" testimony and disregarded the testimony of DPWES's expert, Stuart Stein.[4] DPWES makes three arguments in support of this position. First, DPWES contends that its expert testified that there was no engulfment hazard at this site. Second, DPWES asserts that the risk of falling is not a recognizable hazard.[5] Third, DPWES argues that because Pappas did not specifically identify a hazard, this could not be considered a permit-required confined space. Based on these arguments, DPWES contends that the court erroneously determined that the space was a permit-required confined space and, therefore, the

[4] Without citation to the record, DPWES also contends that the circuit court "disregarded the federal OSHA compliance directives and agency letters of interpretation regarding 29 C.F.R. 1910.146, which govern enforcement of the standard nationwide."

[5] The Federal Occupational Safety and Health Act ("OSHA") regulates conditions in private industry workplaces which affect worker safety and health. The Virginia Occupational and Safety Health Program ("VOSH") is required under OSHA to maintain and enforce an OSHA program standard that is "at least as effective as" the federal standard. See 29 C.F.R. § 1902.37(b)(4). Although the federal Occupational Safety and Health Administration has construed its regulations in an interpretation letter to not require a permit for a space where the *only* hazard potentially present was falling into the space, this interpretation is not binding on our Commonwealth as VOSH may implement more stringent standards. Here, the Attorney General argued that Virginia has defined a fall as a hazard but presented nothing in support of this argument. As the risk of falling through the open manhole cover is not the only hazard potentially present at the site Miley inspected on the day he died, we need not address whether the risk of falling into a hole is itself enough to require a permit in Virginia.

following citations are invalid: citation 1, items 1b, 1c, 1d, 2a through 2n, 3a, 3b, 4a, 4b, 4c, 5a, 5b, and citation 2, items 1, 2, 3a, 3b, 3c, and 4. The commissioner responds that based on the record, a reasonable mind would not necessarily conclude that there were not sufficient hazards present or potentially present at the wet pond that Miley entered for it to qualify as a permit-required confined space.

The hearing officer and the commissioner found by a preponderance of evidence that the space Miley entered was a permit-required confined space. Specifically, the hearing officer found that the space contained or had the potential to contain fall hazards, engulfment hazards, and other hazards. Based on the agency record, the circuit court concluded that the space posed the potential hazard of slips, falls, engulfment hazards, wild animals, and explosions from flammable gasses. The circuit court rejected DPWES's argument that a fall is not a hazard. Assuming without deciding that a fall hazard is not a recognized hazard, there is ample evidence in the record upon which the agency based its determination and the circuit court concluded that "considering the record as a whole, a reasonable mind would [not] necessarily come to a different conclusion." Johnston-Willis, 6 Va. App. at 242, 369 S.E.2d at 7.

It is undisputed that the wet pond facility Miley was inspecting at the time of his death was a "confined space."[6] Therefore, we turn to whether it is a confined space that requires a permit. A "permit-required confined space" is defined as a confined space with at least one of the following characteristics:

> (1) Contains or has a potential to contain a hazardous atmosphere;
>
> (2) Contains a material that has the potential for engulfing an entrant;

[6] A confined space "[i]s a space large enough that an employee can bodily enter the space and perform work[,]" with limited or restricted means of entry or exit and "is not designed for continuous employee occupancy." 29 C.F.R. § 1910.146(b).

(3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or

(4) Contains any other recognized serious safety or health hazard.

29 C.F.R. § 1910.146(b).

DPWES relies heavily on the testimony of its expert in support of its argument that none of the hazards delineated by DOLI's investigator, Pappas, existed. Initially, it should be noted that not all of the dangers need to have been identified nor actually exist for a space to be a permit-required confined space. The regulations only require that some hazards be "potential." Thus, DPWES's argument fails for several reasons. First, DPWES's own employee, Blackwell, told Pappas that the space in question was a permit-required confined space. Moreover, in addition to Blackwell's admission, "[t]he credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995).

As previously stated, Pappas testified that the space was a permit-required confined space because, *inter alia*, there was the potential for engulfment hazards and other recognized safety and health hazards. Regarding the engulfment hazard, Pappas further opined that there was a potential engulfment hazard created by the fact that the private structures are only inspected every five years. According to Pappas, because of this length of time between inspections, the walls could crack allowing water to come through to the dry side. DPWES's expert did not totally disagree with this position testifying that "certainly if you had a structural failure in the wall between the wet side and the dry side, then you could have a potential engulfment hazard." As it cannot be said that Pappas's testimony was inherently incredible, the hearing officer was entitled to accept his testimony regarding the existence or potential existence of hazards.

Pappas also testified in detail about what should have been done to test the air quality in the space that Miley entered. From this testimony, the fact finder could infer that this space contained the potential for atmospheric hazards. In fact, when questioned regarding the atmospheric hazard, DPWES's own expert, Stein, testified that even before they put a camera down into a hole to take a picture (i.e., break the plane), it is standard procedure to test the atmosphere because there might be a problem. This procedure supports Pappas's conclusion that an atmospheric hazard could still be potentially present, even for one who is not physically going into the hole.

Finally, the directives issued by the United States Department of Labor (the Department) regarding the application of permit-required confined space standards support the commissioner's position. In response to a question regarding the scope of the phrase "any other recognized serious safety and health hazard," the Department stated that other hazards may include electrical hazards, rodents, snakes, spiders, poor visibility, wind, weather, or insecure footing. The Department opined that the list was only illustrative of a general range of confined space hazards that could, but would not necessarily always, constitute a hazard that would present an immediate danger to the life and health such that "permit space" protection would be required. In recognizing without deciding that such conditions could be covered, the Department concluded that the employer must address such potential exposures. One with specialized competence could consider the possibility of this broad range of "other hazards" as a whole and conclude that there existed the sort of "other recognized serious safety or health hazard" included within the definition of a permit-required confined space in 20 C.F.R. § 1910.146(b).

As we have previously stated, "[t]he construction which an administrative agency gives to its regulation, if reasonable, is entitled to great deference." Virginia Real Estate Board v. Clay, 9 Va. App. 152, 160, 384 S.E.2d 622, 627 (1989) (holding that "the trial court erred in its

interpretation of Regulation 8.2(36) by substituting its construction of the regulation for the Board's reasonable interpretation . . . [and] by failing to defer to the experience and specialized competence of the Board in interpreting the regulation which it promulgated."). Given the nature of the space at issue and the hazards present or potentially present, we defer to DOLI's specialized competence in determining whether this space is a permit-required confined space. Further, because it cannot be said on the face of this record that a reasonable person would necessarily come to a different conclusion than the agency did or that the agency's specialized interpretation of its regulation is arbitrary and capricious, we do not find that the circuit court erred in finding substantial evidence that the space in question was a permit-required confined space.

3. Whether there is Substantial Evidence to Support the Circuit Court's Judgment that the Commissioner Met his Burden of Proving Employer Knowledge

A "'serious violation' means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*" Code § 40.1-49.3 (emphasis added). "[T]he commissioner's burden of proof may be met upon a showing that [the employer] should have known of the violation in the exercise of reasonable diligence." Magco of Maryland, Inc. v. Barr, 33 Va. App. 78, 85, 531 S.E.2d 614, 617 (2000).

DPWES argues that the circuit court erred in finding that the commissioner met his burden of proving by a preponderance of the evidence that the employer had "actual or constructive knowledge" of the violations because it presented compelling evidence that its policy prohibited the actions that Miley and other employees took. DPWES also contends that the commissioner contradicts his own argument that information contained in DPWES permits

proves that DPWES knew or should have known about the violations by also arguing that DPWES failed to review its permits.[7] Essentially, DPWES argues: 1) although there was ample evidence in our files from which we knew or should have known that our employees violated our policies with impunity on a regular basis, because we had a policy prohibiting such actions, we cannot be held responsible; and 2) although we were required to review our records to ensure compliance, our failure to do so excuses any other violation. Neither argument is persuasive.

Specifically, to support the citations that DPWES challenges on appeal to our Court, the record must contain substantial evidence that DPWES knew or should have known 1) that its measures to prevent employees from entering permit-required confined spaces were not effective, 2) that DPWES's permit-required confined space program did not include all permit-required confined spaces, 3) that its forms were deficient, 4) that the pre-entry verification required for permit-required confined spaces was not done nor was it verified that the space was acceptable for occupation throughout the duration of the authorized entry at the space Miley entered on August 1, 2005, and 5) that DPWES failed to establish employee proficiency. The record here, both through DPWES's documents and employee admissions, provides substantial evidence such that it cannot be said that a reasonable person would necessarily reach a different conclusion than the commissioner did about whether DPWES knew or should have known of the violations.[8]

---

[7] Though the commissioner contends that these questions are waived because DPWES failed to specifically state to which citation(s) this question presented applied, it is clear that this question subsumes the employer knowledge requirement for each citation and, therefore, this Court does not find that DPWES waived this issue through its framing of the question presented. That said, DPWES made arguments on appeal as to only seven items: citation 1, items 1a, 1d, 2a, 2c, 2e, 4b, and 4c. Therefore, we only review whether the record contains substantial evidence as to those seven items.

[8] Because the question of whether DPWES knew or should have known of the violations is not one that falls within the specialized competence of the agency, we afford deference only to DOLI's factual findings and not its interpretations.

First, although the record does not clearly show that DPWES had actual knowledge that Miley was violating entry rules regarding private permit-required confined spaces, the record contains ample evidence from which one could conclude that DPWES should have known that its measures to prevent employees from entering permit-required confined spaces in violation of its policies were ineffective. For example, in direct contravention of DPWES's argument that there was no evidence that Miley entered private permit-required confined spaces is a chart entered into evidence at the informal fact-finding hearing by DOLI as Petitioner's Exhibit M labeled "Confined Space Entry Permits by Phil Miley." The first entry on that document, dated October 28, 2004, indicates an entry by Miley into a private confined space. The document also indicates that the entry was unaccompanied. Despite DPWES's argument that it had policies prohibiting certain acts, DPWES's own documentation indicates that, on a routine basis, employees were not following policy and that DPWES took no preventative action to stop further rule violations.

Further, VOSH regulations provide that an inspector should not enter a permit-required confined space without an attendant. Yet, the evidence indicated that Miley and others routinely entered such spaces without an attendant. Specifically, Fink, a DPWES engineering technician, provided substantial evidence from which the commissioner could find that when an attendant was present, the attendant also signed the confined space entry permit. Because no one else signed Miley's permits, it was reasonable to infer that no one else was present when Miley entered. Clearly, Miley was entering both private and public permit-required confined spaces and was doing so unaccompanied prior to his death. This information was available to DPWES in its confined space entry permits.

Moreover, testimony from DPWES employees provides substantial evidence that DPWES should have known that Miley was not the only employee entering permit-required

confined spaces in violation of DPWES policy. Fink testified that on occasion he entered manholes unaccompanied. Fink also indicated that it was routine for employees to remove the manhole cover and reach in to take photographs, thereby breaking the plane. Blackwell acknowledged that it is DPWES's policy for its employees to take pictures of the internal structures of confined spaces from the outside by sticking their hands and arms into the space. As previously stated, this practice was a clear violation of VOSH regulations that considered an "entry" to have occurred as soon as any part of the entrant's body broke the plane of the space. Therefore, even if Blackwell did not actually know that this practice violated the regulation, because the regulation is clear and unambiguous, he should have known.

Second, the record also contains substantial evidence to support the conclusion that DPWES knew or should have known that permit-required confined spaces on private land were not being evaluated. Indeed, Blackwell admitted that DPWES had a program to evaluate confined spaces to determine whether they required permits before entry, but DPWES did not include private facilities in this evaluation. This admission, combined with the evidence that DPWES knew or should have known that its employees were violating procedures, enabled the agency and the circuit court to conclude that there was substantial evidence that DPWES knew that not all facilities were being examined in compliance with established VOSH regulations.

Third, as previously mentioned, the fact that DPWES knew or should have known that its employees were entering permit-required confined spaces on private property in violation of its policies. DPWES also knew, as Blackwell admitted, that its permit-required confined space program did not apply to such spaces on private property. From this, the agency had substantial evidence before it to support its conclusion that DPWES's forms, which only applied to facilities on public land, were deficient.

Fourth, Blackwell's admission that a pre-entry verification was not done on the site Miley entered on August 1, 2005 provided the agency and the circuit court with substantial evidence of employer knowledge in support of this violation. Moreover, substantial evidence, in the form of Pappas's testimony that there was no gas meter at the site and Blackwell's admission that the space was not evaluated prior to Miley's entry, supports the conclusion that DPWES knew or should have known that it does not verify "that conditions in the permit-required confined space are acceptable for entry throughout the duration of an authorized entry."

Fifth, the agency and the circuit court found substantial evidence in the record to prove that DPWES failed to "establish employee proficiency" by accepting the fact finder's decision to credit the testimony of Miley's supervisor, Crawford, who admitted that he did not check employee proficiencies on gas meters over Blackwell's testimony that the supervisors tested the employee's proficiencies using the gas meters.

Finally, DPWES contends that Blackwell's admission that, in the performance of his duties as a DWPES safety analyst, he did not review the cancelled confined space permits to determine whether there were deficiencies that needed to be addressed through training, negates employer knowledge. This argument, however, is without merit as the standard requires that the employer knew *or should have known through reasonable diligence*. Certainly, reviewing permits as required would have enabled DPWES to learn that its employees were violating its policies, satisfying the knowledge requirement for a serious violation. However, even if they did not review the permits, the information was readily available to them as it was in their system, satisfying the requirement that with reasonable diligence they should have known. Therefore, the circuit court correctly found substantial evidence that the employer should have known about the deficiencies in its program and provided training to remedy those issues.

4. Whether the Circuit Court's Judgment that Citation 2, Item 3 is Properly Classified as Willful is Supported by Substantial Evidence

DPWES next asserts that the circuit court's classification of citation 2, item 3 as willful is not supported by substantial evidence in the record. A willful violation is

> a violation deemed to exist in a place of employment where (i) the employer committed an intentional and knowing, as contrasted with inadvertent, violation and the employer was conscious that what he was doing constituted a violation; or (ii) the employer, even though not consciously committing a violation, was aware that a hazardous condition existed and made no reasonable effort to eliminate the condition.

16 VAC 25-60-10. In Dept. of Professional and Occupational Regulation, Board of Asbestos and Lead v. Abateco Services, Inc., 33 Va. App. 473, 480-81, 534 S.E.2d 352, 356 (2000), aff'd upon rehearing en banc, 35 Va. App. 644, 547 S.E.2d 529 (2001), we held that Abateco Services's failure to produce records upon request, when it had a statutory duty to do so, constituted a willful violation despite the fact that Abateco Services relied in good faith on advice of counsel in refusing to disclose the records. We noted that "good faith" and "willfulness" are not mutually exclusive terms. Id. at 480, 534 S.E.2d at 356. This Court defined "willful" in a non-criminal context "as denoting an act that is intentional, knowing, or voluntary." Id. "In the context of the federal Occupational Safety and Health Act (OSHA), 'willful' has been defined as 'an intentional disregard of, or plain indifference to, OSHA requirements.'" Id. (quoting Reich v. Trinity Indus., Inc., 16 F.3d 1149, 1152 (11th Cir. 1994)).

Here, the circuit court concluded that there was substantial evidence that DPWES acted willfully as to the violation of citation 2, item 3, even if DPWES clearly did not act in bad faith. The court so ruled because it determined that the record revealed that DPWES was aware that Miley and other employees entered the permit-required confined spaces without an attendant present. The court concluded that "[a] reasonable mind could conclude that DPWES'[s] indifference to compliance of the enumerated regulations is indicative of the agency's 'willful'

non-compliance." As previously discussed, the agency's determination that the space Miley entered was a permit-required confined space was neither arbitrary nor capricious. Because it cannot be said that a reasonable person would necessarily reach a different conclusion based on this record, the circuit court did not err in affirming the agency's determination.

5. Whether the Circuit Court Erred in its Decision to Vacate Citation 2, Item 4b

On appeal, the commissioner assigns cross-error to the circuit court's decision to vacate citation 2, item 4b. In citation 2, item 4b, the agency alleged that DPWES willfully violated 29 C.F.R. § 1910.146(d)(14), which requires that the employer must "review the permit space program . . . within one year after each entry and revise the program as necessary, to ensure employees participating in the entry operation are protected from permit space hazards." The commissioner asserts that the record contains substantial evidence that the cancelled permits retained by DPWES contained numerous deficiencies that had not been corrected. The commissioner contends that because the standard of review requires that the circuit court review the evidence in the light most favorable to sustaining the agency's determination, the circuit court erred in vacating this citation.

As noted above, on appeal, the agency's factual findings must be upheld unless a reasonable mind would necessarily reach a different result and we defer to an agency's specialized competence in interpreting regulations where the agency's interpretation is not arbitrary and capricious. Here, the circuit court determined that this citation contained two parts: 1) annual review of the permits, and 2) revisions to the program as necessary to protect employees. The circuit court held that the record lacked substantial evidence to support this citation with regard to the first part, annual review. The court found substantial evidence in the record to support the second part of the citation that alleged that DPWES did not revise the program as necessary. The court determined that because this is a single citation, the

commissioner must prove both parts with substantial evidence. Because the record is unclear whether the program was reviewed within one year after each entry, the circuit court concluded that the citation was unsupported by substantial evidence, and the court vacated the citation.

During the course of his investigation, Pappas learned that there were numerous deficiencies in DPWES's permits, including no space to indicate the purpose for entry or potential hazards. Moreover, the record contains substantial evidence from which the fact finder could infer that the annual reviews to discover these deficiencies were not conducted. Specifically, the fact finder could infer, as it did, that neither Blackwell nor DPWES was reviewing the permits annually because the deficiencies were never corrected. Moreover, Pappas testified to the hearing officer that Blackwell admitted that he did not review the permits. For the circuit court to overturn the agency's decision, the circuit court would have had to have found that a reasonable mind would *necessarily* conclude, based on this record, that DPWES was conducting annual reviews. It cannot be said that a reasonable mind would necessarily reach the opposite conclusion than the agency did or that the agency's interpretation was arbitrary and capricious. Therefore, we reverse the circuit court's decision to vacate this citation and remand to the circuit court for entry of an order consistent with this opinion.

III. CONCLUSION

For these reasons, we determine that DPWES's arguments that the circuit court erred in not considering the affirmative defense of employee misconduct and its argument that the agency intentionally withheld willful documentation are procedurally barred. We further hold that there is substantial evidence in the record to support the agency's decision that the space Miley entered was a permit-required confined space, that DPWES knew or should have known about the violations, and that DPWES's violation in citation 2, item 3 was willful. Finally, we conclude

that the circuit court erred in vacating citation 2, item 4b as it cannot be said that a reasonable mind would necessarily reach a different conclusion than the agency.

Affirmed, in part, and reversed and remanded, in part.

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF LOUDOUN

C. RAY DAVENPORT, Commissioner of Labor and Industry,	)	
Plaintiff,	)	
v.	)	Civil Action No. CL00056577-00
FAMILY FOOT AND ANKLE CENTERS, PLLC	)	
Defendant.	)	

ORDER

This matter came before the Court on Commissioner C. Ray Davenport's ("Commissioner") Motion for Nonsuit as a matter of right pursuant to Va. Code § 8.01-380, and IT APPEARING that on June 26, 2009, the Commissioner filed a complaint against Family Foot and Ankle Centers, PLLC, that no nonsuit has been taken to this cause, and that the defendant, Family Foot and Ankle Centers, PLLC, has not filed a cross-claim, it is therefore ADJUDGED, ORDERED AND DECREED that the Commissioner's motion is GRANTED and that this matter be and hereby is nonsuited without prejudice as a matter of right pursuant to Va. Code § 8.01-380, it is FURTHERMORE ORDERED that the Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both parties.

Enter: Thomas D. Horne
Judge

Date: 1 December 2009

I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

Robert B. Feild

Robert B. Feild (VSB# 23864)
Special Assistant Commonwealth's Attorney
13 South Thirteenth Street
Richmond, VA 23219
804-786-4777, Fax 804-786-8418

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

C. RAY DAVENPORT, Commissioner of Labor and Industry, *Plaintiff,*	)	
v.	)	Chancery No. CL 09-698
GLOVER ENTERPRISES, INC.	)	
Defendant.	)	

ORDER

This matter came before the Court on Commissioner C. Ray Davenport's ("Commissioner") Motion for Nonsuit as a matter of right pursuant to Va. Code § 8.01-380, and IT APPEARING that on June 9, 2009, the Commissioner filed a complaint against Glover Enterprises, Inc., that no nonsuit has been taken to this cause, and that the defendant, Glover Enterprises, Inc., has not filed a cross complaint, it is therefore ADJUDGED, ORDERED AND DECREED that the Commissioner's motion is GRANTED and that this matter be and hereby is nonsuited without prejudice as a matter of right pursuant to Va. Code § 8.01-380, it is FURTHERMORE ORDERED that the Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both parties.

Enter: J. Martin Bass
Judge

Date: 30 Sept. 2009

A COPY TESTE:
Barbara G. Dechiaro, CLERK
CIRCUIT COURT OF STAFFORD
By: [illegible] DC

I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

Robert B Feild

Robert B. Feild (VSB# 23864)
Special Assistant Commonwealth's Attorney
13 South Thirteenth Street
Richmond, VA 23219
804-786-4777, Fax 804-786-8418

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

C. RAY DAVENPORT, Commissioner of Labor and Industry, Plaintiff, v. GUTTER GOO-ROOZ, INCORPORATED, Defendant.	)	Civil Action No. CL07-03936T-01

AGREED ORDER

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

1. That the citation attached to the Complaint is hereby amended as follows:

   a) Serious Citation 1, Item 1 is affirmed with a reduced penalty of $4,500.00.

   b) Serious Citation 1, Item 2 is affirmed with a reduced penalty of $4,500.00.

   c) Serious Citation 1, Item 3 is reduced to other than serious with no penalty.

   d) Serious Citation 1, Item 4 is reduced to other than serious with no penalty.

2. That the Defendant shall pay the penalty of $9,000.00 as follows:

   a) Defendant, upon entry of this order, will pay to the Commissioner $9,000.00 in payment of the penalties for the above citations. Three hundred seventy five dollars ($375.00) of this payment shall be remitted to the Commissioner 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 VOSH inspection number 310744172 noted on the payment. All payments under this order shall be sent to: Accounting Department, Department of Labor and Industry, Powers-Taylor

Building, 13 South Thirteenth Street, Richmond, Virginia 23219.

b) Defendant shall remit the remaining amount of the penalty amount of eight thousand six hundred twenty five dollars ($8,625.00) in twenty three (23) equal payments of three hundred seventy five dollars ($375.00) each on the first day of the month for twenty three consecutive months following the first payment under paragraph 2a). Payments shall be made by check or money order, payable to the Treasurer of Virginia, with VOSH inspection number 310744172 noted on the payment. Payments will be considered timely if postmarked on or before the first day of the month.

3. That the Defendant shall withdraw its original notice of contest, and hereby waives its right to contest the remaining terms contained in this Order;

4. That the Defendant shall submit abatement documentation for the affirmed violations that complies with §307.E.2 of the VOSH Administrative Regulations Manual, *16 VAC 25-60-10 et seq.* within thirty (30) days of the entry date of this Order. The Commissioner may extend the abatement period provided herein. Abatement documentation will be sent to Jeannie Buckingham, Compliance Manager, Virginia Department of Labor and Industry, Interstate Corporate Center Building 6, 6363 Center Drive, Suite 101, Norfolk, VA 23502;

5. That the Defendant shall post a copy of this Order for ten consecutive days, beginning from the date of entry of this Order, at its workplaces in Virginia in a conspicuous location where notices to its employees are generally posted;

6. That this Order shall be construed to advance the purpose of Virginia Code § 40.1-3;

7. That the Commissioner may use this Order in future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia;

8. That under Virginia 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 injury or property damage sustained by any person or entity.

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

It is ORDERED, ADJUDGED, and DECREED that this matter, and hereby is, dismissed with full prejudice and stricken from the docket of this Court.

Entered this 20th day of April 2009.

The Clerk shall send an attested copy of this Oder to all counsel of record.

C. Robert Revell
Judge

We ask for this:

Robert B Feild
Counsel for Plaintiff,
Robert B. Feild
Virginia Department of Labor and Industry
13 S. 13th Street
Richmond, Virginia 23219
Phone: 804-786-4777

4/17/09
Date

Counsel for Defendant,
David S. Dildy, Esquire
ROBERT E. LONG & ASSOCIATES, LTD.
5 West Queen's Way, Suite 200
Hampton, Virginia 23669
Phone: 757-723-7742

4/14/09
Date

04/27/09 – attys (2) / file

I certify that the document to which this authentication is affixed is a true copy of a record in the Newport News Circuit Court, that I have custody of the record and I am the custodian of that record.

Rex A. Davis, Clerk

By: _____ D. C.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

C. RAY DAVENPORT, Commissioner of Labor & Industry	)	
Plaintiff,	)	
v.	)	Case No. 04189-PT
HALL & WILSON CONSTRUCTION, INC., d/b/a HALL CONSTRUCTION, INC.	)	
Defendant.	)	

AGREED ORDER

Upon agreement of the parties and the joint representation that the parties have settled the disputes herein, and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED that this case is dismissed. The Clerk shall strike this matter from the docket of this Court, place it among the ended civil cases, and shall send an attested copy of this Order to both counsel of record.

Entered this 16 day of ~~January~~ November, 2009.

(CCPT)

Judge Peter Tench

WE ASK FOR THIS:

C. Ray Davenport,
Commissioner of Labor and Industry

By: _____
Diane L. Duell (VSB No. 27285)
Special Assistant Commonwealth's Attorney
13 South 13th Street
Richmond, Virginia 23219-4101
804.786.4289
804.786.8418 (facsimile)

1

11/18/09 – attys (2) / file

I certify that the document to which this authentication is affixed is a true copy of a record in the Newport News Circuit Court, that I have custody of the record and I am the custodian of that record.

Rex A. Davis, Clerk

By: _____ D. C.

SEEN AND AGREED:

By: _____
William A. Lascara (VSB No. 23118)
James T. Lang (VSB No. 65153)
PENDER & COWARD, P.C.
222 Central Park Avenue, #400
Virginia Beach, Virginia 23462
757.490.3000
757.456.2935 (facsimile)

Counsel for Defendant

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BUCKINGHAM

C. RAY DAVENPORT, Commissioner of Labor and Industry, Plaintiff, v. **LESUEUR-RICHMOND SLATE CORPORATION,** Defendant.	)	Civil Action No. CL-09000041-00

ORDER

This matter came before the Court on Commissioner C. Ray Davenport's ("Commissioner") Motion for Nonsuit as a matter of right pursuant to Va. Code § 8.01-380, and IT APPEARING that on April 6, 2009, the Commissioner filed a Complaint against LeSueur-Richmond Slate Corporation, that no nonsuit has been taken to this cause, and that the defendant, LeSueur-Richmond Slate Corporation, has not filed a cross-bill, it is therefore ADJUDGED, ORDERED AND DECREED that the Commissioner's motion is GRANTED and that this matter be and hereby is nonsuited without prejudice to the filing of another action concerning any of the matters involved, it is FURTHERMORE ORDERED that the Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both parties.

Enter: _____
Judge

Date: 9/2/09

I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

Robert B. Feild

Robert B. Feild (VSB# 23864)
Special Assistant Commonwealth's Attorney
13 South Thirteenth Street
Richmond, VA 23219
804-786-4777, Fax 804-786-8418

COB inst# 09-599

A Copy, Teste:
Buckingham County
Malcolm A. Booker, Jr.
By: Jane Bryant Deputy/Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF LYNCHBURG

C. RAY DAVENPORT, Commissioner of Labor and Industry, *Plaintiff,*	)	
v.	)	Civil Action No. CL 06-488
MC & P BUILDERS, LLC	)	
Defendant.	)	

ORDER NUNC PRO TUNC

This matter came before the Court on Commissioner C. Ray Davenport's ("Commissioner") Motion for Nonsuit as a matter of right pursuant to Va. Code § 8.01-380, and IT APPEARING that on June 14, 2006, the Commissioner filed a complaint against MC & P Builders, LLC., that no nonsuit has been taken to this cause, and that the defendant, MC & P Builders, LLC., has not filed a cross complaint, it is therefore ADJUDGED, ORDERED AND DECREED that the Commissioner's motion is GRANTED and that this matter be and hereby is nonsuited without prejudice as a matter of right pursuant to Va. Code § 8.01-380, it is FURTHERMORE ORDERED that the Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both parties.

Enter: _____
Judge

Date: 12/4/09

I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

Robert B Feild

Robert B. Feild (VSB# 23864)
Special Assistant Commonwealth's Attorney
13 South Thirteenth Street
Richmond, VA 23219
804-786-4777, Fax 804-786-8418

A Copy, Teste:
Larry B. Palmer, Clerk
By: _____, Deputy Clerk

0297

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

C. RAY DAVENPORT, Commissioner of Labor and Industry, *Plaintiff,*	)	
v.	)	Chancery No. CL 09-698
MC & P BUILDERS, LLC.	)	
Defendant.	)	

ORDER

This matter came before the Court on Commissioner C. Ray Davenport's ("Commissioner") Motion for Nonsuit as a matter of right pursuant to Va. Code § 8.01-380, and IT APPEARING that on June 14, 2006, the Commissioner filed a complaint against MC & P Builders, LLC., that no nonsuit has been taken to this cause, and that the defendant, MC & P Builders, LLC., has not filed a cross complaint, it is therefore ADJUDGED, ORDERED AND DECREED that the Commissioner's motion is GRANTED and that this matter be and hereby is nonsuited without prejudice as a matter of right pursuant to Va. Code § 8.01-380, it is FURTHERMORE ORDERED that the Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and shall send an attested copy of this Order to both parties.

Enter: _____
Judge

Date: 9-30-09

I ask for this:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

Robert B Feild

Robert B. Feild (VSB# 23864)
Special Assistant Commonwealth's Attorney
13 South Thirteenth Street
Richmond, VA 23219
804-786-4777, Fax 804-786-8418

A Copy, Teste:
Larry B. Palmer, Clerk
By: _____ Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

C. RAY DAVENPORT, Commissioner of Labor and Industry,	)	
Plaintiff,	)	
v.	)	Civil Action No. CL08-744-00
NASH'S GENERAL CONSTRUCTION, INC., d/b/a NASH ROOFING SPECIALISTS	)	
Defendant.	)	

DEFAULT JUDGEMENT

This cause came to be heard upon Commissioner C. Ray Davenport's Motion for Default Judgment against Nash's General Construction, Inc. d/b/a Nash Roofing Specialists, (Nash) declaring that $6,600.00 in proposed civil penalties arising from a contested Virginia Occupational Safety and Health (VOSH) citation, identified by VOSH Inspection Number 311443485 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 and no has been made in this action on Nash's behalf, it is therefore

ADJUDGED, ORDERED, and DECREED that Plaintiff be awarded judgment by default in this cause against the Defendant, affirming that Nash's General Construction, Inc. d/b/a Nash Roofing Specialists be held liable for payment to the Commonwealth of Virginia of $6,600.00 in civil penalties, arising from contested Virginia Occupational Safety and Health (VOSH) citations

as set out in Inspection Number 311443485. It is also ADJUDGED, ORDERED, and DECREED that the Clerk of this Court shall strike this matter from the docket and place it among the ended chancery cases. The Clerk shall mail certified copies of this order to the Defendant's registered agent and to C. Ray Davenport, Commissioner of Labor and Industry, at 13 South Thirteenth Street, Richmond, Virginia 23219. Pursuant to *Rule* 1:13, endorsement by defense counsel shall be dispensed with.

JUDGE: _____ ENTER: 5/7/09

I ASK FOR THIS:

C. RAY DAVENPORT,
Commissioner of Labor and Industry

By: Robert B. Feild
Counsel

Robert B. Feild (VSB # 23864)
Special Assistant Commonwealth's Attorney
Department of Labor and Industry
13 South Thirteenth Street
Richmond, Virginia 23219-4101
804-786-4777, Fax 786-8418

A COPY TESTE
FRANK D. HARGROVE, JR. CLERK
HANOVER CIRCUIT COURT
By _____
DEPUTY CLERK

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF PULASKI

C. RAY DAVENPORT, Commissioner of Labor and Industry	)	
Plaintiff,	)	
v.	)	Case No. CL08-280
SPECIAL RENOVATIONS, INC.	)	
Defendant.	)	

ORDER

This matter came before the Court for trial on December 16, 2008, based upon Special Renovations, Inc.'s contest of a Virginia Occupational Safety and Health (VOSH) citation and proposed penalty issued to Special Renovations by Commissioner Davenport on December 5, 2008. After hearing all the evidence presented by both parties, the Court rules as follows:

1. Citation 1, item 1, alleging a serious violation of VOSH §1926.501(b)(10) that employees of Special Renovations were not protected from fall hazards while working on a roof more than six feet above the ground is affirmed as an other than serious violation, with a civil penalty of $300.00, to be paid by Special Renovations within fifteen (15) days of the entry of this order. Payment shall be made by check or money order, payable to the Commonwealth of Virginia with the inspection number 311583306 noted on the payment.

Under Virginia Code § 40.1-51.1.E and the VOSH Administrative Regulations Manual § 40, Special renovations shall post a copy of this order for ten (10) working days at its construction sites in Virginia in conspicuous where notices to its employees are usually posted. The Clerk will strike this matter from the docket of this Court and place it among the ended cases. The Clerk shall send an attested copy of this order to all counsel of record.

Entered this 10th day of Feb, 2009

By: _____
Colin R. Gibb
Circuit Court Judge

Seen and objected to with respect to the classification of citation 1, item 1 as other than serious:

Robert B Feild

Robert B. Feild
Special Assistant Commonwealth's Attorney
County of Pulaski
13 South Thirteenth Street
Richmond, Virginia 23219
Tel: 804-786-4777

Seen and objected to with respect to citation 1, item 1 being affirmed:

R. Leonard Vance

R. Leonard Vance, Attorney at Law
VSB #15305
P. O. Box 1591
Midlothian, Virginia 23112
Tel: 804-690-0779

A TRUE COPY
TESTE: MAETTA H. CREWE, CLERK
BY: Alice Dobbins DC

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ACCOMACK

C. RAY DAVENPORT, Commissioner of Labor and Industry,	)	
Plaintiff,	)	
v.	)	Chancery No.: CH05-229
TYSON FOODS, INCORPORATED,	)	
Defendant.	)	

AGREED ORDER

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

1. That the citations attached to the Bill of Complaint are hereby amended as follows:

a) Willful Citation 1, Item 1 is amended to a serious violation of Virginia Code §40.1-51.1A, with an assessed penalty of $7,000.00. The alleged violation description shall be as follows:

> On October 2, 2004, where the employer decided that its employees would not enter permit spaces in accordance with §1910.146(c)(3), the employer did not effectively train its employees regarding confined spaces to prevent them from entering the deboning area waste/debris collection pit, which was designated as a permit required confined space, under §1910.146(g)(1).
>
> The employer had a waste/debris collection pit located in the pump room behind the deboning area. The employer had designated the pit as a permit required confined space and had established a policy under 1910.146(c)(3) that its employees would not enter permit required confined spaces, including the pit. Two employees were assigned by a management representative to use plastic shovels to remove debris and waste from the deboning process that was floating on top of the water inside the pit. During the course of performing the assigned work, one employee fell into the pit and sustained fatal injury.

2. That the Defendant shall pay the total penalty of $7,000.00 within fifteen (15) days of the date of entry of this order. Payment shall be made by check or money order, payable to the Commonwealth of Virginia, with VOSH inspection number 308253400 noted on the payment;

3. That the Defendant shall withdraw its original notice of contest, and hereby waives its right ton contest the remaining terms contained in this Order;

4. That the Defendant shall certify within fifteen (15) days of the entry date of this Order that all violations affirmed in this Order has been abated;

5. That the Defendant shall post a copy of this Order for ten consecutive days, beginning from the date of entry of this Order, at its workplaces in Virginia in a conspicuous location where notices to its employees are generally posted;

6. That this Order shall be construed to advanced the purpose of Virginia Code § 40.1-3;

7. That the Commissioner may use this Order in future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia, or any other authority and the Commissioner may use the affirmed violation of Virginia Code §40.1-51.1A in this order as the basis for a repeat violation for a period of three years from the date of this order;

8. That under Virginia Code § 40.1-51.3;2, the fact of an issues 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. Except for these proceedings, and matters arising out of these proceedings, and any other subsequent VOSH proceedings between the parties, nothing in this agreement no any

foregoing statements, findings or actions taken by the Defendant shall be deemed an admission by the Defendant of the allegations of the citation, said allegations having been specifically denied. Furthermore, the parties agree that the citation, as amended, does not make any changes either, expressed or implied, that the conditions set forth were the cause or proximate cause of any accident or damages. The agreements, statements, findings and actions taken herein are made of the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated. This agreement is not admissible into evidence for any purpose in any other court or adjudication, except for any future proceedings between VOSH and the Defendant.

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

It is ORDER, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court.

Entered this 29 day of June 2009.

The Clerk shall send an attested of this Order to all counsel of record.

Judge

WE ASK FOR THIS:

C RAY DAVENPORT, Commissioner of Labor and Industry

Robert B. Field

Robert B. Field
Special Assistant Commonwealth's Attorney
County of Accomack
13 South Thirteenth Street
Richmond, Virginia 23219
Telephone: (804) 786-4777
Facsimile: (804) 786-8418

Counsel for Commissioner Davenport

SEEN AND AGREED:

TYSON FOODS, INC.

By: _____

Title: Complex Mgr.

And

_____

Mark A. Lies
SEYFARTH SHAW LLP
131 S. Dearborn Street, Suite 2400
Chicago, IL 60603-5577
Telephone: (312) 460-5000
Facsimile : (312) 460-7000

Counsel for Tyson Foods, Inc.

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.
BY _____, Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

C. RAY DAVENPORT, Commissioner of Labor and Industry, Plaintiff, v. **THE WHITING TURNER CONTRACTING COMPANY** Defendant.	)	Civil Action No. CL08-4828

AGREED ORDER

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

1. That the citations attached to the Complaint are hereby amended as follows:

a) Serious Citation 1, Item 1a is reduced to other than serious with no penalty;

b) Serious Citation 1, Item 1b is vacated;

c) Serious Citation 1, Item 2a is vacated;

d) Serious Citation 1, Item 2b is reduced to other than serious with no penalty;

e) Serious Citation 1, Items 2c, 2d and 2e are vacated;

f) Serious Citation 1, Item 3 is reduced to other than serious with no penalty;

g) Serious Citation 1, Item 4a is vacated;

h) Serious Citation 1, Item 4b is reduced to other than serious with no penalty;

CM
SC

i) Serious Citation 1, Item 5 is affirmed with a reduced penalty of $2,000;

j) Serious Citation 1, Items 6a and 6b are reduced to other than serious with no penalty;

k) Serious Citation 1, Item 7 is vacated.

2. That the Defendant shall pay the total penalty of $2,000.00 within fifteen (15) 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 VOSH inspection number 311700850 noted on the payment;

3. That the Defendant shall withdraw its original notice of contest, and hereby waives its right to contest the remaining terms contained in this Order;

4. That the Defendant shall certify within fifteen (15) days of the entry date of this Order that all violations affirmed in this Order have been abated;

5. That the Defendant shall post a copy of this Order for ten consecutive days, beginning from the date of entry of this Order, at its workplaces in Virginia in a conspicuous location where notices to its employees are generally posted;

6. That this Order shall be construed to advance the purpose of Virginia Code § 40.1-3;

7. That the Commissioner may use this Order in future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia, or any other authority;

8. That under Virginia 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. Except for these proceedings, and matters arising out of these proceedings, and any other subsequent VOSH proceedings between the parties, nothing in this agreement nor any foregoing

statements, findings or actions taken by the Defendant shall be deemed an admission by the Defendant of the allegations of the citations, said allegations having been specifically denied. The agreements, statements, findings and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated.

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

It is ORDERED, ADJUDGED, and DECREED that this matter be, and hereby is, dismissed with full prejudice and stricken from the docket of this Court.

Entered this 20th day of Feb 2009.

The Clerk shall send an attested copy of this Order to all counsel of record.

Judge

Everett A. Martin, Jr., Judge

CLERK
COURT
Deputy Clerk
to sign on behalf
of George B. Schaefer
Date: 2-24-09

WE ASK FOR THIS:

C. RAY DAVENPORT, Commissioner of Labor and Industry

Robert B. Field
Special Assistant Commonwealth's Attorney
City of Norfolk
13 South Thirteenth Street
Richmond, Virginia 23219
Telephone: (804) 786-4777
Facsimile: (804) 786-8418

Counsel for Commissioner Davenport

SEEN AND AGREED:

THE WHITING TURNER CONTRACTING COMPANY

Jessica L. Sartorius, VSB No 68622
Venable LLP
8010 Towers Crescent Drive Suite 300
Vienna, Virginia 22182
Telephone: (703) 760-1684
Facsimile: (703) 821-8949

Counsel for The Whiting Turner Contracting Company

Ronald W. Taylor
Venable LLP
750 E. Pratt St., Suite 900
Baltimore, Maryland 21202
(410) 244-7654 (phone)
(410) 244-7742 (fax)

Of Counsel for Defendant The Whiting Turner Contracting Company

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

C. RAY DAVENPORT, Commissioner of Labor & Industry	)	
Plaintiff,	)	
v.	)	Case No. 2008-4354
WILLIAM A. HAZEL, INC.	)	
Defendant	)	

AGREED ORDER

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

1. In settlement of the matters alleged in this action, the citation attached to the Complaint is hereby amended as follows:

   a. Citation 1, Items 1a and 1b are amended from a serious to an other-than-serious violation. Citation 1, item 1c is vacated. The initial penalty of $1875.00 is reduced to $1000.00

2. William A. Hazel, Inc., shall pay the penalty of $ 1000.00 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 VOSH inspection number 309532299 noted on the payment.

3. William A. Hazel, Inc., certifies that the violation alleged in this agreement was abated.

4. As further consideration for the modification of the terms of the original citation, William A. Hazel, Inc., agrees to withdraw its original notice of contest and waives its right to contest the remaining terms contained in this Order.

5. William A. Hazel, Inc., shall post a copy of this Order for a period of thirty (30) days in a conspicuous location where notices to its employees are generally posted.

6. This Order is meant to settle the above contested claims, and is not to be considered an admission of liability by William A. Hazel, Inc. 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. This Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

7. The Clerk shall strike this matter from the docket of this Court, place it among the ended civil cases, and shall send an attested copy of this Order to both counsel of record.

Entered this 27 day of February, 2009.

Judge

WE ASK FOR THIS:

C. Ray Davenport,
Commissioner of Labor and Industry

By: John J. Murray
John J. Murray
Assistant Commonwealth's Attorney
Fairfax County
4110 Chain Bridge Road, Room 123
Fairfax, Virginia 22030
(703) 246-2776
(703) 691-4004 (fax)

By:
Paul J. Waters (VSB No. 47923)
AKERMAN SENTERFITT
SunTrust Financial Centre, Suite 1700
401 East Jackson Street
Tampa, Florida 33602-5230
(813) 223-7333
(813) 223-2837 (fax)

Counsel for William A. Hazel, Inc.

A COPY TESTE:
JOHN T. FREY, CLERK
BY: Annika Powers
Deputy Clerk
Date: 2/27/09
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 & Industry	)	
Plaintiff,	)	
v.	)	Case No. 2008-4355
WILLIAM A. HAZEL, INC.	)	
Defendant	)	

AGREED ORDER

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

1. In settlement of the matters alleged in this action, the citation attached to the Complaint is hereby amended as follows:

   a. Citation 1, Items 1a and 1b are vacated. The penalty of $7,000.00 is vacated;

   b. Citation 1, items 2a and 2b are vacated. The penalty of $4,500.00 is vacated;

   c. Citation 1, item 3 is vacated. The penalty of $4,500.00 is vacated;

   d. Citation 1, items 4a and 4b are reduced from serious to other-than-serious. The initial penalty of $4,500.00 is reduced to $3,375.00; and

   e. Citation 2, items 1a, 1b and 1c are reduced from willful to serious. The initial penalty of $70.000.00 is reduced to $5,250.00

2. William A. Hazel, Inc., shall pay the penalty of $ 8,625.00 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 VOSH inspection number 307354233 noted on the payment.

3. William A. Hazel, Inc., certifies that the violation alleged in this agreement was abated.

4. As further consideration for the modification of the terms of the original citation, William A. Hazel, Inc., agrees to withdraw its original notice of contest and waives its right to contest the remaining terms contained in this Order.

5. William A. Hazel, Inc., shall post a copy of this Order for a period of thirty (30) days in a conspicuous location where notices to its employees are generally posted.

6. This Order is meant to settle the above contested claims, and is not to be considered an admission of liability by William A. Hazel, Inc. 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. This Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

7. The Clerk shall strike this matter from the docket of this Court, place it among the ended civil cases, and shall send an attested copy of this Order to both counsel of record.

Entered this 15 day of April, 2009.

Judge

WE ASK FOR THIS:

C. Ray Davenport,
Commissioner of Labor and Industry

By: John Murray

John J. Murray
Assistant Commonwealth's Attorney
Fairfax County
4110 Chain Bridge Road, Room 123
Fairfax, Virginia 22030
(703) 246-2776
(703) 691-4004 (fax)

By: _____

Paul J. Waters (VSB No. 47923)
AKERMAN SENTERFITT
SunTrust Financial Centre, Suite 1700
401 East Jackson Street
Tampa, Florida 33602-5230
(813) 223-7333
(813) 223-2837 (fax)

Counsel for William A. Hazel, Inc.

A COPY TESTE:
JOHN T. FREY, CLERK

BY: _____
Deputy Clerk

Date: 4/29/05

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 & Industry	)	
Plaintiff,	)	
v.	)	Case No. 2008-4356
WILLIAM A. HAZEL, INC.	)	
Defendant	)	

AGREED ORDER

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

1. In settlement of the matters alleged in this action, the citation attached to the Complaint is hereby amended as follows:

   a. Citation 1, items 1a and 1b are reduced from serious to other-than-serious, with a penalty of $2,250.00; and

   b. Citation 1, item 2a is vacated. Citation 1, item 2b is reduced from serious to other-than-serious. The penalty of $2,250.00 is reduced to $750.00.

2. William A. Hazel, Inc., shall pay the penalty of $ 3,000.00 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 VOSH inspection number 307363853 noted on the payment.

3. William A. Hazel, Inc., certifies that the violation alleged in this agreement was abated.

4. As further consideration for the modification of the terms of the original citation, William A. Hazel, Inc., agrees to withdraw its original notice of contest and waives its right to contest the remaining terms contained in this Order.

5. William A. Hazel, Inc., shall post a copy of this Order for a period of thirty (30) days in a conspicuous location where notices to its employees are generally posted.

6. This Order is meant to settle the above contested claims, and is not to be considered an admission of liability by William A. Hazel, Inc. 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. This Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

7. The Clerk shall strike this matter from the docket of this Court, place it among the ended civil cases, and shall send an attested copy of this Order to both counsel of record.

Entered this 15 day of April, 2009.

Judge

WE ASK FOR THIS:

C. Ray Davenport,
Commissioner of Labor and Industry

By: John Murray
John J. Murray
Assistant Commonwealth's Attorney
Fairfax County
4110 Chain Bridge Road, Room 123
Fairfax, Virginia 22030
(703) 246-2776
(703) 691-4004 (fax)

By:
Paul J. Waters (VSB No. 47923)
AKERMAN SENTERFITT
SunTrust Financial Centre, Suite 1700
401 East Jackson Street
Tampa, Florida 33602-5230
(813) 223-7333
(813) 223-2837 (fax)

Counsel for William A. Hazel, Inc.

A COPY TESTE:
JOHN T. FREY, CLERK
BY: Deputy Clerk
Date: 4/22/09
Original retained in the office of the Clerk of the Circuit Court of Fairfax County, Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

C. Ray Davenport
Plaintiff(s),

v.

William A. Hazel
Defendant(s).

Case No.: 2008-4357

ORDER

This matter came to be heard on the 17th day of November 2009 on the Plaintiff(s)/Defendant(s) motion _____

Upon the matters presented to the Court at the hearing, it is hereby

ADJUDGED, ORDERED, and DECREED as follows:

Citation 1; item 1 is amended to "Unclassified" with a $10,000.00 penalty. Penalty shall be paid within 30 days. This Order is meant to settle the above contested claims not considered to be an admission of liability by Wm Hazel. Pursuant to §40.1-51.3:2 the fact of the issuance of a citation, voluntary payment by a party or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Va. shall not be admissible in evidence in the trial of any action to recover

(over)

Entered this 17 day of November, 2009.

Circuit Court Judge

SEEN AND Agreed

John Murray A.C.A.
Counsel for Plaintiff/Complainant

SEEN AND Agreed

Counsel for Defendant

for personal injury or property damage by any party. This Order may be used for future enforcement actions pursuant to 401 of the Code of Virginia.