

**FINAL ORDERS OF THE VIRGINIA COURTS  
IN CONTESTED CASES ARISING UNDER THE  
VIRGINIA OCCUPATIONAL SAFETY AND HEALTH ACT  
2022**

Digges, Thomas, Commonwealth of Virginia v., Case No. FE-2019-904 (Circuit Court of the County of Fairfax) (criminal case)

Jenkins, Donnie Jr., Commonwealth of Virginia v., Case No. FE-2020-216 (Circuit Court of the County of Fairfax) (criminal case)

J. Sanders Construction Company, Gary G. Pan, Commissioner of Labor and Industry v., Case No. CL22002440-00 (Circuit Court of the County of York and City of Poquoson)

Jacobs, Greg, Gary G. Pan, Commissioner of Labor and Industry v., Case No. CL19000722-00 (Circuit Court of the County of Russell)

Oak City Team Ventures, LLC d/b/a Burn Boot Camp, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL22001165-00 (Circuit Court of the City of Williamsburg/James City County)

Performance Foodservice – Virginia, C. Ray Davenport, Commissioner of Labor and Industry v. Case No. CL21005918-00 (Circuit Court of the County of Henrico)

Proof Mark Corporation, Gary G. Pan, Commissioner of Labor and Industry v., Case No. CL22000070-00 (Circuit Court of the County of Northumberland)

Reliance Well Services, LLC, C. Ray Davenport, Commissioner of Labor and Industry v., Case No. CL21000352-00 (Circuit Court of the County of Buchanan)

Utility Trailer Manufacturing Company, C. Ray Davenport, Commissioner of Labor and Industry v., Record No. 0285-21-3 (Court of Appeals of Virginia)

Utility Trailer Manufacturing Company v. Gary G. Pan, Commissioner of Labor and Industry, Record No. 220117 (Supreme Court of Virginia)

W.A.C., Inc. v. Gary G. Pan, Commissioner of Labor and Industry, CL2022-11479 (Circuit Court of the County of Fairfax)

Whitley/Service Roofing and Sheet Metal Company v. Gary G. Pan, Commissioner of Labor and Industry, CL19000135-00 (Circuit Court of the County of Chesterfield)

Yokohama Tire Manufacturing Virginia, LLC, Gary G. Pan, Commissioner of Labor and Industry v., Case No. CL20000593-00 (Circuit Court of the City of Salem)

**SENTENCING ORDER**

**VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

FEDERAL INFORMATION PROCESSING  
STANDARDS CODE: 059

Hearing Date: **October 28, 2022**

Judge: **ROBERT J. SMITH**

**COMMONWEALTH OF VIRGINIA,**

Versus

**THOMAS DIGGES, Defendant**

This case came before the Court on October 28, 2022, for sentencing of the Defendant, who appeared in person with his Attorney, Peter D. Greenspun. The Commonwealth was represented by J. David Gardy. The Defendant appeared while on bond.

On August 10, 2022, the Defendant entered a guilty plea to the following offense:

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CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
FE-2019-0000904	INVOLUNTARY MANSLAUGHTER (COUNT I) (F)	07/23/2019	18.2-36 MUR0942F5

The pre-sentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code § 19.2-299.

Pursuant to the provisions of Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guideline worksheets. The sentencing guideline worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the Defendant desired to make a statement and if the Defendant desired to advance any reason why judgment should not be pronounced.

The Court, after hearing argument in this case, found the Defendant guilty of the felony of INVOLUNTARY MANSLAUGHTER (COUNT I).

The Court **SENTENCED** the Defendant to:

**INCARCERATION.** Incarceration in the Department of Corrections for a period of ten (10) years. The total sentence imposed is **ten (10) years**.

**SUSPENDED SENTENCE.** The Court further **ORDERED** that all ten (10) years of the sentence be suspended for a period of ten (10) years, upon the following conditions:

**GOOD BEHAVIOR.** The Defendant shall be of good behavior from this day forward until the completion of the sentence, including any period of probation.

**SUPERVISED PROBATION.** The Defendant is placed on probation to commence upon his release from incarceration, under the supervision of a Probation Officer for ten (10) years, or unless sooner released by the Court. The Defendant shall comply with all the rules and requirements set by the Probation Officer.

**COSTS.** The Defendant shall pay all costs of this case.


**CREDIT FOR TIME SERVED.** The Defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187 of the 1950 Code of Virginia, as amended.

The Court further **ORDERED** that Count II be nolle prosequied in this case.

The Court certifies that at all times during these proceedings, the Defendant was present and his Attorney likewise was present and capably represented the Defendant.

The Defendant was released on Probation upon the aforesaid conditions.

Entered on Dec 6, 2022.

  
\_\_\_\_\_  
JUDGE ROBERT J. SMITH

**DEFENDANT IDENTIFICATION:**

Alias: no  
SSN: [REDACTED]  
DOB: 4/15/1971  
SEX: Male

**SENTENCING SUMMARY:**

TOTAL SENTENCE IMPOSED: ten (10) years  
TOTAL SENTENCE SUSPENDED: ten (10) years  
TOTAL TIME TO SERVE: none

**ABSTRACT OF CONVICTION:**

ADDRESS: 1700 N Albemarle St,  
McLean, VA, 22101

SNN/OL#: [REDACTED]	STATE of OPERATOR'S LICENSE: Unknown
STATUTE: 18.2-36	VCC: MUR0942F5
OTN: 059CF1900090401	VIOLATION: State
OL SURRENDERED: No	SEX:
DOO: 07/23/2019	DOB: 4/15/1971

**SENTENCING ORDER**

**VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

FEDERAL INFORMATION PROCESSING  
STANDARDS CODE: 059

Hearing Date: April 6, 2022

Judge: PENNEY S. AZCARATE

**COMMONWEALTH OF VIRGINIA,**

Versus

**DONNIE JENKINS, JR.,** Defendant

This case came before the Court on April 6, 2022, for entry of a plea. The Defendant appeared in person with his attorney Amy L. Wilson. The Commonwealth was represented by J. David Gardy. The Defendant appeared while on bond.

On April 6, 2022, the Defendant was arraigned upon the indictment, and the Defendant, in person and in writing signed by him, entered a plea of guilty to the following offense:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
FE-2020-0000216	INVOLUNTARY MANSLAUGHTER (F)	05/28/2019	18.2-36

4/11/22  
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In consideration of the Defendant's plea of guilty and the evidence proffered, the Court found DONNIE JENKINS, JR., guilty of INVOLUNTARY MANSLAUGHTER, as charged.

The Defendant, in person, advised the Court that he waived his right to a pre-sentence investigation and report and wished to be sentenced today.

Pursuant to the provisions of Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guideline worksheets. The sentencing guideline worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the Defendant desired to make a statement and if the Defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the Defendant to incarceration with the Virginia Department of Corrections for the term of: five years. The total sentence imposed is **five years**.

The Court **SUSPENDS** all five years of the sentence for a period of five years, such period of suspension commencing today, upon the following conditions:

**GOOD BEHAVIOR.** The Defendant shall be of good behavior from this day forward until the completion of the sentence, including any period of probation.

**SUPERVISED PROBATION.** The Defendant is placed on probation to commence immediately, under the supervision of a Probation Officer for one year, or unless sooner released by the Court. The Defendant shall comply with all the rules and requirements set by the Probation Officer.

**COSTS.** The Defendant shall pay all costs of this case.


**RESTITUTION.** The Defendant shall make restitution as set forth in the attached form DC-317, RESTITUTION ORDER.

The Court **grants**, without objection by the Defendant or his Counsel, the Assistant Commonwealth Attorney's motion to nolle prosequi Count II. The Court **ORDERS** that Count II be nolle prosequied.

The Court certifies that at all times during these proceedings, the Defendant was present and his Attorney likewise was present and capably represented the Defendant.

The Defendant was referred for DNA processing and released to Probation upon the aforesaid conditions.

Entered on April 8, 2022.

  
\_\_\_\_\_  
JUDGE PENNEY S. AZCARATE

**DEFENDANT IDENTIFICATION:**

**Alias: None**

**SSN:** [REDACTED]

**DOB: 08/16/1980**

**SEX: Male**

**SENTENCING SUMMARY:**

**TOTAL SENTENCE IMPOSED: Five years**

**TOTAL SENTENCE SUSPENDED: All five years**

**TOTAL SUPERVISED PROBATION: One year**

**ABSTRACT OF CONVICTION:**

**ADDRESS: 9102 Heritage Dr.,  
Culpeper, VA 22701**

**SNN/OL#:** [REDACTED]

**STATE of OPERATOR'S LICENSE: Unknown**

**CHARGE 1:**

**STATUTE: 18.2-36**

**VCC: MUR-0942-F5**

**OTN: 059CF2000021601**

**VIOLATION: State**

**OL SURRENDERED: No**

**SEX: Male**

**DOO: 05/28/2019**

**DOB: 08/16/1980**

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR YORK COUNTY**

**GARY G. PAN**  
Commissioner of Labor and Industry

*Plaintiff,*

v.

Civil Action No. CL22002440-00

**J. SANDERS CONSTRUCTION  
COMPANY**

*Defendant.*

**FINAL ORDER**

This matter came before the Court on the parties' Joint Motion to Dismiss the Complaint of plaintiff Gary G. Pan, Commissioner of Labor and Industry (Commissioner), originally filed on December 3, 2021, against the defendant J. Sanders Construction Company (JSC), and IT APPEARING that the Commissioner and JSC have subsequently settled all outstanding issues through a separate Settlement Agreement, attached to this Order; upon agreement of the parties and for good cause show, it is therefore ADJUDGED, ORDERED, AND DECREED that:

The Joint Motion to Dismiss is GRANTED and that this matter be and hereby is dismissed with prejudice.

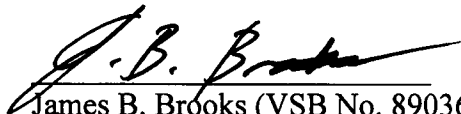
The Clerk will strike this matter from the docket of this Court, place it among the ended civil cases, and shall send an attested copy of this Order to both

counsel of record.

Entered this 28 day of September 2022.

By:   
Circuit Court Judge

We ask for this:



James B. Brooks (VSB No. 89036)  
Special Assistant Commonwealth's Attorney  
York County  
c/o Department of Labor and Industry  
600 East Main Street, Suite 207  
Richmond, VA 23219  
Tel.: 804-786-0610  
Fax: 804-786-8418  
Email: james.brooks@doli.virginia.gov  
*Counsel for the Commissioner*

Seen and agreed:



Samantha Bohannon (VSB No. 84092)  
BOHANNON & ASSOCIATES, PLLC  
704 Main Street  
P. O. Box 1381  
West Point, Virginia 23181  
Tel.: 804-843-3656  
Fax: 804-843-4778  
Email: samantha@bohannon-legal.com  
*Counsel for J. Sanders Construction Company*

**Attachment:  
Settlement Agreement**

**Gary G. Pan**  
Commissioner of Labor and Industry  
Commonwealth of Virginia  
Department of Labor and Industry  
Main Street Centre  
600 East Main Street, Suite 207  
Richmond, VA 23219

**J. Sanders Construction Co.**  
Carrol J. Sanders Jr.  
Officer of the Corporation  
3240 King William Avenue  
West Point, VA 23181

**SETTLEMENT AGREEMENT**  
Inspection No. 1446627

**THIS AGREEMENT** is made this 24 day of August 2022, is entered into by the Commonwealth of Virginia, Commissioner of Labor and Industry Gary G. Pan (the Commissioner) and by J. Sanders Construction Company (the Employer).

WHEREAS, on January 23, 2020, the Commissioner issued citations to the Employer alleging six violations of Virginia Occupational Safety and Health (VOSH) Standards for Construction and assessing a total of \$18,380.00 in proposed penalties;

WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations under Va. Code § 40.1-49.4(E) in the York County Circuit Court against the Employer, case number C1.22002440-00; and

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

NOW, THEREFORE, the parties agree to the following:

## **TERMS AND CONDITIONS OF AGREEMENT**

1. Upon full execution of the Agreement the Commissioner modifies the citations and monetary penalties in Inspection Number 1446627 in the following manner:
  - a. Citation 1, Item 1 is vacated as a Serious violation; the \$4,990.00 proposed penalty is withdrawn.
  - b. Citation 1, Item 2a is affirmed as a Serious violation; the \$4,990.00 proposed penalty is reduced to \$2,495.00.
  - c. Citation 1, Item 2b is affirmed as a Serious violation; the \$0.00 proposed penalty is maintained.
  - d. Citation 1, Item 3 is vacated; the \$4,200.00 proposed penalty is withdrawn.
  - e. Citation 1, Item 4a, upon receipt of a sworn affidavit from the mechanic, stating under penalty of perjury pursuant to Va. Code § 8.01-4.3, that he checked the seatbelt on the excavator and found it to be in working order, this violation is vacated and the proposed penalty is withdrawn.
  - f. Citation 1, Item 4b, upon receipt of a sworn affidavit from the mechanic, stating under penalty of perjury pursuant to Va. Code § 8.01-4.3, that the JCB Vibromax roller-vibrating compactor, the Case front loaders, 21BXT and 486FLL, all are equipped with and have working horns, this violation is vacated and the proposed penalty is withdrawn.
2. The Commissioner, upon execution of this Settlement Agreement, will modify Citation 1, Item 1 by: redacting the Alleged Violation Description, removing the reference to the Case mini excavator MTS CX55B, and properly identifying the JCB Vibromax roller-vibrating compactor.
3. The Commissioner, upon execution of this Settlement Agreement, will modify Citation 1, Item 4b by: redacting the Alleged Violation Description, removing reference to the JCB Vibromax roller-vibrating compactor, and properly identifying the Case front loaders.

4. The Employer, upon execution of this Settlement Agreement, will pay the Commonwealth \$2,495.00 in payment of the penalty assessed for the above violation. Payment must be received within thirty days from the date this Settlement Agreement is executed. Payment must be made in the form of a check or money order, payable to the "Commonwealth of Virginia", with the VOSH inspection number 1446627, listed on the check or money order. Payment must be mailed to: Department of Labor and Industry, Main Street Centre, 600 East Main Street, Suite 207, Richmond, Virginia, 23219.
5. The Employer, upon execution of this Settlement Agreement, will mail all affidavits by the mechanic required by paragraph 1 of this Agreement to: Department of Labor and Industry, ATTN: James Brooks, Main Street Centre, 600 East Main Street, Suite 207, Richmond, Virginia, 23219. The affidavits are due to the Department of Labor and Industry within thirty calendar days of the execution of this Agreement.
6. It is expressly understood that any modification to citation classification or penalty level, or any vacating of a citation or penalty in this Agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this Agreement or to make a penalty payment by the due date constitutes a breach of this Agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable fifteen calendar days following the breach.
7. The Employer certifies the violations referred to in this Agreement have been abated.
8. Upon execution of the Agreement, counsel for the Commissioner will prepare a Joint Motion and Order to Dismiss the Case with prejudice. Once signed by the parties, the Joint Motion and Order to Dismiss will be filed with the York County Circuit Court, under the expectation that the Case, CL22002440-00, will be dismissed and the matter filed among the Court's closed cases. Under 16 Va. Admin. Code § 25-60-340(F), this Agreement shall be made an exhibit and incorporated into the dismissal order.

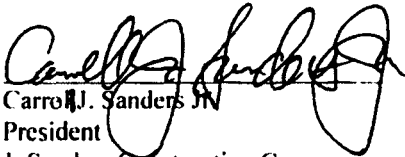
9. As consideration for the modification of the terms of the original citation, the Employer agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this Agreement. The Employer certifies that the violations alleged in this Agreement have been corrected and abated.
10. The Employer will post a copy of this Settlement Agreement for ten working days at each work site in Virginia in a conspicuous location where it generally posts notices to its employees as required by 16 Va. Admin. Code § 25-60-40.
11. This Agreement settles the above contested claims. Under Va. Code § 40.1-51.3:2 the fact of an issuance of a citation under Chapter 3 of Title 40.1 of the Code of Virginia will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This Agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.
12. This Agreement *shall not* be construed as an admission by the Employer of civil or criminal liability for any violation or penalty alleged by the Commissioner.
13. The citations and penalties, as modified above, and any new obligations contained in this Agreement, are a final order of the Commissioner of Labor and Industry.
14. This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, and shall also bind and inure to the benefit of any successor in interest of the Employer, except that the Employer may not assign any right or obligation flowing from this Agreement.
15. This Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Agreement constitutes the entire agreement between the parties concerning the aforesaid settlement and citations, and all prior negotiations, offers, and agreements, whether written or oral, are either superseded or merged in this document. This agreement cannot be amended except by a writing signed by the parties.

16. A court's ruling rendering any provision of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.
17. Each person signing this Agreement hereby represents and warrants that he or she has the authority to bind the entity on behalf of which he or she has signed.
18. This Agreement may be executed in any number of copies, each of which shall be deemed a counterpart original.

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IN WITNESS WHEREOF, the Commissioner and the Employer, intending to be legally bound, duly acknowledges and executes this Settlement Agreement for Inspection Number 1446627.

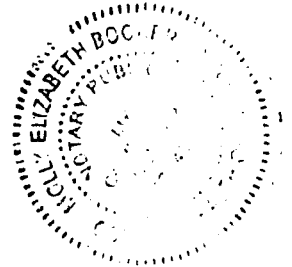
J. Sanders Construction Company

By:   
Carrol J. Sanders Jr.  
President  
J. Sanders Construction Co.

8/24/2022  
Date

Commonwealth of Virginia, AT LARGE, to wit:

The foregoing instrument was acknowledged before me this 24 day of August 2022, by Carrol J. Sanders Jr., President of J. Sanders Construction Company.



  
Notary Public

Commission No.: 7384868

Commission expires: 9/30/2024

Gary G. Pan,  
COMMISSIONER OF LABOR AND INDUSTRY

By:   
Marta Espadas, Director  
Occupation Safety Compliance

9/1/22  
Date

VIRGINIA:                   IN THE CIRCUIT COURT OF THE COUNTY OF RUSSELL

GARY G. PAN,  
Commissioner of Labor and Industry,

*Plaintiff.*

Case No. CL19000722-00

v.

GREG JACOBS,

*Defendant.*

**JOINT MOTION AND FINAL ORDER OF DISMISSAL**

This matter comes before the Court on the Joint Motion of Gary G. Pan, Commissioner of Labor and Industry, and Defendant Greg Jacobs, advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as **Exhibit A** pursuant to 16 Va. Admin. Code § 25-60-340(F), and

FURTHER that Gary G. Pan has succeeded Plaintiff C. Ray Davenport as Commissioner of Labor and Industry and is to be substituted as Plaintiff in this action, therefore

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

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

ADJUDGED, ORDERED and DECREED that (1) Gary G. Pan, Commissioner of Labor and Industry is substituted as plaintiff in this matter, and (2) the Joint Motion to Dismiss is GRANTED and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

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

Entered this 30<sup>th</sup> day of AUGUST, 2022.

A COPY TESTE

ANN S. McREYNOLDS, CLERK

Kathy Huff D. CLERK



Michael J. Moore  
Judge

We ask for this:

Alex W. West

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

*Counsel for the Commissioner*

Seen and agreed:

Waived pursuant to Rule 1:13

Greg Jacobs  
P.O. Box 806  
Castlewood, VA 24224

*Defendant pro se*

**GARY G. PAN**  
Commissioner of Labor and Industry

**GREG JACOBS**

Inspection Number 1193003

**SETTLEMENT AGREEMENT**

**THIS AGREEMENT** is entered into by Gary G. Pan, Commissioner of Labor and Industry (Commissioner) and Greg Jacobs.

WHEREAS, on or about May 15, 2017, the Commissioner issued citations to Greg Jacobs alleging two Serious violations and one Other than Serious violation of the Virginia Occupational Safety and Health (VOSH) Standards for General Industry. A total of \$14,100.00 in penalties was proposed by the Commissioner along with the violation. (Copy of the citation attached by reference hereto).

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

WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations pursuant to Va. Code § 40.1-49.4(E) in the Russell County Circuit Court, case number CL19000722-00 (the "Litigation"); and

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

NOW, THEREFORE, the parties agree to the following:

**TERMS AND CONDITIONS OF AGREEMENT**

1. Upon full execution of the agreement, the Commissioner will modify the citations as follows:
  - a. Serious Citation 1, Item 1 is affirmed, subject to paragraph 2 as to payment of the penalty and vacation for no further violations within six months of the date of this agreement.
  - b. Serious Citation 1, Item 2 is reclassified as Other-than-Serious with the penalty of \$2,100.00.
  - c. Other-than-Serious Citation 2, Item 1 is affirmed with a reduced penalty of \$900.00.



2. If Greg Jacobs does not commit any further violations of the VOSH Act (Va. Code § 40.1-49.3, *et seq.*) or VOSH regulations enforced by the Commissioner, for a period of six (6) months after the date of this agreement, the Commissioner will vacate Citation 1, Item 1, including the \$7,000.00 proposed penalty. However, should Greg Jacobs commit any such violation, as embodied in a final order of the Commissioner or a court of competent jurisdiction, the penalty of \$7,000.00 will become due and payable immediately upon the effective date of the final order for the subsequent violation.

3. The Employer agrees to pay, and the Commissioner agrees to accept, partial payments toward the total penalty amount pursuant to the following schedule:

- a. Employer to pay to Commissioner an initial payment of \$83.45 no later than August 1, 2022;
- b. On or before September 1, 2022 and the first each month thereafter through July 1, 2025 payment in the amount of \$83.33 (for a total of 36 payments).

4. Any monthly payment not received on or before the tenth (10th) day of the month will be considered a material breach of this Agreement. All payments shall be made payable to "Treasurer of Virginia" and mailed or delivered to:

Virginia Department of Labor and Industry  
c/o Accounting  
600 E Main Street, Suite 207  
Richmond, VA 23219

Employer shall place a reference to "Inspection number 1193003" on any forms of payment.

5. Pursuant to Va. Code § 2.2-614.1(C), returned checks or dishonored credit card or debit card payments may incur a handling fee of the greater of \$35.00 or the amount of the costs charged by the financial institution, and shall not be considered timely payment.

6. So long as no material breach occurs, the Commissioner agrees to waive any interest and administrative costs otherwise assessable pursuant to Va. Code §§ 40.1-49.4(A)(1)(4) and 2.2-4805.

7. Greg Jacobs represents and affirms under penalty of perjury and pursuant to Va. Code § 40.1-51.4:2 that he does not employ any employees as of the date of this Agreement, and similarly did not employ Timothy Collins or Chris Harden on November 18, 2016.

8. Pursuant to the affirmation in paragraph 4 by Greg Jacobs, the Commissioner agrees that any abatement obligation for the citation items is moot.

9. Upon execution of this Agreement in full, the Commissioner will file a motion to dismiss the Litigation. Greg Jacobs agrees to endorse (or to instruct any legal counsel to endorse)

such an order as "seen and agreed" and to take no steps to hinder the entry of such an order. Pursuant to 16 Va. Admin. Code § 25-60-340(F), this Agreement shall be made an exhibit and incorporated into the dismissal order.

10. This Agreement shall not be construed as an admission by Greg Jacobs of civil or criminal liability for any violation or penalty alleged by the Commissioner. Greg Jacobs represents that he is entering into this Agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid further litigation. Neither this Agreement nor Greg Jacobs's consent to entry of a final order of the Commissioner pursuant to this Agreement shall constitute an admission by him of a violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations, or standards promulgated thereunder. Neither this Agreement nor any order of the Commissioner entered pursuant to this Agreement shall be offered, used, or admitted in evidence in any proceeding or litigation, whether civil or criminal, other than a proceeding arising under VOSH laws, regulations, or standards. Greg Jacobs is entering into this Agreement without any prejudice to his right to assert in any subsequent action or proceeding that any future existing conditions identical or similar to those alleged in the original citation do not violate the VOSH laws, regulations, or standards promulgated thereunder. By entering into this Agreement, Greg Jacobs does not admit the truth of any alleged facts, any of the characterization of his alleged conduct or any conclusions set forth in the citation or issued in this matter.

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

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

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

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

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

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

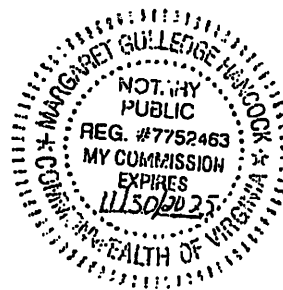
17. A court's ruling rendering any provision(s) of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.

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

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

**GREG JACOBS**

Greg Jacobs (SEAL) 8-15-22  
Date



State of Virginia, City/County of Russell;  
to wit:

The foregoing instrument was acknowledged before me this 15<sup>th</sup> day of August, 2022 by Greg Jacobs.

Margaret Gullledge Hancock  
Notary Public

My commission expires: 11/30/2025  
Registration # 7752463

**GARY G. PAN**  
**COMMISSIONER OF LABOR AND INDUSTRY**

By: [Signature] (SEAL) 8/23/22  
Date  
María Fernandes  
Director, Occupational  
Safety Compliance

VIRGINIA:           IN THE CIRCUIT COURT OF THE COUNTY OF JAMES CITY AND  
                          CITY OF WILLIAMSBURG

GARY G. PAN,  
Commissioner of Labor and Industry,

*Plaintiff.*

Case No. CL22001165-00

v.

OAK CITY TEAM VENTURES, LLC,  
d/b/a Burn Boot Camp

*Defendant.*

**JOINT MOTION AND FINAL ORDER OF DISMISSAL**

This matter comes before the Court on the Joint Motion of Plaintiff Gary G. Pan, Commissioner of Labor and Industry, and Defendant Oak City Team Ventures, LLC, advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as **Exhibit A** pursuant to 16 Va. Admin. Code § 25-60-340(F), and

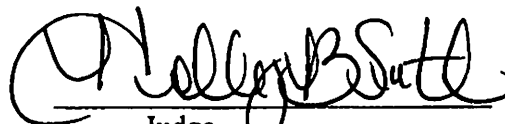
IT APPEARING that as part of said settlement agreement, the Defendant withdraws its notice of contest of the citations at issue; and therefore the parties seek dismissal with prejudice of Plaintiff's Complaint.

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

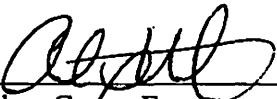
ADJUDGED, ORDERED and DECREED that the Joint Motion to Dismiss is GRANTED and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

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

Entered this 27<sup>th</sup> day of July, 2022.

  
Judge HOLLY B. SMITH


We ask for this:

  
\_\_\_\_\_  
Nathan Green, Esq.  
Commonwealth's Attorney  
James City County/City of Williamsburg  
5201 Monticello Avenue, Suite 4  
Williamsburg, VA 23188

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

Seen and agreed:

**OAK CITY TEAM VENTURES, LLC**

By:   
\_\_\_\_\_  
John K. Byrum, Jr., Esq. (VSB # )  
Woods Rogers Vandeventer Black  
901 East Byrd Street, Suite 1550  
Richmond, VA 23219  
Telephone: (804) 343-5027  
Email: jbyrum@woodsrogers.com  
*Counsel for the Defendant*

**GARY G. PAN**  
Commissioner of Labor and Industry

**OAK CITY TEAM VENTURES, LLC**  
d/b/a **Burn Boot Camp**

Inspection Number 1515955

### SETTLEMENT AGREEMENT

**THIS AGREEMENT** is entered into by Gary G. Pan, Commissioner of Labor and Industry (Commissioner) and Oak City Team Ventures, LLC d/b/a Burn Boot Camp (Employer).

WHEREAS, on or about July 30, 2021, the Commissioner issued citations to the employer alleging one Willful-Serious violation of the Virginia Occupational Safety and Health (VOSH) Final Permanent Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus that Causes COVID-19 (FPS). A total of \$22,000.00 in penalties was proposed by the Commissioner along with the violation. (Copy of the citation attached by reference hereto).

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

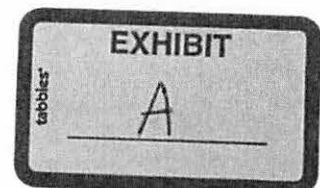
WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations pursuant to Va. Code § 40.1-49.4(E) in the City of Williamsburg/James City County Circuit Court, case number CL22001165-00 (the "Litigation"); and

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

NOW, THEREFORE, the parties agree to the following:

### TERMS AND CONDITIONS OF AGREEMENT

1. Upon full execution of the agreement, the Commissioner will modify the citations as follows: Willful-Serious Citation 1, Item 1 is reclassified as Willful-Other-than-Serious with a reduced monetary penalty of \$7,000.00.
2. The Employer agrees to pay, and the Commissioner agrees to accept, partial payments toward the total penalty amount pursuant to the following schedule:
  - a. Employer to pay to Commissioner an initial payment of \$500.00 no later than August 1, 2022;



b. On or before September 1, 2022 and the first each month thereafter through September 1, 2023 payment in the amount of \$500.00 (at total of 14 monthly payments.)

3. Any monthly payment not received on or before the tenth (10th) day of the month will be considered a material breach of this Agreement. All payments shall be made payable to "Treasurer of Virginia" and mailed or delivered to:

Virginia Department of Labor and Industry  
c/o Accounting  
600 E Main Street, Suite 207  
Richmond, VA 23219

Employer shall place a reference to "Inspection number 1515955" on any forms of payment.

4. Pursuant to Va. Code § 2.2-614.1(C), returned checks or dishonored credit card or debit card payments shall incur a handling fee of the greater of \$35.00 or the amount of the costs charged by the financial institution, and shall not be considered timely payment.

5. So long as no material breach occurs, the Commissioner agrees to waive any interest and administrative costs otherwise assessable pursuant to Va. Code §§ 40.1-49.4(A)(1)(4) and 2.2-4805.

6. All violations are noted as abated, as the cited regulations have been repealed or otherwise withdrawn. The Employer acknowledges its continuing obligations under Va. Code § 40.1-51.1(A) (the "General Duty Clause"), and is aware of the Department of Labor and Industry's March 1, 2022 Guidance for Employers to Mitigate the Risk of COVID-19 to Workers, accessible at [http://www.doli.virginia.gov/wp-content/uploads/2022/03/DOLI-Guidance-for-Employers-to-Mitigate-the-Risk-of-COVID-19-to-Workers-03.01.2022\\_Final.pdf](http://www.doli.virginia.gov/wp-content/uploads/2022/03/DOLI-Guidance-for-Employers-to-Mitigate-the-Risk-of-COVID-19-to-Workers-03.01.2022_Final.pdf).

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

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

proceeding that any future existing conditions identical or similar to those alleged in the original citations do not violate the VOSH laws, regulations or standards promulgated thereunder.

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

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

11. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due per paragraphs 2-3 of this Agreement. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.

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

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

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

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

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

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

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

**OAK CITY TEAM VENTURES, LLC**  
d/b/a BURN BOOT CAMP

By: [Signature] (SEAL) 6-11-22  
Date

Name: Scott Tobin  
Its: owner

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

The foregoing instrument was acknowledged before me this 11<sup>th</sup> day of July, 2022 by Monika S. Patel on behalf of Scott Tobin.



Monika S. Patel  
Notary Public

My commission expires: June 16, 2025

**GARY G. PAN**  
COMMISSIONER OF LABOR AND INDUSTRY

By: [Signature] (SEAL) 7/13/22  
Date  
Ron Graham  
Director, Occupational  
Health Compliance

VIRGINIA: CIRCUIT COURT OF THE CITY OF WILLIAMSBURG & COUNTY OF JAMES CITY: I CERTIFY THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THIS COURT AND I AM THE CUSTODIAN OF THAT RECORD.  
MONA A. FOLEY, CLERK

BY: [Signature] Dep. Clerk

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR HENRICO COUNTY**

**GARY G. PAN**  
Commissioner of Labor and Industry

*Plaintiff,*

v.

Civil Action No. CL21005918-00

**PERFORMANCE FOODSERVICE  
– VIRGINIA**

*Defendant.*

**FINAL ORDER**

This matter came before the Court on the parties' Joint Motion to Dismiss the Complaint of plaintiff Gary G. Pan, Commissioner of Labor and Industry (Commissioner), originally filed on September 3, 2021, against the defendant Performance Foodservice – Virginia (PFS), and IT APPEARING that the Commissioner and PFS have subsequently settled all outstanding issues through a separate Settlement Agreement, attached to this Order; upon agreement of the parties and for good cause show, it is therefore ADJUDGED, ORDERED, AND DECREED that:

The Joint Motion to Dismiss is GRANTED and that this matter be and hereby is dismissed with prejudice.

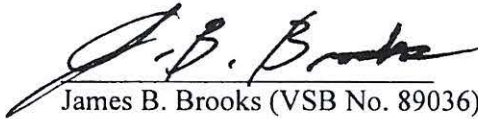
The Clerk will strike this matter from the docket of this Court, place it among the ended civil cases, and shall send an attested copy of this Order to both

counsel of record.

Entered this 26 day of May 2022.

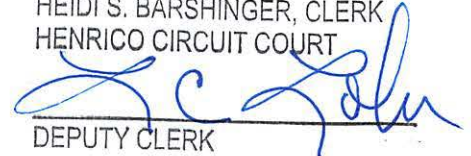
By:   
Circuit Court Judge

We ask for this:

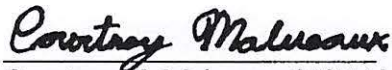


James B. Brooks (VSB No. 89036)  
Special Assistant Commonwealth's Attorney  
Henrico County  
c/o Department of Labor and Industry  
600 East Main Street, Suite 207  
Richmond, VA 23219  
Tel.: 804-786-0610  
Fax: 804-786-8418  
Email: james.brooks@doli.virginia.gov  
*Counsel for the Commissioner*

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

  
DEPUTY CLERK

Seen and agreed:



Courtney M. Malveaux (VSB No. 51064)

D. Paul Holdsworth (VSB No. 89258)

JACKSON LEWIS P.C.

701 East Byrd Street, 17th Floor

Richmond, Va. 23219

Tel.: 804-212-2862

Fax: 804-649-0403

Email: courtney.malveaux@jacksonlewis.com

*Counsel for Performance Foodservice – Virginia*

*Signed w/ permission by  
James B. Brooks on  
5/23/22*

**Attachment:**  
**Settlement Agreement**

**GARY G. PAN**  
Commissioner of Labor and Industry

**PERFORMANCE FOODSERVICE – VIRGINIA**  
Inspection No. 1491394

**SETTLEMENT AGREEMENT**

**THIS AGREEMENT**, made on this 17 day of May 2022 is entered into by the Commonwealth of Virginia, Commissioner of Labor and Industry (“Commissioner”) with Performance Foodservice – Virginia (the “Employer”) (collectively, the “Parties”).

WHEREAS, on October 27, 2020, the Commissioner issued safety citations to the Employer alleging two Serious violations of the Virginia Occupational Safety and Health (VOSH) Standards and one Other-than-Serious violation, Inspection Number 1491394 and assessing a total of \$21,400.00 proposed penalties;

WHEREAS, the Employer filed a notice of contest of the violation and penalty contained in the citation within fifteen working days from the date of the receipt of the citations, as provided by § 40.1-49.4 of the Code of Virginia;

WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations under Va. Code § 40.1-49.4(E) in the Henrico County Circuit Court against the Employer, Case Number CL21005918-00; and

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

NOW, THEREFORE, the Parties agree to the following:

## **TERMS AND CONDITIONS OF AGREEMENT**

1. **Upon full execution of the Agreement, the Commissioner modifies the citations and monetary penalties in Inspection Number 1491394 in the following manner:**
  - a. **Citation 1, Item 1 is reclassified from Serious to Other-than-Serious; the \$8,125.00 proposed penalty is reduced to \$6,075.00.**
  - b. **Citation 1, Item 2 is reclassified from Serious to Other-than-Serious; the \$13,275.00 proposed penalty is reduced to \$9,925.00.**
  - c. **Citation 2, Item 1 is affirmed as an Other-than-Serious violation; the \$0.00 proposed penalty is maintained.**
2. **The Employer, upon execution of this Settlement Agreement, will pay the Commonwealth \$16,000.00 in payment of the penalties assessed for the above violations. Payment must be received within thirty days from the date this settlement agreement is executed. Payment must be made in the form of a check or money order, payable to the "Commonwealth of Virginia", with the VOSH Inspection Number 1491394, listed on the check or money order. Payment must be mailed to: Department of Labor and Industry, Main Street Centre, 600 East Main Street, Suite 207, Richmond, Virginia, 23219.**
3. **The Employer, upon execution of this Agreement, will decrease the speed of powered industrial trucks ("PIT") used by new operators who have not been trained by the Employer. The Employer will decrease the speed by adjusting the governors on PITs used by such new operators.**
4. **Upon execution of this Agreement, counsel for the Commissioner will prepare a Joint Motion and Order to Dismiss the Case with prejudice. Once signed by the parties, the Joint Motion and Order to Dismiss will be filed with the Henrico County Circuit Court, under the expectation that the Case, CL21005918-00, will be dismissed and the matter filed among the Court's closed cases. Under 16 Va. Admin. Code § 25-60-340(F), this Agreement shall be made an exhibit and incorporated into the dismissal order.**
5. **The Employer represents that it is entering into this Agreement in the spirit of conciliation and cooperation in an effort to avoid litigation. This Agreement shall not be construed as an admission by the Employer of**

**civil or criminal liability for any violation or penalty alleged by the Commonwealth. By entering into this Agreement, the Employer does not admit the truth of any alleged facts, any of the characterization of Employer's alleged conduct, or any conclusions set forth in the citations issued in this matter. Neither this Agreement nor the Employer's consent to entry of a final order of the Commissioner under this Agreement shall constitute an admission by the Employer of violation of VOSH laws, regulations, or standards promulgated thereunder.**

- 6. It is expressly understood that any modification to the citations' penalty levels is contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable fifteen calendar days following the breach.**
- 7. The Employer certifies that the cited violations referred to in this Agreement have been abated.**
- 8. As consideration for the modification of the terms of the original penalty amount, the Employer agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this Agreement.**
- 9. The Employer will post a copy of this Settlement Agreement for ten working days at the work site in a conspicuous location where it generally posts notices to its employees as required by 16 VAC § 25-60-40.**
- 10. This Agreement settles the above contested claims. Under Va. Code § 40.1-51.3:2, the fact of an issuance of a citation under Chapter 3 of Title 40.1 of the Code of Virginia will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This Agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.**
- 11. This Agreement *shall not* be construed as an admission by the Employer of civil or criminal liability for any violation or penalty alleged by the Commissioner.**

12. The citations and penalties, as modified above and any new obligations contained in this Agreement, are a final order of the Commissioner of Labor and Industry.
13. This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, and shall also bind and inure to the benefit of any successor in interest of the Employer, except that the Employer may not assign any right or obligation flowing from this Agreement.
14. This Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Agreement constitutes the entire agreement between the parties concerning the aforesaid settlement and citations, and all prior negotiations, offers, and agreements, whether written or oral, are either superseded or merged in this document. This agreement cannot be amended except by a writing signed by the parties.
15. A court's ruling rendering any provision of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.
16. Each person signing this Agreement hereby represents and warrants that he or she has the authority to bind the entity on behalf of which he or she has signed.
17. This Agreement may be executed in any number of copies, each of which shall be deemed a counterpart original.

**REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK;  
SIGNATURE PAGE TO FOLLOW**

**PERFORMANCE FOODSERVICE - VIRGINIA**

By:  5/17/2022  
Date

Title: VP, Deputy General Counsel

**GARY G. PAN,**  
**Commissioner of Labor and Industry**

By:  5/17/2022  
Date  
Marta Fernandes, Director  
Occupational Safety Compliance

#202200314  
9 pgs

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR NORTHUMBERLAND COUNTY**

**GARY G. PAN**  
Commissioner of Labor and Industry

*Plaintiff,*

v.

Civil Action No. CL22000070-00

**PROOF MARK CORPORATION**

*Defendant.*

**ORDER**

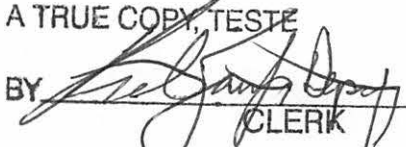
This cause came to be heard upon Commissioner Gary G. Pan's (the Commissioner) Motion for Default Judgment against Proof Mark Corporation (Proof Mark), declaring that the contested Virginia Occupational Safety and Health (VOSH) citation, and associated \$3,675.00 in proposed civil penalties, also identified by VOSH Inspection Number 1454389 and as attached to the Commissioner's Complaint, be upheld.

UPON CONSIDERATION WHEREOF, it appearing to the Court that more than twenty-one days have elapsed since service of process on Proof Mark, and that no responsive pleadings have been filed by the same, nor has an appearance been made in this action on Proof Mark's behalf.

It is therefore ADJUDGED, ORDERED, and DECREED that the Plaintiff Commissioner be awarded judgment by default in this cause against the

A TRUE COPY, TESTE

BY

  
CLERK

 **ORIGINAL**



**Defendant, affirming the VOSH citations, and that Proof Mark be held liable for payment to the Commonwealth of Virginia of a \$3,675.00 civil penalty, arising from the contested VOSH citations as set out in Inspection Number 1454389.**

**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 civil cases. The Clerk shall mail certified copies of this order Proof Mark Corporation's Registered Agent, James W. S. Wilson, at 2490 Hacks Neck Road, Heathsville, Virginia, 22473; and to the Commissioner's counsel, James Brooks, at Main Street Centre, 600 East Main Street, Suite 207, Richmond, Virginia, 23219. Under Rule 1:13, endorsement by defense counsel shall be**


dispensed with.

ENTERED this 25<sup>th</sup> day of August 2022

  
Hon. Roy Michael McKenney, Judge

I ASK FOR THIS:

**GARY G. PAN,**  
Commissioner of Labor and Industry

By:   
James B. Brooks (VSB No. 89036)  
Special Assistant Commonwealth's Attorney  
Northumberland County  
c/o Department of Labor and Industry  
600 East Main Street, Suite 207  
Richmond, Virginia, 23219  
Tel.: 804-786-0610  
Fax: 804-786-8418  
Email: james.brooks@doli.virginia.gov

Mailed cert. copies to PLT's counsel & DIF  
8-25-22

**Violation Worksheet**

Print Date : 03/19/2020

<b>Inspection Number</b>	1454389
<b>Opt. Insp. Number</b>	011-20

<b>Establishment Name</b>	Proof Mark Corporation				
<b>DBA Name</b>					
<b>Type Of Violation</b>	Serious	<b>Citation Number</b>	1	<b>Item/Group</b>	1 /
<b>Number Exposed</b>	2	<b>No. Instances</b>	1	<b>REC</b>	Complaint
<b>Special Enforcement?</b>				<b>Employer's Relationship to Hazard</b>	All
<b>Standard</b>	1910.1025(e)(3)(f)				
<b>Substance Codes</b>				<b>Photo/Video Number</b>	
<b>Alleged Violation Description</b>	<p>1910.1025(e)(3)(f): Each employer shall establish and implement a written compliance program to reduce exposures to or below the permissible exposure limit, and interim levels if applicable, solely by means of engineering and work practice controls in accordance with the implementation schedule in paragraph (e)(1).</p> <p>a) At this establishment, the employer did not establish a written compliance program for employees exposed to lead dust while melting, manufacturing, and packaging lead core small arms ammunition.</p>				
<b>Recommended Abatement Action</b>	The employer shall establish and implement a written compliance program.				

**Penalty**

<b>Severity</b>	Medium		
<b>Severity Justification</b>	Lead Poisoning.		
<b>Probability</b>	Lesser		
<b>Probability Justification</b>	The employer does provide gloves and D-lead soap for employee use.		
<b>Number of Times Repeated</b>			
<b>Gravity</b>	Moderate	<b>Gravity based Penalty</b>	8400.00
<b>Multiplier</b>		<b>Size</b>	70%
<b>Good Faith</b>	0%	<b>History</b>	10%
<b>Calculated Penalty</b>	1680.00	<b>Proposed Penalty</b>	1680.00
<b>Proposed Penalty Justification:</b>	Size and History.		

**Abatement Details**

<b>Days to Abate</b>	30 Cal Days	<b>Abatement Status</b>	
<b>User-entered Abatement Due Date</b>		<b>Date Abated</b>	
<b>Abatement Documentation Required?</b>	Yes	<b>Date Verified</b>	
<b>Abatement Completed Description:</b>			

**MultiStep Abatement**

Type/Other Type	Days to abate	User entered Abatement Due Date	Completed(status)	Verify Date
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**Employee Exposure**

Exposure Instance	No. Exposed	Employer	Name and Address Telephone Numbers	Duration	Frequency	Proximity
1	2	Proof Mark Corporation	James Wilson 2490 Hacks Neck Road HEATHSVILLE VA 22473 Home: Work: 800-817-2845 Personal Mobile: Fax: 804-453-4337	1.00 year	8hrs, day	Point of danger

<b>20. Instance Description:</b>	A. Hazard	B. Equipment	C. Location	D. Injury/Illness	E. Measurements
----------------------------------	-----------	--------------	-------------	-------------------	-----------------

a) **Hazards-Operation/Condition-Accident:** The employer did not establish a written compliance program for employees exposed to lead dust while melting, manufacturing, and packaging lead core small arms ammunition.

b) **Equipment:** Three (3) Magma Engineering Model 2400MK-6 Bullet Master Bullet Molding Machine, Gloves, and D-Lead Soap (see attached photos).

c) **Location:** 2490 Hacks Neck Road, Heathsville, VA 22473.

d) **Injury/Illness (and Justifications for Severity and Probability):** Lead Poisoning.

e) **Measurements:** Interview Statements, CSHO Observations, and Results of Ghost Wipe sampling for lead dust that indicated lead dust levels of 79000 ug/sf (sort table) and 521 ug/sf (packaging table) (see exhibit #4 for Sampling Results).

**23. Employer Knowledge:** James Wilson, President of Proof Mark Corporation stated and pointed out during the walkaround that he provides gloves and D-Lead soap (see attached photos and exhibit #8 for CSHO notes). When asked via email for a copy of written lead compliance program, Mr. Wilson stated "We have no written programs. Never have had any." (see email dated Tue, Jan 28, 2020 in exhibit #6).

**24. Comments:** OSHA/ VOSH does not define the amount of surface lead dust is a violation, but it does requires that all surfaces shall be maintained as free as practicable of accumulations of lead. However, the EPA does define the amount under 40 CFR Part 745.65(b) "Dust-lead hazard. A dust-lead hazard is surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding 10 µg/ft<sup>2</sup> on floors or 100 µg/ft<sup>2</sup> on interior window sills based on wipe samples."

**25. Other Employer Information:**

**Violation Worksheet**

Print Date : 03/19/2020

<b>Inspection Number</b>	1454389
<b>Opt. Insp. Number</b>	011-20

<b>Establishment Name</b>	Proof Mark Corporation				
<b>DBA Name</b>					
<b>Type Of Violation</b>	Serious	<b>Citation Number</b>	1	<b>Item/Group</b>	2 /
<b>Number Exposed</b>	2	<b>No. Instances</b>	2	<b>REC</b>	Complaint
<b>Special Enforcement?</b>		<b>Employer's Relationship to Hazard</b>	All		
<b>Standard</b>	1910.1025(h)(1)				
<b>Substance Codes</b>		<b>Photo/Video Number</b>			
<b>Alleged Violation Description</b>	<p>1910.1025(h)(1): Surfaces. All surfaces shall be maintained as free as practicable of accumulations of lead.</p> <p>a) At this establishment, the employer did not maintain surfaces to include the sorting table and packaging table as free as practicable of lead dust during lead bullet melting, manufacturing, and packaging operations.</p>				
<b>Recommended Abatement Action</b>	The employer shall maintained all surfaces as free as practicable of accumulations of lead.				

**Penalty**

<b>Severity</b>	Medium		
<b>Severity Justification</b>	Lead Poisoning.		
<b>Probablility</b>	Greater		
<b>Probablility Justification</b>	The employer stated that they have had no increase blood lead levels when biological monitoring was performed. They also provide gloves and D-lead soap for employee use.		
<b>Number of Times Repeated</b>			
<b>Gravity</b>	Moderate	<b>Gravity based Penalty</b>	9975.00
<b>Multiplier</b>		<b>Size</b>	70%
<b>Good Faith</b>	0%	<b>History</b>	10%
<b>Calculated Penalty</b>	1995.00	<b>Proposed Penalty</b>	1995.00
<b>Proposed Penalty Justification:</b>	Size and History.		

**Abatement Details**

<b>Days to Abate</b>	30 Cal Days	<b>Abatement Status</b>	
<b>User-entered Abatement Due Date</b>		<b>Date Abated</b>	
<b>Abatement Documentation Required?</b>	Yes	<b>Date Verified</b>	
<b>Abatement Completed Description:</b>			

**MultiStep Abatement**

Type/Other Type	Days to abate	User entered Abatement Due Date	Completed(status)	Verify Date
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**Employee Exposure**

Exposure Instance	No. Exposed	Employer	Name and Address Telephone Numbers	Duration	Frequency	Proximity
2	2	Proof Mark Corporation	James Wilson 2490 Hacks Neck Road HEATHSVILLE VA 22473 Home: Work: 800-817-2845 Personal Mobile: Fax: 804-453-4337	1.00 year	8hrs, Day	Point of Danger

<b>20. Instance Description:</b>	A. Hazard	B. Equipment	C. Location	D. Injury/Illness	E. Measurements
----------------------------------	-----------	--------------	-------------	-------------------	-----------------

a) **Hazards-Operation/Condition-Accident:** The employer did not maintain surfaces to include the sorting table and packaging table as free as practicable of lead dust during lead bullet melting, manufacturing, and packaging operations.

b) **Equipment:** Three (3) Magma Engineering Model 2400MK-6 Bullet Master Bullet Molding Machine, Gloves, and D-Lead Soap (see photos attached to worksheet 1-1).

c) **Location:** 2490 Hacks Neck Road, Heathsville, VA 22473.

d) **Injury/Illness (and Justifications for Severity and Probability):** Lead Poisoning.

e) **Measurements:** Interview Statements, CSHO Observations, and Results of Ghost Wipe sampling for lead dust that indicated lead dust levels of 79000 ug/sf (sort table) and 521 ug/sf (packaging table) (see exhibit #4 for Sampling Results).

23. **Employer Knowledge:** James Wilson, President of Proof Mark Corporation stated and pointed out during the walkaround that he provides gloves and D-Lead soap (see attached photos and exhibit #8 for CSHO notes). When asked via email for a copy of written lead compliance program, Mr. Wilson stated "We have no written programs. Never have had any." (see email dated Tue, Jan 28, 2020 in exhibit #6).

24. **Comments:** OSHA/ VOSH does not define the amount of surface lead dust is a violation, but it does requires that all surfaces shall be maintained as free as practicable of accumulations of lead. However, the EPA does define the amount under 40 CFR Part 745.65(b) "Dust-lead hazard. A dust-lead hazard is surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding 10 µg/ft<sup>2</sup> on floors or 100 µg/ft<sup>2</sup> on interior window sills based on wipe samples."

25. **Other Employer Information:**

# Violation Worksheet

Print Date : 03/19/2020

Inspection Number	1454389
Opt. Insp. Number	011-20

Establishment Name	Proof Mark Corporation				
DBA Name					
Type Of Violation	Other-than-Serious	Citation Number	2	Item/Group	2 /
Number Exposed	2	No. Instances	1	REC	
Special Enforcement?				Employer's Relationship to Hazard	All
Standard	1910.1200(e)(1)				
Substance Codes				Photo/Video Number	
Alleged Violation Description	<p>1910.1200(e)(1): Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met.</p> <p>a) At this establishment, the employer did not develop a written hazard communication program for employees exposed to lead dust while melting, manufacturing, and packaging lead core small arms ammunition.</p>				
Recommended Abatement Action	The employer shall develop, implement, and maintain a written hazard communication program				

## Penalty

Severity	Minimal		
Severity Justification	No Injuries or illnesses would result.		
Probablility	Lesser		
Probablility Justification	The employer stated that they have had no increase blood lead levels when biological monitoring was performed. They also provide gloves and D-lead soap for employee use.		
Number of Times Repeated			
Gravity	Low	Gravity based Penalty	0.00
Multiplier		Size	70%
Good Faith	0%	History	10%
Calculated Penalty	0.00	Proposed Penalty	0.00
Proposed Penalty Justification:	Size and History.		

## Abatement Details

Days to Abate	30 Cal Days	Abatement Status	
User-entered Abatement Due Date		Date Abated	
Abatement Documentation Required?	Yes	Date Verified	

**Abatement Completed Description:**

**MultiStep Abatement**

Type/Other Type	Days to abate	User entered Abatement Due Date	Completed(status)	Verify Date
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**Employee Exposure**

Exposure Instance	No. Exposed	Employer	Name and Address Telephone Numbers	Duration	Frequency	Proximity
1	2	Proof Mark Corporation	James Wilson 2490 Hacks Neck Road HEATHSVILLE VA 22473 Home: Work: 800-817-2845 Personal Mobile: Fax: 804-453-4337	1.00 year	8hrs, day	Marginal

**20. Instance Description:** A. Hazard B. Equipment C. Location D. Injury/Illness E. Measurements

a) **Hazards-Operation/Condition-Accident:** The employer did not develop a written hazard communication program for employees exposed to lead dust while melting, manufacturing, and packaging lead core small arms ammunition.

b) **Equipment:** Three (3) Magma Engineering Model 2400MK-6 Bullet Master Bullet Molding Machine, Gloves, and D-Lead Soap (see photos attached to worksheet 1-1).

c) **Location:** 2490 Hacks Neck Road, Heathsville, VA 22473.

d) **Injury/Illness (and Justifications for Severity and Probability):** No Injuries would result.

e) **Measurements:** Interview Statement and CSHO observations

**23. Employer Knowledge:** James Wilson, President was asked via email for a copy of written hazard communication program, Mr. Wilson stated "We have no written programs. Never have had any." (see email dated Tue, Jan 28, 2020 in exhibit #6).

**24. Comments:**

**25. Other Employer Information:**

VIRGINIA  
IN THE CLERK'S OFFICE OF  
NORTHUMBERLAND CIRCUIT COURT  
AUGUST 25, 2022 AT 02:02 PM  
JUDGMENT/RELEASE #202200314 WAS DOCKETED  
UPON CERTIFICATION OF ACKNOWLEDGEMENT  
THERE TO ANNEXED, ADMITTED TO RECORD.  
THE FEE IMPOSED BY SEC. 17.1-275(17)  
OF THE VIRGINIA CODE, HAS BEEN PAID.  
RCPT: 22000004295 BK: \_\_\_\_\_ PG: \_\_\_\_\_  
TESTE: DEBORAH T. BINGHAM, CLERK

RECORDED BY: KMS

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE COUNTY OF BUCHANAN**

**GARY G. PAN,  
Commissioner of Labor and Industry,**

*Plaintiff.*

Case No. CL21000352-00

v.

**RELIANCE WELL SERVICES, LLC,**

*Defendant.*

**JOINT MOTION AND FINAL ORDER OF SUBSTITUTION OF PLAINTIFF  
AND OF DISMISSAL**

This matter comes before the Court on the Joint Motion of Gary G. Pan, Commissioner of Labor and Industry, successor in interest to Plaintiff C. Ray Davenport, former Commissioner of Labor and Industry, and Defendant Reliance Well Services, LLC, advising the Court both that the parties have agreed to substitute the plaintiff, and have entered into a settlement agreement, incorporated and attached hereto as Exhibit A pursuant to 16 Va. Admin. Code § 25-60-340(F), and

IT APPEARING that Gary G. Pan has succeeded C. Ray Davenport as Commissioner of Labor and Industry, and that as part of said settlement agreement, the Defendant withdraws its notice of contest of the citations at issue; and therefore the parties seek dismissal with prejudice of Plaintiff's Complaint.


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

ORDERED that the name of the Plaintiff in this action be substituted, pursuant to Rule 3:17, to be Gary G. Pan, Commissioner of Labor and Industry, and it is further

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

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

Entered this 25<sup>th</sup> day of MAY, 2022.

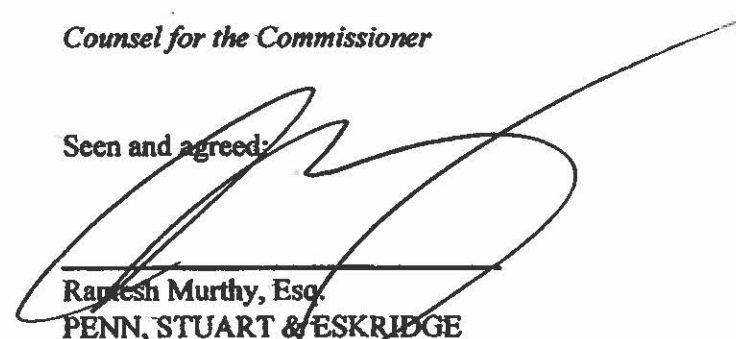
  
Judge

We ask for this:

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

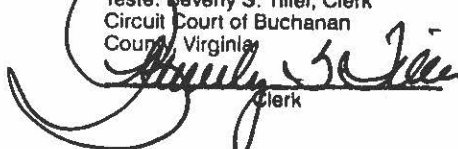
*Counsel for the Commissioner*

Seen and agreed:

  
Ramesh Murthy, Esq.  
PENN, STUART & ESKRIDGE  
208 East Main Street  
Abingdon, VA 24210  
Telephone: (276) 623-4412  
Fax: (276) 623-5532  
Email: rmurthy@pennstuart.com

*Counsel for the Defendant*

A Copy  
Teste: Beverly S. Tiller, Clerk  
Circuit Court of Buchanan  
County, Virginia

  
Clerk

**GARY G. PAN**  
Commissioner of Labor and Industry

**RELIANCE WELL SERVICES, LLC**

Inspection Number 1425658

### **SETTLEMENT AGREEMENT**

**THIS AGREEMENT** is entered into by Gary G. Pan, Commissioner of Labor and Industry (Commissioner) and Reliance Well Services, LLC (Employer).

WHEREAS, on or about February 10, 2020, the Commissioner issued citations to the employer alleging two Serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for General Industry. A total of \$16,907.00 in penalties was proposed by the Commissioner along with the violation. (Copy of the citation attached by reference hereto).

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

WHEREAS, the Commissioner caused to be filed a Complaint to affirm the contested VOSH citations pursuant to Va. Code § 40.1-49.4(E) in the Buchanan County Circuit Court, case number CL21000352-00 (the "Litigation"); and

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

NOW, THEREFORE, the parties agree to the following:

#### **TERMS AND CONDITIONS OF AGREEMENT**

1. Upon full execution of the agreement, the Commissioner will modify the citations as follows:
  - a. Serious Citation 1, Item 1 is reduced to an "Other than Serious" violation, with a recalculated penalty of \$1,300.00;
  - b. Serious Citation 1, Item 2 is vacated.
2. Within ninety (90) days from the execution of this agreement, the Employer will provide its employees refresher training about the importance of wearing seat belts in any work vehicle. Such training must be at no cost to the employee and in manner (including language) capable of being understood by each employee. Documentation showing compliance with this

paragraph will be given to the address shown in the following paragraph.

3. Within thirty (30) days from the execution of this agreement, pursuant to 16 Va. Admin. Code § 25-60-307, the Employer will provide documentation proving Citation 1, Item 1 has been abated to the following address:

Paul Saunier  
Regional Health Director  
Virginia Department of Labor and Industry  
3013 Peters Creek Road  
Roanoke, Virginia 24019

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

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

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

6. The Employer certifies that the violations alleged in this agreement have been abated. Unless already provided, within thirty calendar days of the execution of this Agreement, the Employer agrees to provide documentation proving the violations alleged have been abated.

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

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

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

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

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

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

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

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

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

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

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

**RELIANCE WELL SERVICES, LLC**

By: [Signature] (SEAL)

3-29-2022  
Date

Name: Daniel C. Doyle  
Its: President

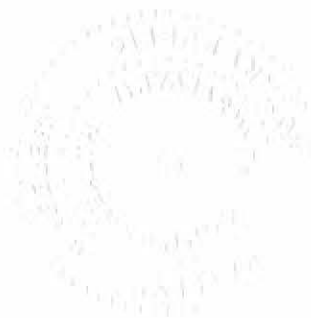
State of PA, City/County of Erie ;  
to wit:

The foregoing instrument was acknowledged before me this 29 day of Mar, 2022 by Daniel Doyle on behalf of Reliance Well Services.

Katelyn L. Wheeler  
Notary Public

My commission expires: 06/10/22

Commonwealth of Pennsylvania - Notary Seal  
Katelyn L. Wheeler, Notary Public  
Erie County  
My commission expires June 10, 2022  
Commission number 1334112  
Member, Pennsylvania Association of Notaries



**GARY G. PAN,  
COMMISSIONER OF LABOR AND INDUSTRY**

By: [Signature] (SEAL)  
Ron Graham  
Director, Occupational  
Health Compliance

6/7/22  
Date

COURT OF APPEALS OF VIRGINIA

Present: Judges Humphreys, AtLee and Raphael  
Argued at Lexington, Virginia

C. RAY DAVENPORT, COMMISSIONER  
OF LABOR AND INDUSTRY

v. Record No. 0285-21-3

UTILITY TRAILER MANUFACTURING COMPANY

OPINION BY  
JUDGE ROBERT J. HUMPHREYS  
JANUARY 18, 2022

FROM THE CIRCUIT COURT OF WASHINGTON COUNTY  
Frederick A. Rowlett, Judge

Alex W. West, Special Assistant Commonwealth's Attorney  
(Mark R. Herring,<sup>1</sup> Attorney General; Donald D. Anderson, Deputy  
Attorney General; Heather Hays Lockerman, Senior Assistant  
Attorney General and Section Chief; Joshua E. Laws, Assistant  
Attorney General, on briefs), for appellant.

Travis W. Vance (David I. Klass; Fisher & Phillips, LLP, on brief),  
for appellee.

On July 31, 2017, the Virginia Department of Labor and Industry (“the Commissioner”) issued a citation to Utility Trailer Manufacturing Company (“UTMC”) for a violation of safety standards issued by the Virginia Department of Labor and Industry Occupational Safety and Health Administration (“VOSH”). UTMC contested the citation, and the Commissioner filed a complaint in the Circuit Court of Washington County in accordance with Code § 40.1-49.4 to enforce the citation.<sup>2</sup> At trial, the circuit court sustained UTMC’s objection to the introduction

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<sup>1</sup> Jason S. Miyares succeeded Mark R. Herring as Attorney General on January 15, 2022.

<sup>2</sup> Pursuant to Code § 40.1-49.4(E), when a citation for a safety or health violation is contested, the Commissioner is required to file a civil action in the circuit court for that court to affirm, modify or vacate the citation or proposed penalty, or to direct other appropriate relief, upon making findings of fact and conclusions of law.

of an investigative report generated by UTMC on the grounds that it was a subsequent remedial measure. Additionally, at the close of the Commissioner's evidence, the circuit court granted UTMC's motion to strike on the grounds that the Commissioner failed to prove the existence of a noncomplying condition. The Commissioner appealed these rulings to this Court pursuant to Code § 40.1-49.5.

### BACKGROUND

On appeal of an order granting a motion to strike, we view the evidence in the light most favorable to the non-moving party—the Commissioner—and accord him “the benefit of any inferences that may be fairly drawn from the evidence.” *Curtis v. Highfill*, 298 Va. 499, 502-03 (2020).

UTMC is a corporation that manufactures dry vans at a facility in Washington County (“the worksite”). To construct these dry vans, eighteen-foot-long slider rails are welded to cross members and vertical bars in a part of the worksite called the “marriage area.” The slider rails are stored on a table some distance from the marriage area and must be transported via forklift to the marriage area before they can be welded to the cross members or bars. The cross members and vertical bars are stored in boxes on pallets that are placed near the path of the slider rails and the marriage area. The location of the pallets required the forklift operators to elevate the forks to prevent a collision between the long slider rails and the pallets.

On May 22, 2017, a forklift operator was transporting slider rails to the marriage area with the forks elevated when a welder turned into the slider rails, striking his face on the rails in the process. UTMC reported the incident to VOSH, which initiated an inspection.

The Code authorizes the Virginia Safety and Health Codes Board (“the Board”) to promulgate and adopt regulations to assure “that no employee will suffer material impairment of health or functional capacity.” Code § 40.1-22(5). Pursuant to this authorization, the Board has

incorporated several federal regulations, including 29 C.F.R. § 1910.176(a), into its administrative code. 16 Va. Admin. Code § 25-90-1910. 29 C.F.R. § 1910.176(a) reads as follows:

Use of mechanical equipment. Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

Following the inspection of the UTMC facility, the Commissioner issued a “serious violation” citation against UTMC.<sup>3</sup> The citation notes the following alleged violations:

(a) Pallets with trailer parts stacked on them were allowed to be stored in an area commonly used by forklift operators to transport materials into the area. On May 22, 2017, a forklift operator was transporting a load of approximately 10 slider rails to the marriage area with a Hyster 60 forklift. Due to the pallets and trailer parts that were obstructing the forklift passageway, the forklift operator had to raise the load in order to clear the items in the forklift passageway. An employee who was retrieving a welding helmet nearby and had his back to the load, turned as the load approached and walked into the slider rails striking his nose and face and causing the rails to fall to the floor.

(b) Aisle ways [sic] and passageways used by forklifts to transport slider rails to the marriage area welders were not appropriately marked. Items had been placed in the forklift path where the 18-foot-long slider rails were transported. The forklift operators often had to raise their loads several feet above the floor surface in order to clear the obstructions.

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<sup>3</sup> Code § 40.1-49.3 defines “serious violation” as

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.

The Commissioner then issued a \$4,845 penalty for the serious violation, which UTMC subsequently contested.<sup>4</sup>

Pursuant to Code § 40.1-49.4(E), upon receipt of written notice from UTMC that it contested the citation, the Commissioner filed a complaint in the circuit court. In his complaint, the Commissioner attached the citation as exhibit A and relied on its explanation of the violation as the basis for the complaint.

Trial began on November 19, 2020. The Commissioner's main witness was VOSH investigator Robert Farmer. Mr. Farmer's testimony was at times contradictory, but he testified that travelling with the forks elevated could have caused a visual hazard due to the load or the mast of the forklift. Mr. Farmer also testified that traveling with the forks raised could have created a collision hazard or a tip-over hazard and that traveling with raised forks posed a risk of "more significant injury" due to contact higher on the body. Finally, Mr. Farmer testified that the aisle in which the forklifts operated was not marked.

Additionally, the Commissioner called Keith Walsh, UTMC's safety manager and corporate representative. Following the accident, Mr. Walsh helped draft a report on behalf of UTMC detailing its view on the basic causes of the accident and necessary remedial steps to prevent future incidents. The Commissioner sought to introduce the report into evidence, but UTMC objected on the grounds of hearsay, subsequent remedial measures, and relevance. The

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<sup>4</sup> At the time of the citation, Code § 40.1-49.4 required the Commissioner to issue a civil penalty of up to \$7,000 for any serious violations but made any penalty discretionary for an other-than-serious violation. Code § 40.1-49.4 permits the Commissioner to determine the exact amount of the penalty by giving "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The Department of Labor and Industry has standardized its practices for determining the amount of a violation in its Field Operations Manual, but the manual "is not and does not purport to establish substantive law." *Nat'l Coll. of Bus. & Tech., Inc v. Davenport*, 57 Va. App. 677, 683 n.6 (2011).

Commissioner argued that the party-admission exception to the hearsay rule applied, that the portions of the report that he sought to be admitted were not a subsequent remedial measure, and that the report was relevant. The Commissioner then offered to introduce a redacted version of the report to include only the portion of the report entitled “basic causes.” Specifically, the relevant portion of the report identified the following as one of the causes of the accident:

Mr. Greer raised a load on the forklift higher than needed. Forks were elevated approximately 60 inches above ground level upon clearing pallets in the area, and at least 20 inches higher than needed. He did not then lower the load before traveling further, all contrary to his training.

Following the argument of counsel, the circuit court sustained the objection on the grounds that the report constituted a subsequent remedial measure:

I have to say that I agree with Mr. Vance [counsel for UTMC]. I mean, this is just full of the assessment of the purported violations and incorrect measures that they are trying to correct. So I am going to sustain your objection, Mr. Vance.

The Commissioner thereafter sought to elicit Mr. Walsh’s opinion on the causes of the accident. UTMC objected on the same grounds, and the circuit court sustained its objection. The Commissioner proffered that Mr. Walsh’s expected testimony was that the elevation of the load created a visual hazard.

At the close of the Commissioner’s evidence, UTMC made a motion to strike on the grounds that the Commissioner failed to prove the existence of a noncomplying condition. UTMC argued that the Commissioner was required to prove the existence of an obstruction which created an actual hazard. UTMC specifically argued that the Commissioner failed to present any evidence on the actual existence of a hazard caused by the presence of the pallets. The circuit court sustained the motion to strike on the grounds that “there was no violation.”

On February 23, 2021, the circuit court entered a sketch order submitted by UTMC memorializing its ruling at trial. The written order reasoned that the federal administrative case law required the Commissioner prove that the obstructions created an actual hazard. In applying this interpretation, the circuit court ruled that the Commissioner failed to present any evidence on this fact. The circuit court focused exclusively on the causes of the accident and injury at issue. On March 24, 2021, the Commissioner filed his notice of appeal.

### ANALYSIS

The Commissioner alleges two assignments of error in the proceedings below. First, that the circuit court erroneously required proof of causation between an injury and a hazard when it sustained UTMC's motion to strike. Second, that the circuit court abused its discretion in excluding an investigative report and testimony from the investigator who generated the report.

#### A. The Motion to Strike

The Commissioner appeals from the circuit court's ruling sustaining UTMC's motion to strike because the Commissioner failed to make a *prima facie* case for the existence of noncomplying conditions. The core of the Commissioner's argument is that the circuit court improperly required proof that the pallets created an actual hazard and/or an injury.

##### 1. The Standard of Review and Regulatory Scheme

The circuit court's legal interpretations of a regulation are questions of law which we review *de novo*. See *New Age Care, LLC v. Juran*, 71 Va. App. 407, 421 (2020).

The Code requires that the Commissioner file a civil action in circuit court when he receives written notice that a company contests a VOSH citation. Code § 40.1-49.4(E). Unlike the typical agency review process under the Virginia Administrative Process Act, the circuit court reviews the agency action *de novo*. *Atl. Env't Constr. Co. v. Malveaux*, 63 Va. App. 656, 660, 661 n.3 (2014). To prevail, the Commissioner must prove four elements: "(1) the

applicability of the standard, (2) the existence of noncomplying conditions, (3) employee exposure or access, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the violative condition.” *Nat’l Coll. of Bus. & Tech., Inc. v. Davenport*, 57 Va. App. 677, 685 (2011) (emphasis omitted). Accordingly, VOSH actions require a multi-layered analysis when weighing a motion to strike. In other words, in order to prove the existence of a noncomplying condition, the Commissioner must also prove all of the facts necessary to show the employer’s noncompliance with a given regulation. Here, the circuit court ruled that the Commissioner made a *prima facie* case as to the first element—the applicability of the standard—but failed to prove the existence of noncomplying conditions. The circuit court did not reach the exposure or knowledge elements.

In this case, the parties dispute what the Commissioner must show to prove the existence of a noncomplying condition under 29 C.F.R. § 1910.176, as incorporated into Virginia law by 16 Va. Admin. Code § 25-90-1910. The Commissioner contends that the plain text of the regulation controls: that a noncomplying condition exists if there are (1) obstructions, (2) across or in aisles, (3) that *could* create a hazard. UTMC argues that several federal administrative law cases require the Commissioner prove that there are (1) obstructions, (2) across or in aisles, (3) that *actually* create a hazard.

There is no controlling case law on the meaning of the regulation at issue in this case. There are no Virginia cases interpreting this regulation, and there are no federal Article III court decisions interpreting this regulation. While the federal Occupational Safety and Health Review Commission (“OSHRC”) has published cases and decisions involving this regulation, none speak directly to the meaning of the word “could” in the regulation. For the reasons that follow, we hold that the word “could” as used in the regulation only requires that the Commissioner prove that it was reasonably foreseeable that an obstruction could create a hazard.

When interpreting the meaning of a regulation under VAPA, we ordinarily give deference to an agency’s interpretation of that regulation. *See Bd. of Supervisors v. State Bldg. Code Tech. Rev. Bd.*, 52 Va. App. 460, 466 (2008).<sup>5</sup> However, as noted, VOSH citations are not reviewed under VAPA, but instead under a specially designated procedure contained in Code § 40.1-49.4. Under this procedure, VOSH’s citation decisions are reviewed *de novo* by the circuit court for “‘findings of fact and conclusions of law, affirming, modifying or vacating [the Commissioner’s] citation or proposed penalty, or directing other appropriate relief’ deemed necessary by the court.” *Atl. Evt’l Constr. Co.*, 63 Va. App. at 660 (quoting Code § 40.1-49.4(E)). The Code, therefore, does not direct courts to give any deference to the agency’s interpretation.

Accordingly, courts should employ the traditional tools of statutory interpretation when interpreting VOSH safety standards. First, it is axiomatic that statutory interpretation must begin with the text itself to determine the intent of the legislature. *See Potter v. BFK, Inc.*, 300 Va. 177, 182 (2021). When determining that intent, words are “given their ordinary meaning, unless it is apparent that the legislative intent is otherwise.” *Cox v. Commonwealth*, 73 Va. App. 339, 344 (2021) (quoting *Phelps v. Commonwealth*, 275 Va. 139, 142 (2008)). Where a word is not defined by the legislature, courts can look to dictionary definitions to supply the ordinary meaning of a word. *E.g., Rose v. Commonwealth*, 53 Va. App. 505, 512 (2009) (applying dictionary definition of “use”).

First, UTMC concedes that the Commissioner was not required to present evidence of an actual *harm* caused by the obstruction in the aisleway. The word “hazard” as used in the

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<sup>5</sup> “This deference stems from Code § 2.2-4027, which requires that reviewing courts ‘take due account’ of the ‘experience and specialized competence of the agency’ promulgating the regulation.” *Bd. of Supervisors*, 52 Va. App. at 466 (quoting *Va. Real Est. Bd. v. Clay*, 9 Va. App. 152, 160-61 (1989)).

regulation is not synonymous with the word “harm.” “The term ‘hazard’ has been defined as ‘a thing or condition that *might* operate against success or safety . . . a *possible* source of peril, danger, duress or difficulty.’” *Holtzman Oil Corp. v. Commonwealth*, 32 Va. App. 532, 544 (2000) (emphasis added) (quoting *Hazard*, *Webster’s Third New International Dictionary* (1993)). In *Pelron Corp.*, 12 BNA OSHC 1833, at \*4 (No. 83-388, 1986), the OSHRC defined a “hazard” as “practices, procedures or conditions which *increase* the likelihood” of harm. Accordingly, it is completely irrelevant in this case whether the pallets actually caused the accident that triggered the VOSH investigation. In other words, at a minimum, the parties agree that the regulation prohibits obstructions in aiseways that create an increased likelihood of harm.

However, the regulation not only prohibits obstructions that create a hazard, but also obstructions that *could* create a hazard. In this case, the word “could” is not defined in the regulation. Webster’s Dictionary defines “could” as the past tense of the word “can,” and defines the word “can” as meaning “may perhaps: may possibly,” or, alternatively, “be inherently able or designed to.”<sup>6</sup> Applying the plain meaning of the word “could” in the regulation therefore indicates that the regulation prohibits obstructions that possibly create hazards, subject to certain limitations.<sup>7</sup>

In other words, combining the definition of the word “hazard” and the word “could” leads us to conclude that the regulation prohibits obstructions in aiseways that “may possibly” create a “condition which increases the likelihood of harm.” Accordingly, the regulation prohibits not only actual hazards, but what the OSHRC in *Pelron Corp.* called “potential

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<sup>6</sup> *Could*, *Webster’s Third New International Dictionary* (1993); *Can*, *Webster’s Third New International Dictionary*, *supra*.

<sup>7</sup> As we explain further below, the regulation only prohibits obstructions which could create a *reasonably foreseeable* hazard in light of the facts and circumstances of a given workplace.

hazards.” See *Pelron Corp.*, 12 BNA OSHC 1833, at \*3 (defining a “potential hazard” as “the ‘possibility’ that a condition will occur”). Therefore, in this case, the noncomplying condition that the Commissioner was required to establish was an obstruction in an aisleway that created a potential hazard, not an actual hazard as the circuit court ruled.<sup>8</sup>

That said, the regulation’s reach is not limitless. The regulation does not require employers to consider any and every condition which could conceivably increase the chances of harm. First, the test for a violation of a VOSH safety standard eschews strict liability and requires that the Commissioner prove actual or constructive knowledge by the employer. *Nat’l Coll. of Bus. & Tech., Inc.*, 57 Va. App. at 685. This Court has interpreted this element as precluding citations for violations “which are not generally foreseeable.” *Atl. Env’t Constr. Co.*, 63 Va. App. at 661. As the Virginia Supreme Court said in *Floyd Southern Pike Electrical Contractor, Inc. v. Commissioner*, 222 Va. 317 (1981) (per curiam), “[a]n employer . . . need not take steps to prevent hazards which are not generally foreseeable . . . but at the same time an employer must do all it feasibly can to prevent foreseeable hazards.” *Id.* at 322-23 (quoting *Gen. Dynamics Corp. v. Occupational Safety & Health Rev. Comm’n*, 599 F.2d 453, 458 (1st Cir. 1979)). Accordingly, an employer cannot be held liable for a condition which is not reasonably foreseeable to create an increased risk of harm.

Second, the federal administrative case law makes clear that courts should consider the facts and circumstances of a given workplace to determine whether an obstruction creates a potential hazard. For example, in *Anchor Hocking Glass Co.*, 17 BNA OSHC 1644, at \*3 (No. 94-0178, 1996) (ALJ), the administrative law judge found that the mere presence of an obstruction in an aisleway did not create a hazard “[u]nder the circumstances in [company’s]

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<sup>8</sup> Of course, if the Commissioner established that the obstruction created an actual hazard, then he has necessarily established that the obstruction was a potential hazard.

location.” In *Anchor Hocking Glass Co.*, the Secretary of Labor claimed that pallets in an aisleway prohibited the safe operation of multiple forklifts if there was pedestrian traffic at the same time. *Id.* The administrative law judge considered this potential hazard in light of the circumstances of the workplace including the “mammoth” size of the aisle, the specific traffic patterns and schedules established by the company for the forklifts, and training regarding the presence of the pallets. *Id.* In light of these circumstances, the pallets did not create a hazard. *Id.* Therefore, in order to prove the existence of a noncomplying condition under the regulation, the Commissioner must show that an obstruction in an aisleway is reasonably foreseeable to create a potential hazard in light of the facts and circumstances of a given workplace.

The federal administrative case law is consistent with interpreting the regulation as prohibiting potential hazards in addition to actual hazards. While none of the decisions are binding or directly on point, their reasoning is persuasive.

UTMC cites *Pelron Corp.*, 12 BNA OSHC 1833, in support of its argument that the regulation only prevents actual hazards, however, this case actually supports the opposite argument. In *Pelron Corp.*, the employer was cited for a violation of the OSHA general duty clause, not 29 C.F.R. § 1910.176(a). The general duty clause guarantees workers the right to work in an environment “free from recognized hazards.” 29 U.S.C. § 654(a)(1). The OSHRC found that the general duty clause only prohibited actual hazards, not potential hazards. Notably, however, the general duty clause does not include the word “could,” “can,” or any other word of possibility. *See id.* Unlike the general duty clause, the regulation in this case *does* include a word of possibility and defining the regulation as prohibiting potential hazards would be consistent with the OSHRC’s decision in *Pelron Corp.*

UTMC also cites *General Motors Co., Packard Electric Division*, 7 BNA OSHC 1205 (No. 78-1368, 1979) (ALJ) for the proposition that the word “could” should be excised from the

regulation. In *General Motors Co., Packard Electric Division*, the administrative law judge ruled that a twenty-two-inch intrusion into a ten-foot-wide aisleway did not create a hazard when the only vehicular traffic consisted of forty-inch-wide forklifts carrying forty-two-inch-wide loads. 7 BNA OSHC 1205, at \*1. UTMC relies heavily on language from this ruling that notes that “only those obstructions which create a hazard are prohibited.” *Id.* However, this ruling was issued in response to the Secretary of Labor’s argument that *any* obstruction in an aisle constituted a violation of the regulation, an argument that the Commissioner does not make here. Indeed, the administrative law judge’s ruling was inconsistent in its inclusion of the word “could.” *E.g., id.* at \*2 (“Since the skid was not an obstruction which *could* create a hazard, there was no violation of 29 C.F.R. § 1910.176(a).” (emphasis added)). *General Motors Co., Packard Electric Division* stands for the proposition that not all obstructions can create hazards, not that an obstruction must create an actual hazard. *See also Anchor Hocking Glass Co.*, 17 BNA OSHC 1644 (relying on *Gen. Motors Co., Packard Elec. Div.*).<sup>9</sup>

Nonetheless, UTMC argues that reading “could” as meaning that the Commissioner need only present evidence of a reasonably foreseeable hazard as violating the canon against superfluity by rendering the phrase “could create a hazard” superfluous. Virginia courts “disfavor a construction of statutes that renders any part of the statute useless or superfluous.”

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<sup>9</sup> In fact, other federal administrative case law clearly shows that the OSHRC will consider potential hazards when interpreting this regulation. For example, in *Pharmasol Corp.*, 2018 CCH OSHD ¶ 33,692 (No. 16-1172, 2018), the OSHRC found a violation of the regulation despite the fact that the obstructions did not actually create hazards. The OSHRC considered reasonable hypothetical scenarios created by the obstructions in light of the actual practices of the company in finding a violation. *Id.* (finding that company’s expert opinion that obstruction could not create a hazard was unpersuasive when it relied on the driving ability of the forklift operator and did not consider possible abilities of other operators); *Hughes Tool Co.*, 6 BNA OSHC 1366 (No. 15086, 1978) (same). The federal administrative case law supports the conclusion that the word “could” extends the reach of the regulation to reasonable potential hazards.

*Shoemaker v. Funkhouser*, 299 Va. 471, 487 (2021). However, as noted above, the phrase “could create a hazard” operates as a vitally important limitation on the scope of the regulation, notwithstanding the plain meaning of the word “could.”

Indeed, the interpretation proposed by UTMC would require this Court to treat the word “could” as superfluous, violating the canon against superfluity by requiring the Commissioner to show that an “obstruction across or in [an] aisle[] . . . create[d] a hazard.” This interpretation simply excises the word “could” from the regulation and would give it no meaning whatsoever. *See Shoemaker*, 299 Va. at 487.

UTMC also argues that applying the plain meaning of the word “could” will open the floodgates to employer liability by requiring courts to consider *any* conceivable hazard no matter how absurd or attenuated. However, UTMC’s argument not only neglects the “facts-and-circumstances” limitation found in the federal administrative case law and Virginia case law prohibiting only foreseeable hazards, but also the substantial procedural safeguards contained in the regulatory enforcement scheme that protect employers from liability from the most extreme interpretations of the plain meaning of the word “could.”

For example, the regulations provide an employer with an affirmative defense. 16 Va. Admin. Code § 25-60-260(B) provides that a citation shall be vacated if an employer demonstrates that

1. Employees of such employer have been provided with the proper training and equipment to prevent such a violation;
2. Work rules designed to prevent such a violation have been established and adequately communicated to employees by such employer and have been effectively enforced when such a violation has been discovered;
3. The failure of employees to observe work rules led to the violation; and

4. Reasonable steps have been taken by such employer to discover any such violation.

Therefore, UTMC may avoid liability if it can show that it took appropriate steps to prevent violations.<sup>10</sup>

Finally, an employer's liability is limited by the statutory definition of a "serious violation." The most severe punishments under the regulatory scheme are limited to those violations that carry "substantial probability that death or serious physical harm could result." Code § 40.1-49.3. Therefore, employers do not face significant liability for technical violations of the regulations that do not pose serious risks to employee safety.

UTMC's concerns that a decision applying the plain meaning of the word "could" would open the floodgates to employer liability is unfounded. The Commissioner was only required to prove that it was foreseeable that the pallets created a potential hazard in light of the facts and circumstances of the case. He was not required to prove that the pallets caused a specific accident or injury, nor was he required to prove that the pallets created an actual hazard.

## 2. The Regulation as Applied in the Circuit Court

It is important to note that this case comes to us from the appeal of a grant of a motion to strike the evidence. With the case before us in that posture, it is irrelevant whether UTMC has a defense or whether the evidence is sufficiently credible or should be given sufficient weight for the Commissioner to ultimately prevail and we offer no opinion regarding the ultimate disposition of this case. The issue before us is only whether the Commissioner's evidence was sufficient to establish a regulatory violation when the evidence presented is considered in the light most favorable to him.

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<sup>10</sup> Because this case comes before us on review of a motion to strike, whether UTMC will ultimately prevail on such a defense is not before us in this case.

Both parties agree that the Commissioner was not required to prove a causal connection between any injury and the alleged hazard. The regulation is wholly silent on injuries, accidents, or harms. While an injury could be relevant to proving the exposure or knowledge elements of the case (or the seriousness of the violation), the Commissioner does not need to show actual harm or injury to prove the existence of a noncomplying condition.

Here, the circuit court did not expressly rule that the Commissioner was required to prove a causal link between the injury and the alleged hazard. However, the circuit court's ruling focuses heavily on the cause of the accident that triggered the Commissioner's investigation. For example, the circuit court found that the Commissioner failed to present evidence that the forklift operator or the injured worker's visions were obstructed by the elevated load "at the time of the accident." The circuit court explained that "the testimony demonstrated that the accident occurred at least in part because the injured worker was not paying attention." Additionally, the circuit court clearly held that the regulation required the Commissioner to prove an actual hazard as opposed to a potential hazard.

We hold that the circuit court erred by requiring proof of an actual hazard instead of simply a reasonably foreseeable potential hazard. At first glance, the distinction between potential hazards and actual hazards appears to be a nebulous and vague one. The distinction is more clearly drawn by applying it to the facts of this case. Here, the Commissioner presented evidence that raising the forks in order for the forklift to clear the pallets created three potential hazards: a visual hazard, a "tip-over" hazard, and the risk that a collision would create a greater risk of injury.

To prove that the pallets created an *actual* visual hazard, the Commissioner would be required to present evidence that raising the forks actually obstructed the operator's vision. If the operator's vision was not actually obstructed by raising the forks, then doing so did not increase

the likelihood of harm and therefore did not create an actual hazard. However, to prove that the pallets created a *potential* hazard, the Commissioner simply needed to show that raising the forks *could have* obstructed the operator’s vision—assuming that such a possibility was reasonably foreseeable in light of the facts and circumstances of the UTMC workplace. Mr. Farmer testified that the height of the load meant that the load itself or the mast of the forklift could have obstructed the forklift operator’s vision.<sup>11</sup> This testimony is sufficient to survive a motion to strike.

Relatedly, to prove that the pallets created an *actual* “tip-over” hazard or a risk of greater injury, the Commissioner would have needed to present evidence that traveling with the forks raised increased the likelihood that the forklift would tip over or that an injury caused by a collision would be more significant. In fact, Mr. Farmer testified that travelling with an elevated load could have created a “tip-over” hazard or a risk of greater injury, facts which the circuit court ignored in its ruling.<sup>12</sup> It is irrelevant that no “tip over” happened in this case, and there is evidence that a collision occurred with a worker’s head instead of his leg. Accordingly, the Commissioner presented evidence that travelling with the forks elevated created an actual hazard and the circuit court erred by disregarding that evidence on a motion to strike.

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<sup>11</sup> UTMC argues on brief that the mast of a forklift is a stationary component of the machinery and that any visual obstruction risk created by the mast is present regardless of the heights of the forks. However, this fact was not presented to the circuit court and we cannot consider it on appeal.

<sup>12</sup> While Mr. Farmer’s testimony is lacking detail as to the facts and circumstances necessary for an elevated load to create a “tip-over” hazard or a greater risk of injury, as noted above, this case is before us on a motion to strike and we only consider whether any rational fact finder could find for the Commissioner. *See Newton v. Veney*, 220 Va. 947, 951 (1980) (citing *Reagan v. Reagan*, 215 Va. 222, 224 (1974)).

### 3. Citation 1(b)

Finally, the Commissioner also argues that the circuit court erred because it did not consider evidence presented as to citation 1(b) regarding insufficiently marked aisles. The Commissioner clearly presented evidence that the aisle was not marked.

However, UTMC argues that the Commissioner has waived this argument by not expressly stating it in his assignments of error. Rule 5A:12(c)(1) requires that petitions for appeal “must list, clearly and concisely and without extraneous argument, the specific errors in the rulings below.” This Court has held that Rule 5A:20(c)’s requirements that the opening brief contain the assignments of error imposes the same requirement on an appellant as Rule 5A:12(c)(1) imposes on a petitioner. *See Fox v. Fox*, 61 Va. App. 185, 202-03 (2012). The purpose of the assignment of error is “to ‘point out the errors with reasonable certainty in order to direct [the] court and opposing counsel to the points on which [the] appellant intends to ask a reversal of the judgment, and to limit discussion to these points.’” *Carroll v. Commonwealth*, 280 Va. 641, 649 (2010) (first alteration in original) (quoting *Yeatts v. Murray*, 249 Va. 285, 290 (1995)). The Virginia Supreme Court has held that Rule 5A:12(c)(1) does not demand the inclusion of a “because clause” in an assignment of error. *Findlay v. Commonwealth*, 287 Va. 111, 116 (2014). Such a requirement would “create an unnecessary procedural trap that may bar appellate review of meritorious claims.” *Id.*

Here, the Commissioner clearly identified his argument as to citation 1(b) to the circuit court below. In his assignment of error, he sufficiently identified the point on which he contends the circuit court erred: requiring the Commissioner to prove something that the regulation does

not require.<sup>13</sup> Additionally, the Commissioner clearly identified this argument in his brief. UTMC was on notice as to the nature of the Commissioner’s argument, and the Commissioner has complied with the requirement to “point out the errors with reasonable certainty.” *Carroll*, 280 Va. at 649 (quoting *Yeatts*, 249 Va. at 290).

Accordingly, the circuit court also erred by requiring proof of an injury or actual hazard because the regulation provides an alternative noncomplying condition on which the Commissioner presented evidence. *See* 29 C.F.R. § 1910.176(a) (“Permanent aisles and passageways shall be appropriately marked.”).

#### B. The Evidentiary Ruling

In his second assignment of error, the Commissioner argues that the circuit court erred by sustaining UTMC’s objections to the introduction of a post-accident investigative report prepared by UTMC. Separately, but relatedly, the Commissioner also argues that the circuit court erred by sustaining UTMC’s objections to follow-up questions to the report’s author.

Appellate courts review a circuit court’s ruling on the admissibility of evidence under an abuse of discretion standard. *Thomas v. Commonwealth*, 279 Va. 131, 168 (2010). A court always abuses its discretion when it makes an error of law. *See, e.g., Warnick v. Commonwealth*, 72 Va. App. 251, 263 (2020). A court can also abuse its discretion in three other ways: (1) by failing to consider a relevant factor that should have been given significant weight, (2) by considering and giving significant weight to an irrelevant or improper factor, and (3) by committing a clear error of judgment, even while weighing “all proper factors.” *Lawlor v.*

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<sup>13</sup> Specifically, the Commissioner’s assignment of error claims that “The circuit court erred by misinterpreting the Regulation to require proof of causation between an injury and the alleged hazard – obstructed aisleways – and by discounting evidence of an actual hazard that likely caused this injury.”

*Commonwealth*, 285 Va. 187, 213 (2013) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011)).

Virginia Rule of Evidence 2:407, derived from Code § 8.01-418.1, provides that:

When, after the occurrence of an event, measures are taken which, if taken prior to the event, would have made the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct as a cause of the occurrence of the event; provided that evidence of subsequent measures is not required to be excluded when offered for another purpose for which it may be admissible, including, but not limited to, proof of ownership, control, feasibility of precautionary measures if controverted, or for impeachment.

Therefore, when faced with such questions, courts must consider two questions: is the evidence offered actually a remedial measure, *i.e.* a measure which “if taken prior to [an] event, would have made the event less likely to occur”; and, second, whether the evidence is offered to prove negligence or culpable conduct as a cause of the event.

We deal first with the purpose element. The inferential process that the rule prohibits is that the defendant, by remedying a given situation, has admitted by his conduct that the situation was dangerous or illegal, or that he was otherwise at fault for causing that situation. *See* Fed. R. Evid. 407 advisory committee’s note to 1972 proposed rule.<sup>14</sup> The rationale behind this rule is two-fold. First, this inference is weak in any event. There are myriad other explanations for why a defendant would change a condition other than as an admission of fault by conduct. *Id.* Second, and more importantly, the law should not discourage potential defendants from making working conditions within their control safer for fear that such a remedial measure will later be used against them to prove their culpability. *See Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 253 (1975).

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<sup>14</sup> While there are some stylistic differences between Federal Rule of Evidence 407 and Rule 2:407, we find the rationales behind the rules to be similar.

In this case, the situation or “event” in question is the existence of a noncomplying condition under the VOSH standards. Accordingly, the inferential process that the rule prohibits in this case is that the Commissioner may not rely on any action taken by UTMC that would make the presence of an obstruction that could create a hazard less likely to occur, if that action is offered to prove that UTMC’s negligence or culpable conduct caused the presence of an obstruction that could create a hazard.

We note that this is not a torts case. Negligence is not an element of the Commissioner’s claim. As such, the report could not have been offered to prove that UTMC’s negligence caused the existence of a noncomplying condition. The question then becomes whether the evidence was offered to prove UTMC’s culpable conduct as a cause of the existence of a noncomplying condition.<sup>15</sup>

In *Werner v. Upjohn Co., Inc.*, 628 F.2d 848 (4th Cir. 1980), the Fourth Circuit interpreted “culpable conduct” as used in the federal analogue to Rule 2:407 as conduct which is “blamable; censurable; involving the breach of a legal duty or the commission of a fault. . . . [I]t implies that the act or conduct spoken of is reprehensible or wrong, but not that it involves malice or a guilty purpose.” *Id.* at 856-57 (quoting *Black’s Law Dictionary* (4th ed. 1968)).

The *Werner* court interpreted the phrase “culpable conduct” in the context of a strict products liability case where, as is the case here, negligence is not an element of the claim. There, the plaintiff argued that Rule 407 did not apply in such a situation because the inquiry only focused on the dangerousness of the product, not the bad actions of the defendant. *Id.* at 856. The *Werner* court disagreed, reasoning that, “[f]rom a defendant’s point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or

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<sup>15</sup> The phrase “culpable conduct” is not defined in the Rule or in the statute, and there are no Virginia cases interpreting the phrase in the context of Rule 2:407.

improvement. It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed.” *Id.* at 857.<sup>16</sup>

Based on the policy purposes behind the rule and the *Werner* court’s persuasive reasoning on its application to strict liability cases, we find that Rule 2:407 applies in an action to enforce a citation for violations of the VOSH safety regulations. The goal of Rule 2:407 is to encourage potential defendants to make improvements to prevent injuries. This goal would be thwarted by refusing to apply Rule 2:407 in VOSH safety regulation cases.<sup>17</sup>

Having found that Rule 2:407 applies to VOSH safety regulations cases, we turn to whether the investigative report generated by UTMC can fairly be considered a subsequent remedial measure within the meaning of the rule. There are no reported Virginia cases determining whether a party’s subsequent identification of the cause of an accident constitutes a subsequent remedial measure. However, other jurisdictions have interpreted their analogues to Rule 2:407 and their analyses are instructive.

The majority of courts hold that investigative reports, by their very nature, cannot be subsequent *remedial* measures. As the Tenth Circuit has noted “such [reports] are conducted for the purpose of investigating the occurrence to discover what might have gone wrong or right. Remedial measures are those actions taken to remedy any flaws or failures indicated by the [report].” *Rocky Mountain Helicopters, Inc. v. Bell Helicopters*, 805 F.2d 907, 918 (10th Cir.

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<sup>16</sup> See also *Bauman v. Volkswagenwerk Aktiengesellschaft*, 621 F.2d 230, 232 (6th Cir. 1980); *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463, 469 (7th Cir. 1984); *Gauthier v. AMF, Inc.*, 788 F.2d 634, 636-37 (9th Cir.), *amended on denial of reh’g*, 805 F.2d 337 (9th Cir. 1986); Fed. R. Evid. 407 advisory committee’s note to 1997 amendments.

<sup>17</sup> We note also that the OSHRC has applied the federal rule in its proceedings with little controversy. See, e.g., *Houston Sys. Manuf. Co.*, 1978 CCH OSHD ¶ 23,024 (No. 77-2117, 1978); *Gen. Dynamics Corp., Elec. Boat Div.*, 1980 CCH OSHD ¶ 24,892 (No. 79-6844, 1980).

1986).<sup>18</sup> These courts reason that post-accident investigations cannot logically be measures that would make an event less likely to occur because one cannot identify the cause of an event before it happens. However, these reports do occasionally include recommendations for how to prevent accidents happening in the future. When investigative reports do include recommendations for subsequent remedial measures, most of these courts agree that simply redacting any mention of the remedial recommendations from the version of the report ultimately admitted is an appropriate compromise. *See, e.g., City of Bethel v. Peters*, 97 P.3d 822, 827 (Alaska 2004).

Other courts have held that the policy purposes behind the rule prohibit the introduction of these investigative reports in their entirety. In *Martel v. Massachusetts Bay Transportation Authority*, 525 N.E.2d 662, 664 (Mass. 1988), the Massachusetts Supreme Judicial Court

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<sup>18</sup> Other jurisdictions have adopted the reasoning of the Tenth Circuit. *See, e.g., Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 431 (5th Cir. 2006) (declining to extend Rule 407 to investigations “which by themselves do not make the accident less likely to occur”); *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir. 1988) (holding that report at issue was “‘internal investigatory report’ of the sort not protected by Rule 407”); *J.M. v. City of Milwaukee*, 249 F. Supp. 3d 920, 932 (E.D. Wis. 2017) (holding that the investigation leading to the remedial act of employee discipline did not fall within scope of Rule 407); *Aranda v. City of McMinnville*, 942 F. Supp. 2d 1096, 1103 (D. Or. 2013); (“By it [sic] terms, [Rule 407] is limited to measures that would have made the harm less likely to occur; it does not extend to post-incident investigations into what *did* occur.”); *Bullock v. BNSF Ry. Co.*, 399 P.3d 148, 158 (Kan. 2017) (“[I]t is not unusual for some evidence to include information that is permissible, such as investigative conclusions, and information that is impermissible, such as [the recommended remedial measure of] employee discipline.”); *City of Bethel v. Peters*, 97 P.3d 822, 827 (Alaska 2004) (holding that post-incident report, with “corrective action” section redacted, was admissible); *Fox v. Kramer*, 994 P.2d 343, 352 (Cal. 2000) (noting that the majority of courts “distinguish between an investigation and actual steps taken to correct a problem; post[-]event investigations do not themselves constitute remedial measures, although they might provide the basis for such measures”); *J.B. Hunt Transp., Inc. v. Guardianship of Zak*, 58 N.E.3d 956, 966 (Ind. Ct. App. 2016) (“The majority of jurisdictions agree that a post-incident investigation and report of the investigation do not constitute inadmissible subsequent remedial measures.”).

explained that while such reports are not themselves remedial, they are a necessary prerequisite to any remedial safety measures.

Finally, in a recent case, *Thomas v. University Medical Center, Inc.*, 620 S.W.3d 576 (Ky. 2020), the Kentucky Supreme Court announced a third approach. Under the Kentucky approach, a court should consider whether a defendant has actually adopted any of the remedial measures contained in the investigative report. *Id.* at 586. If so, the *Thomas* court reasons, the report merges with the measures and the policy purposes of the rule are best served by total exclusion. *Id.* However, where any measures recommended by a report are not implemented, the “information alone would not have made the incident less likely to occur.” *Id.* Accordingly, the Kentucky test constitutes a case-by-case approach wherein trial courts must determine whether any remedial actions recommended by an investigative report were actually implemented by the defendant. *Id.* at 587. If so, then the entirety of the report is excluded from evidence. *Id.* If the recommendations are not taken, then the court should admit the document in its entirety. *Id.*

We think the majority rule—admitting investigative reports with redactions for remedial measures recommended—is the best approach. While we find many aspects of the Kentucky approach attractive, it presents several pitfalls that give us pause. First, it has the consequence of excluding more evidence than the rule explicitly allows. Rule 2:407 only excludes measures which “if taken prior to [an] event, would have made the event less likely to occur.” Significantly, the rule is derived from the Virginia Code, and it is a long-standing rule of statutory construction that we may not add language to statutes. *Berglund Chevrolet, Inc. v. Va. Dep’t of Motor Vehicles*, 71 Va. App. 747, 754 (2020). The rule and statute only reach specific conduct (measures that would make an event less likely to occur) and do not permit potential

defendants to immunize incriminating evidence by including it in a report that also happens to recommend remedial measures.

Additionally, the Kentucky rule could prove difficult to implement in marginal cases. Should entire reports be inadmissible if only one minor recommendation is adopted? What if a recommendation is adopted in part or in a modified manner? What if remedial changes were made following an accident but prior to or contemporaneous with a report? When do a report's recommendations become stale? The Kentucky rule provides more questions than answers.

Accordingly, we hold that the mere identification of the causes of an event are not subsequent remedial measures within the meaning of Rule 2:407. Where such a report includes a recommendation for a remedial measure or evidence of an actual remedial measure taken, such inclusions should be redacted or otherwise excised from the report ultimately admitted into evidence.

Applying this holding to the facts of this case, the fact that UTMC investigated the worksite accident and generated a report as to its causes is not a measure "which if taken prior to the event would have made the event less likely to occur." Had the Commissioner sought to introduce evidence of some subsequent physical change UTMC made to the worksite (such as moving the pallets), that evidence would have been inadmissible as a subsequent remedial measure, but UTMC's identification of a cause of the accident is admissible. Accordingly, the circuit court made an error of law and abused its discretion by classifying UTMC's identification of the causes of the accident as a subsequent remedial measure. To the extent to which the report contained recommendations for how to prevent such accidents in the future, the circuit court did not err as those recommendations should have been redacted from the version of the report ultimately admitted.

UTMC argues that even if the circuit court erred by excluding the report as a subsequent remedial measure, this Court should affirm as the report was inadmissible hearsay. We disagree. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *See* Va. R. Evid. 2:801. Hearsay is inadmissible unless it falls within one of the exceptions to the hearsay rule. Va. R. Evid. 2:802. Among these exceptions is the party admissions exception. Va. R. Evid. 2:803(0). Under that exception

A statement offered against a party that is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or employee, made during the term of the agency or employment, concerning a matter within the scope of such agency or employment, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

*Id.*

The report is undeniably hearsay; however, it is also undeniably a party admission. Mr. Walsh was an employee of UTMC who generated the report during the term of his employment, concerning a matter within the scope of his employment as safety manager. *See* Va. R. Evid. 2:803(0)(D). Furthermore, Mr. Walsh was present at trial as the corporate representative of UTMC. *See* Va. R. Evid. 2:803(0)(A). Mr. Walsh's statements qualify as a party admission under two separate theories, and the circuit court could not have excluded the report on hearsay grounds.

UTMC additionally argues, however, that any error by the circuit court in excluding the report and the Commissioner's follow-up questions was harmless because the report and follow-up questions would not have revealed relevant evidence. *See Commonwealth v. White*, 293 Va. 411, 420-21 (2017). An error is harmless if "the error did not influence the [factfinder],

or had but slight effect.” *Commonwealth v. Swann*, 290 Va. 194, 201 (2015) (per curiam) (quoting *Anderson v. Commonwealth*, 282 Va. 457, 467 (2011)). Evidence is relevant if it has “any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence.” Va. R. Evid. 2:401.

The section of the report that the Commissioner sought to introduce meets this low threshold. Although much of the Commissioner’s evidence irrelevantly focused on the causes of the accident that triggered the compliance investigation, the cause of the accident itself was not an element of the Commissioner’s claim. Instead, the “fact in issue” in this case was whether the pallets caused an obstruction that could have created a hazard. Accordingly, the relevance question becomes whether the fact that UTMC identified the elevation of the load as a cause of the accident made it more probable that the pallets could have created a hazard. Based on the Commissioner’s proffer of Mr. Walsh’s expected testimony in response to the Commissioner’s follow-up questions (that the elevated load caused the accident because it obstructed the operator’s vision), we find that the report in redacted form and questions were relevant, and the circuit court’s error was not harmless.

#### CONCLUSION

Because the circuit court erred by requiring the Commissioner to prove that the pallets created an actual hazard, and because the circuit court abused its discretion by excluding a post-accident investigative report generated by UTMC, we reverse the judgment of the circuit court in sustaining UTMC’s motion to strike the evidence and in refusing to admit a redacted version of UTMC’s report on the accident and remand for further proceedings consistent with this opinion.

*Reversed and remanded.*

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of September, 2022.*

Utility Trailer Manufacturing Company,

Appellant,

against

Record No. 220117

Court of Appeals No. 0285-21-3

Gary G. Pan, Commissioner of  
Labor and Industry,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By:



Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

GARY G. PAN,  
Commissioner of Labor and Industry,

*Plaintiff.*

Case No. CL-2022-11479

v.

WAC, INC,

*Defendant.*

**JOINT MOTION AND FINAL ORDER OF DISMISSAL**

110 emv  
This matter comes before the Court on the Joint Motion of Plaintiff Gary G. Pan, Commissioner of Labor and Industry, and Defendant WAC, Inc, advising the Court that the parties have entered into a settlement agreement, incorporated and attached hereto as Exhibit A pursuant to 16 Va. Admin. Code § 25-60-340(F), and


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

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

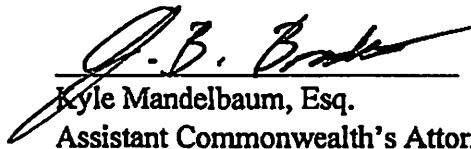
ADJUDGED, ORDERED and DECREED that the Joint Motion to Dismiss is GRANTED and that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

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

Entered this 17 day of October, 2022.

  
\_\_\_\_\_  
Judge

We ask for this:




Kyle Mandelbaum, Esq.  
Assistant Commonwealth's Attorney  
Fairfax County  
4110 Chain Bridge Rd, Suite 114  
Fairfax, VA 22030

Kaitlin Hopingardner, Esq. (VSB # 97034)  
Special Assistant Commonwealth's Attorney (*appointment pending*)  
Fairfax County  
c/o Department of Labor and Industry  
600 East Main Street, Suite 207  
Richmond, VA 23219  
Telephone: (804) 786-2641  
Email: kaitlin.hopingardner@doli.virginia.gov  
*Counsel for the Commissioner*

James Brooks, Esq. (VSB # 89036)  
Special Assistant Commonwealth's Attorney (*appointment pending*)  
Fairfax County  
c/o Department of Labor and Industry  
600 East Main Street, Suite 207  
Richmond, VA 23219  
Telephone: (804) 786-0610  
Email: james.brooks@doli.virginia.gov  
*Counsel for the Commissioner*

Seen and agreed:

WAC, INC



By: \_\_\_\_\_  
J. Chapman Petersen, Esq. (VSB # 37775)  
Chap Petersen & Associates, PLC  
3970 Chain Bridge Rd  
Fairfax, VA 22030  
Telephone: (571) 495-2510  
Email: jcp@petersenfirm.com  
*Counsel for the Defendant*

# **Exhibit A**

**GARY G. PAN**  
Commissioner of Labor and Industry

**W.A.C., Inc.,**

Inspection Number 1470788

### **SETTLEMENT AGREEMENT**

**THIS AGREEMENT** is entered into by Gary G. Pan, Commissioner of Labor and Industry (Commissioner) and W.A.C., Inc. (Employer).

WHEREAS, on or about June 1, 2020, the Commissioner issued citations to the employer alleging six Serious citations with grouped three grouped violations of Va. Code 40.1-51.1.A and 29 C.F.R. §§ 1910.106(e)(2)(ii); 1910.157(c)(1); 1910.212(a)(2); 1910.212(b); 1910.305(a)(2)(ix); 1910.305(g)(1)(iv)(A); 1910.305(g)(1)(iv)(D); 1910.305(j)(1)(i); 1910.1200(e)(1); 1910.1200(f)(6); 1910.1200(f)(10); 1910.1200(h)(1); and three Other-than-Serious violations of 29 C.F.R. §§ 1910.22(b); 1910.28(b)(15); and 1910.38(b) alleged to have occurred at 11728 Sunset Hills Road, Reston, VA. A total of \$34,465.00 in penalties was proposed by the Commissioner along with the violations. (Copy of the citation attached by reference hereto).

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

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

NOW, THEREFORE, the parties agree to the following:

#### **TERMS AND CONDITIONS OF AGREEMENT**

1. Upon full execution of the agreement, the Commissioner will modify the citations as follows:
  - a. Citation 1, Item 1 will remain as Serious with a reduced monetary penalty of \$2,304.
  - b. Citation 1, Item 2 will remain as Serious with a reduced monetary penalty of \$2,880.00

- c. Citation 1, Item 3 will remain as Serious with a reduced monetary penalty of \$2,304.00
  - d. Citation 1, Item 4 Grouped Violations will remain as Serious with a reduced grouped monetary penalty of \$2,304.00. This set of Grouped Violations includes the following:
    - i. Citation 1, Item 4a
    - ii. Citation 1, Item 4b
  - e. Citation 1, Item 5 Grouped Violations will remain as Serious with a reduced grouped monetary penalty of \$2,304.00. This set of Grouped Violations includes the following:
    - i. Citation 1, Item 5a
    - ii. Citation 1, Item 5b
    - iii. Citation 1, Item 5c
    - iv. Citation 1, Item 5d
  - f. Citation 1, Item 6 Grouped Violations will remain as Serious with a reduced grouped monetary penalty of \$2,304.00. This set of Grouped Violations includes the following:
    - i. Citation 1, Item 6a
    - ii. Citation 1, Item 6b
    - iii. Citation 1, Item 6c
    - iv. Citation 1, Item 6d
  - g. Other-than-Serious Citation 2, Item 1 will remain as is.
  - h. Other-than-Serious Citation 2, Item 2 will remain as is.
  - i. Other-than-Serious Citation 2, Item 3 will remain as is.
- For a total monetary penalty of \$14,400.00.

- 2. The Department of Labor and Industry agrees to waive an additional 15% (\$5,169.75) provided the Employer does not receive an additional Serious, Willful, or Repeat violation within three (3) years of the execution of this agreement. The Employer agrees to pay the remaining \$9,230.25 upon the execution of this agreement.
- 3. The Employer represents it is entering into this agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid litigation. This agreement shall not be construed as an admission by the Employer of civil or criminal liability for any violation or penalty alleged by the Commonwealth. By entering into this agreement, the Employer does not admit the truth of any alleged facts, any of the characterization of the Employer's alleged conduct or any conclusions set forth in the citations issued in this matter. Neither this agreement nor the Employer's consent to entry of a final order of the Commissioner pursuant to this agreement shall constitute an admission by the defendant of violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations or standards

promulgated thereunder. The Employer is entering into this agreement without any prejudice to its right to assert in any subsequent action or proceeding that any future existing conditions identical or similar to those alleged in the original citations do not violate the VOSH laws, regulations or standards promulgated thereunder.

4. As consideration for the modification of the terms of the original citations, the Employer agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this agreement.
5. The Employer will post a copy of this Settlement Agreement for a period of fifteen (15) days at the worksite in a conspicuous location where notices to its employees are generally posted.
6. Unless otherwise provided in this agreement or in a separate penalty installment payment agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.
7. This Agreement compromises and settles the above contested claims. Under Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia will not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party.
8. All citations and penalties, as modified above, including all new obligations contained in this settlement agreement, are a final order of the Commissioner of Labor and Industry.
9. This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, and shall also bind and inure to the benefit of any successor in interest of the Employer, except that the Employer may not assign any right or obligation flowing from this Agreement.
10. This Agreement is entered into by each of the parties without reliance upon any statement, representation, promise, inducement, or agreement not expressly contained herein. This Agreement constitutes the entire agreement between the parties concerning the aforesaid

settlement and citation(s), and all prior negotiations, offers, and agreements, whether written or oral, are either superseded or merged in this document. This agreement cannot be amended except by a writing signed by the parties.

11. A court's ruling rendering any provision(s) of this Agreement invalid or unenforceable shall not affect the validity of the remaining provisions of the Agreement.
12. Each person signing this Agreement hereby represents and warrants that he or she has the authority to bind the entity on behalf of which he or she has signed.
13. This Agreement may be executed in any number of copies, each of which shall be deemed a counterpart original.

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

W.A.C., INC.

By: William A Wygul (SEAL) 9.12.22  
Date

Name: William A Wygul  
Its: VP

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

The foregoing instrument was acknowledged before me this 10<sup>th</sup> day of Sept 2022 by William A Wygul on behalf of W.A.C., Inc.

Sonia E Hicks  
Notary Public

My commission expires: 3/31/26



GARY G. PAN  
COMMISSIONER OF LABOR AND INDUSTRY

By: [Signature] (SEAL) 09/27/22  
Date  
Marta Fernandes  
Director, Occupational  
Safety Compliance

**VIRGINIA:**

**IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY**

<b>GARY G. PAN,</b>	)	
Commissioner of Labor and Industry,	)	
<i>Plaintiff,</i>	)	
v.	)	Case No. CL19000135-00
	)	
<b>WHITLEY/SERVICE ROOFING</b>	)	
<b>AND SHEET METAL COMPANY</b>	)	
<i>Defendant.</i>	)	

**AGREED ORDER**

WHEREAS, on or about September 18, 2017, plaintiff Gary G. Pan, Commissioner of Labor and Industry ("Commissioner") issued a citation to defendant, Whitley/Service Roofing and Sheet Metal Company ("Whitley/Service Roofing"), alleging six Serious violations of the Virginia Occupational Safety and Health ("VOSH") Standards for the Construction Industry, and proposing \$36,995.00 in civil penalties; and

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

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

1. That the VOSH citation bearing Inspection Number 1221342, attached as Exhibit "A" is hereby amended as follows:

a) Item 1 is amended to an "Other Than Serious" classification, and its

\$1,995.00 proposed penalty is amended to \$780.00;

b) Item 2 and its \$7,000.00 penalty are both vacated;

c) Item 3 is grouped with former Item 4 as a single Serious violation - now Item 3a and 3b - and is affirmed as amended with a \$7,000.00 penalty;

d) Item 4 is grouped as described above;

e) Item 5 is amended to cite VOSH regulation § 1926.503(a) and affirmed as Serious, with the \$7,000.00 proposed penalty amended to \$5,000.00; and

f) Item 6 and its \$7,000.00 penalty are vacated.

2. That Whitley/Service Roofing will pay the amended civil penalties of \$12,780.00 within twenty-one (21) 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 1221342 noted on the payment;

3. That upon Whitley's payment in full, the Commissioner shall edit the Accident Investigation Summary for this VOSH Inspection Number 1221342, on the federal OSHA website, and amend it to read as follows:

"At approximately 11am on 3/30/2017, a Whitley roofing employee was walking on an industrial plant roof to a specific area to assist in cleaning a section of roof. The employee fell through a roof opening for a new air conditioning unit. The opening was not covered adequately, and the cover not secured sufficiently, nor marked as a floor hole. The Whitley employee did not work for the HVAC contractor that both created the holes in the roof deck and inadequately and ineffectually covered them. The employee landed on a concrete floor and injured his head and back. The employee was hospitalized and treated for his injuries."

4. That Whitley/Service Roofing withdraws its original notice of contest, and hereby waives its right to contest the remaining terms contained in this Order;

5. That it is expressly understood that any modifications to violations and penalty amounts in this agreement are contingent upon Whitley/Service Roofing's full payment of all penalties due. Failure by Whitley/Service Roofing to substantially comply with the terms of this Order or to make a penalty payment by the due date constitutes a breach of this Order. Any breach shall mean that the originally proposed violations and penalties shall be reinstated, and all unpaid amounts shall become due and payable 15 calendar days following the breach;

6. That Whitley/Service Roofing certifies that the violations amended and affirmed herein have each been abated;

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

8. That this Order shall be construed to advance the purpose of *Va. Code § 40.1-3*;

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

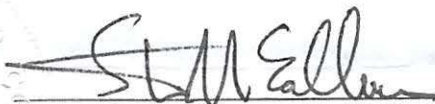
10. That this agreement shall not be construed as an admission by Whitley/Service Roofing of civil or criminal liability for any violation or penalty alleged by the Commissioner; and

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

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

Entered this 15<sup>th</sup> day of November, 2022.



  
\_\_\_\_\_  
Judge Steven C. McCallum

A COPY TESTE:  
WENDY S. HUGHES, CLERK

BY:   
Elizabeth Brown, Deputy Clerk

WE ASK FOR THIS:



Alfred B. Albiston (VSB # 29851)  
Special Assistant Commonwealth's Attorney  
Chesterfield County  
c/o Department of Labor and Industry  
600 East Main Street, Suite 207  
Richmond, Virginia 23219  
(804) 786-6760  
(804) 786-8418 Fax  
[Alfred.Albiston@doli.virginia.gov](mailto:Alfred.Albiston@doli.virginia.gov)

*Counsel for plaintiff*

SEEN AND AGREED:



Dannel C. Duddy, Esquire (VSB #72906)  
Harman, Claytor, Corrigan & Wellman  
P.O. Box 70280  
Richmond, Virginia 23255  
Phone: (804) 747-5200  
Fax: (804) 747-6085  
[dduddy@hccw.com](mailto:dduddy@hccw.com)

Philip J. Siegel, Esquire (*admitted pro hac vice*)  
Hendrick, Phillips, Salzman & Siegel, P.C.  
230 Peachtree Street, N.W.  
Suite 2500  
Atlanta, GA 30303-1515  
(404) 469-9197  
(404) 522-9545 fax  
[pis@hpsslaw.com](mailto:pis@hpsslaw.com)

*Counsel for defendant*

**VIRGINIA:**

**IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY**

<b>GARY G. PAN,</b>	)	
Commissioner of Labor and Industry,	)	
<i>Plaintiff,</i>	)	
v.	)	Case No. CL19000135-00
	)	
<b>WHITLEY/SERVICE ROOFING</b>	)	
<b>AND SHEET METAL COMPANY</b>	)	
<i>Defendant.</i>	)	

**AGREED ORDER'S EXHIBIT A**

Virginia Occupational Safety and Health citation issued September 18, 2017;

Inspection Number 1221342,

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

Inspection Number: 1221342  
Inspection Date: 03/30/2017-  
09/18/2017  
Issuance Date: 09/18/2017



**Citation and Notification of Penalty**

**Company Name:** Whitley / Service Roofing & Sheet Metal Company  
**Inspection Site:** 1925 Ruffin Mill Road Colonial Heights, VA 23834

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

1926.100(a): At this jobsite, on the roof and ground, employees exposed to possible head injury from falling or flying objects or from impact with hand tools, equipment and building materials during construction operations were not wearing hard hats.

**Date by Which Violation Must Be Abated:**  
**Proposed Penalty:**

**Corrected During Inspection**  
**\$1995.00**

**Citation 1 Item 2**                      **Type of Violation:    Serious**

1926.501(a)(2): At this jobsite, on the roof, the employer did not determine if the walking/working surfaces on which employees worked had the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity to support employees safely.

On or about March 30, 2017 a Whitley/Service Roofing and Sheet Metal Company employee stepped on and fell through the unmarked, unsecured roof hole cover that was not sufficient to hold his weight. The employee sustained serious injury resulting in death.

**Date by Which Violation Must Be Abated:**  
**Proposed Penalty:**

**Corrected During Inspection**  
**\$7000.00**

**Citation 1 Item 3**                      **Type of Violation:    Serious**

1926.501(b)(4)(i): Each employee on walking/working surfaces shall be protected from falling through holes more than 6 feet above a lower level, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

At this jobsite, on the roof, employees were not protected from falling through two HVAC roof openings, approximately 6 ft. 9 in. long, by 5 ft. 5 in. wide and 3 ft. 11 in. long by 5 ft. 7 in wide, and approximately 28 ft. above the interior factory floor by the use of guardrail systems, covers or personal fall arrest systems.

On or about March 30, 2017 a Whitley/Service Roofing and Sheet Metal Company employee stepped on and fell through the unmarked, unsecured roof hole cover that was not sufficient to hold his weight. The employee sustained serious injury resulting in death.

**Date by Which Violation Must Be Abated:**  
**Proposed Penalty:**

**Corrected During Inspection**  
**\$7000.00**

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

Inspection Number: 1221342  
Inspection Date: 03/30/2017-  
09/18/2017  
Issuance Date: 09/18/2017



**Citation and Notification of Penalty**

**Company Name:** Whitley / Service Roofing & Sheet Metal Company  
**Inspection Site:** 1925 Ruffin Mill Road Colonial Heights, VA 23834

**Citation 1 Item 4**                      **Type of Violation:    Serious**

1926.502(i)(2): At this jobsite, on the roof, two HVAC roof openings, approximately 6 ft. 9 in. long, by 5 ft. 5 in. wide and 3 ft. 11 in. long by 5 ft. 7 in wide, and approximately 28 ft. above the interior factory floor, had been covered with one sheet of 4 ft. wide by 8 ft. long 1/2 in. OSB board, in lieu of a cover which would be capable of supporting without failure, at least twice the weight of employees, equipment, and other materials that may be imposed on the cover at any one time.

On or about March 30, 2017 a Whitley/Service Roofing and Sheet Metal Company employee stepped on and fell through the unmarked, unsecured roof hole cover that was not sufficient to hold his weight. The employee sustained serious injury resulting in death.

**Date by Which Violation Must Be Abated:**  
**Proposed Penalty:**

**Corrected During Inspection**  
**\$7000.00**

**Citation 1 Item 5**                      **Type of Violation:    Serious**

1926.502(i)(3): All covers were not secured when installed so as to prevent accidental displacement by the wind, equipment, or employees:

At this jobsite, on the roof, two HVAC roof openings, approximately 6 ft. 9 in. long, by 5 ft. 5 in. wide and 3 ft. 11 in. long by 5 ft. 7 in wide, and approximately 28 ft. above the interior factory floor, had been covered with one sheet of 4 ft. wide by 8 ft. long 1/2 in. OSB board, had not been secured when installed so as to prevent accidental displacement.

On or about March 30, 2017 a Whitley/Service Roofing and Sheet Metal Company employee stepped on and fell through the unmarked, unsecured roof hole cover that was not sufficient to hold his weight. The employee sustained serious injury resulting in death.

**Date by Which Violation Must Be Abated:**  
**Proposed Penalty:**

**Corrected During Inspection**  
**\$7000.00**

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

**Inspection Number:** 1221342  
**Inspection Date:** 03/30/2017-  
09/18/2017  
**Issuance Date:** 09/18/2017



**Citation and Notification of Penalty**

**Company Name:** Whitley / Service Roofing & Sheet Metal Company  
**Inspection Site:** 1925 Ruffin Mill Road Colonial Heights, VA 23834

**Citation 1 Item 6**                      **Type of Violation: Serious**

1926.502(i)(4): At this jobsite, on the roof, two HVAC roof openings, approximately 6 ft. 9 in. long, by 5 ft. 5 in. wide and 3 ft. 11 in. long by 5 ft. 7 in wide, and approximately 28 ft. above the interior factory floor, had been covered with one sheet of 4 ft. wide by 8 ft. long 1/2 in. OSB board, had not been marked with the work "Hole" or "Cover" to provide warning of the hazard.

On or about March 30, 2017 a Whitley/Service Roofing and Sheet Metal Company employee stepped on and fell through the unmarked, unsecured roof hole cover that was not sufficient to hold his weight. The employee sustained serious injury resulting in death.

**Date by Which Violation Must Be Abated:**  
**Proposed Penalty:**

**Corrected During Inspection**  
**\$7000.00**

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

Stanley J. Dykstra  
Regional Safety Director

C  
9/14/22  
West  
Ballings

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF SALEM

GARY G. PAN,  
Commissioner of Labor and Industry )

*Plaintiff,* )

v. )

Case No. CL20000593-00

YOKOHAMA TIRE MANUFACTURING  
VIRGINIA, LLC, )

*Defendant.* )

AGREED ORDER

THIS DAY CAME the parties, jointly and by counsel, moving that the Court enter this Agreed Order embodying the settlement as agreed to by the parties; and incorporating the terms of the Settlement Agreement entered into by the parties on September 1, 2022.

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

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

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

- 1. This court retains jurisdiction over the parties and this action solely to enforce the terms of this Order and the parties' Settlement Agreement (attached as Exhibit A);

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

3. If, upon motion by the Commissioner, the Court determines that Yokohama has not met its good faith obligation to complete one or more of the five safety projects referenced above within the agreed upon time period or within any Extension of Abatement Time approved by the Commissioner pursuant to 16VAC25-60-320, Yokohama shall pay an additional \$50,000.00 of the penalty owed to the Commonwealth.


4. Pursuant to *Virginia Administrative Code* § 16 VAC 25-60-40(1), Yokohama shall post a copy of this order for ten (10) consecutive days in a conspicuous location where notices to employees generally are posted.

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

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

7. The Clerk shall strike this matter from the docket and place it among the ended civil cases. The Clerk shall certify copies of this order to both counsels of record.

Entered this 9<sup>th</sup> day of September 2022.

  
Circuit Court Judge, 23rd Judicial Circuit

We request this:



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Alex W. West, Esq. (VSB 84607)  
Special Assistant Commonwealth's Attorney, City of Salem  
c/o Department of Labor and Industry  
600 East Main Street, Suite 207  
Richmond, Virginia 23219  
(804) 371-2631  
(804) 371-6524 (fax)  
Email: [alex.west@doli.virginia.gov](mailto:alex.west@doli.virginia.gov)

/s/R. Patrick Bolling

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R. Patrick Bolling, Esq. (VSB 87334)  
Woods Rogers Vandeventer Black PLC  
10 South Jefferson Street, Suite 1800  
Roanoke, VA 24011  
(540) 983-7683  
(540) 332-3840  
Email: [pbolling@woodsrogers.com](mailto:pbolling@woodsrogers.com)



**Gary G. Pan**  
Commissioner of Labor and Industry

**Yokohama Tire Manufacturing Virginia, LLC**  
Inspection Numbers 1236386, 1255478, 1252954, 1301902, 1373262, 1382316, 1409078,  
and 1402102

THIS AGREEMENT is entered into by the Commonwealth of Virginia,  
Commissioner of Labor and Industry (Commissioner) and Yokohama Tire  
Manufacturing Virginia, LLC (Employer or "Yokohama").

WHEREAS, on November 21, 2017, inspection number 1236386, the  
Commissioner issued citations to the Employer alleging one serious and one repeat  
violation of Virginia Occupational Safety and Health (VOSH) regulations and assessing  
\$42,000.00 in proposed penalties;

WHEREAS, on January 11, 2018, inspection number 1255478, the Commissioner  
issued citations to the Employer alleging twenty-three serious, one repeat and five other  
than serious violations of Virginia Occupational Safety and Health (VOSH) regulations  
and assessing \$249,565.00 in proposed penalties;

WHEREAS, on January 11, 2018, inspection number 1252954, the Commissioner  
issued citations to the Employer alleging four serious, and five other than serious  
violations of Virginia Occupational Safety and Health (VOSH) regulations and assessing  
\$24,080.00 in proposed penalties;

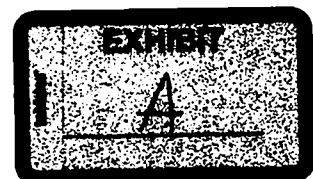
WHEREAS, on June 28, 2018, inspection number 1301902, the Commissioner  
issued citations to the Employer alleging three serious, and one other than serious  
violations of Virginia Occupational Safety and Health (VOSH) regulations and assessing  
\$24,195.00 in proposed penalties;

WHEREAS, on March 29, 2019, inspection number 1373262, the Commissioner  
issued citations to the Employer alleging two serious and one repeat violations of  
Virginia Occupational Safety and Health (VOSH) regulations and assessing \$51,255.00  
in proposed penalties;

WHEREAS, on May 9, 2019, inspection number 1382316, the Commissioner  
issued a citation to the Employer alleging one repeat violation of Virginia Occupational  
Safety and Health (VOSH) regulations and assessing \$63,630.00 in proposed penalties;

WHEREAS, on September 20, 2019, inspection number 1409078, the  
Commissioner issued citations to the Employer alleging five serious and one other-than-  
serious violations of Virginia Occupational Safety and Health (VOSH) regulations and  
assessing \$41,976.00 in proposed penalties;

WHEREAS, on November 19, 2019, inspection number 1402102, the



Commissioner issued citations to the Employer alleging one serious and one other than serious violations of Virginia Occupational Safety and Health (VOSH) regulations and assessing \$12,725.00 in proposed penalties;

WHEREAS, the Employer filed a notice of contest of all violations and penalties contained in the above citations (together, the "cases") within 15 working days from the date of the receipt of the citations, as provided by '40.1-49.4 of the Code of Virginia; and

WHEREAS, the parties want to settle the cases short of litigation in a way that will further, protect and promote the safety and health of the employees of the Employer and avoid the time and expense of litigation;

NOW, THEREFORE, the parties agree to the following:

### **TERMS AND CONDITIONS OF AGREEMENT**

1. The parties agree that the provisions of this agreement are intended solely for the safety, health and welfare of Yokohama Tire Manufacturing Virginia, LLC employees and the benefits thereof shall not run to any other person not a party to this agreement, nor shall any third party have any right of action for breach of any provision of this agreement, unless otherwise specifically provided for herein.
2. Upon full execution of the agreement, the Commissioner will modify the penalties and citations as provided in ATTACHMENT A.
3. The Employer, upon execution of this settlement agreement, will pay to the Commonwealth \$275,000.00 in partial payment of the penalties assessed for the above citations. The Employer will make the check or money order payable to the "Treasurer of Virginia," with the VOSH inspection numbers (1236386, 1255478, 1252954, 1301902, 1373262, 1382316, 1409078, and 1402102) noted on the payment.
  - a. The Commonwealth shall forgive \$75,000.00 of the remaining penalty owed if between September 8, 2022 and March 8, 2023, the Employer requests and completes a VOSH Safety Consultation job site survey of its current worksite. If the Employer chooses not to request and complete a VOSH Safety Consultation survey for the worksite, it shall pay an additional \$75,000.00 to the Commonwealth in partial settlement of the penalties.
  - b. The Commonwealth shall forgive \$75,000.00 of the remaining penalty owed if between March 9, 2023 and August 8, 2023, the Employer requests and completes a VOSH Health Consultation job site survey of its current worksite. If the Employer chooses not to request and complete a VOSH Health Consultation survey for the worksite, it shall pay an

additional \$75,000.00 to the Commonwealth in partial settlement of the penalties.

- c. The Commonwealth shall forgive \$75,000.00 of the remaining penalty owed if between September 8, 2022 and March 8, 2023, the Employer completes the five safety projects agreed to by the parties and outlined in ATTACHMENT B concerning the elevators, pit lighting, lower rings, public address system and squeeze motors.
4. Unless otherwise provided in this agreement, penalties assessed under this agreement are due and payable within 30 calendar days of the effective date of this agreement. It is expressly understood that any modifications to citation classification or penalty level, or any vacating of a citation or penalty in this agreement are contingent upon the Employer's full payment of all penalties due. Failure by the Employer to substantially comply with the terms of this agreement or to make a penalty payment by the due date constitutes a breach of this agreement. Any breach shall mean that all originally proposed citations and penalties shall be reinstated and affirmed as a final order of the Commissioner, and all unpaid amounts shall become due and payable 15 calendar days following the breach.
5. Yokohama will submit an abatement plan with proposed completion dates as agreed to by the parties but in no case to exceed 180 days for the **five safety projects** referenced above in accordance with 16VAC25-60-307(F) within twenty-five (25) days of the effective date of this agreement and comply with VOSH employee notification, abatement verification, and certification requirements contained in 16VAC25-60-307. As each safety project is completed, Yokohama shall submit abatement verification documentation to the Commissioner. The abatement verification documentation shall be consistent with 16VAC25-60-307(E) demonstrating that abatement is complete, such as video or photographic evidence of abatement, evidence of purchase of repair equipment, or other written records. The documentation shall be provided to:  
  
Russel Bambarger  
VOSH Southwest Regional Safety Director  
Virginia Department of Labor and Industry  
Brammer Village  
3013 Peters Creek Road  
Roanoke, Virginia 24019
6. If not already provided, the Yokohama agrees to provide within thirty (30) days of the effective date of this agreement documentation verifying abatement of **all other violations affirmed in this agreement** and comply with VOSH employee notification, abatement verification, and certification requirements contained in 16VAC25-60-307. The documentation shall comply with 16VAC25-

60-307.E.2 of the Virginia Occupational Safety and Health (VOSH) Administrative Regulations Manual, which states that "Documents demonstrating that abatement is complete may include, but are not limited to, evidence of purchase or repair of equipment, photographic or video evidence of abatement, or other written records."

The documentation shall be provided to: VOSH Southwest Regional Safety Director Russell Bamberger or VOSH Southwest Regional Health Director Paul Saunier, as appropriate, at the address above.


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

7. The parties recognize that due to unforeseen circumstances, and despite substantial compliance by both parties with the terms of this agreement, that completion of abatement of the five safety projects and all other affirmed violations might exceed previously agreed upon time periods specified for completion. In that event, the parties agree that the Employer will comply with the procedures established for filing a petition for Extension of Abatement Time in accordance with 16VAC25-60-320.
8. As consideration for the modification of the terms of the original violations, penalties and abatement dates for the inspections covered by this agreement, the Employer agrees to withdraw its original notice of contests filed with respect to the above styled cases and waives its right to contest the remaining terms contained in this agreement.
9. Nothing in this agreement shall be construed to limit the Commissioner's enforcement authority under Title 40.1 of the Code of Virginia to conduct inspections in accordance with Va. Code § 40.1-49.8 at Yokohama's worksite during or after the pendency of this agreement.
10. The Employer represents that it is entering into this agreement of settlement in the spirit of conciliation and cooperation in an effort to avoid litigation. This agreement shall not be construed as an admission by Yokohama of civil or criminal liability for any violation or penalty alleged by the Commissioner. By entering into this agreement, the Employer does not admit the truth of any alleged facts, any of the characterization of the Employer's alleged conduct or any conclusions set forth in the citation(s) issued in this matter. Neither this agreement nor the Employer's consent to entry of a final order of the Commissioner pursuant to this agreement shall constitute an admission by the Employer of violation of the Virginia Occupational Safety and Health (VOSH) laws, regulations or standards promulgated thereunder. The Employer is entering into this agreement without any prejudice to its right to assert in any subsequent action or proceeding that any future existing conditions identical or

similar to those alleged in the original citation do not violate the VOSH laws, regulations or standards promulgated thereunder.

11. Pursuant to Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party, in which it is alleged that an employer acted in violation of or failed to act in accordance with any provision of Chapter 3 of Title 40.1 of the Code of Virginia, or any state or federal occupational safety and health law, standard or regulation. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia in accordance with applicable law or regulations, including but not limited to the rules of evidence, civil procedure, and the Rules of the Supreme Court of Virginia.

**YOKOHAMA TIRE MANUFACTURING VIRGINIA, LLC**

By:  \_\_\_\_\_

Agent

08/30/2022

Date

**GARY G. PAN**

**COMMISSIONER OF LABOR AND INDUSTRY**

By:  \_\_\_\_\_

Marta Fernandes

VOSH Safety Compliance Director

09/01/22

Date

**ATTACHMENT A**

**Yokohama Tire Manufacturing Virginia, LLC**

**Inspection Number 1236386, Citations Issued November 21, 2017  
- Employer Reported Referral**

Serious Citation 1, Item 1, is affirmed with a penalty of \$7,000.00.

Repeat Citation 2, Item 1, is affirmed with a penalty of \$25,573.00.

**TOTAL PROPOSED PENALTIES: \$42,000.00**

**TOTAL FINAL PENALTIES: \$32,574.00**

**Inspection Number 1255478, Citations Issued January 11, 2018 - Safety  
Comprehensive**

Serious Citation 1, Item 1, is affirmed with a penalty of \$8,570.00.

Serious Citation 1, Item 2, is affirmed with a penalty of \$8,570.00.

Serious Citation 1, Item 3a, is affirmed with a penalty of \$12,470.00.

Serious Citation 1, Item 3b, is affirmed with a penalty of \$0.00.

Serious Citation 1, Item 4, is affirmed with a penalty of \$4,490.00.

Serious Citation 1, Item 5, is affirmed with a penalty of \$8,570.00.

Serious Citation 1, Item 6, is affirmed with a penalty of \$10,080.00.

Serious Citation 1, Item 7, is affirmed with a penalty of \$4,490.00.

Serious Citation 1, Item 8, is affirmed with a penalty of \$4,490.00.

Serious Citation 1, Item 9, is affirmed with a penalty of \$7,750.00.

Serious Citation 1, Item 10, is affirmed with a penalty of \$12,470.00.

Serious Citation 1, Item 11, is affirmed with a penalty of \$6,530.00.

Serious Citation 1, Item 12, is affirmed with a penalty of \$9,070.00.

Serious Citation 1, Item 13, is affirmed with a penalty of \$8,570.00.

Serious Citation 1, Item 14, is affirmed with a penalty of \$6,530.00.

Serious Citation 1, Item 15a, is affirmed with a penalty of \$6,530.00.

Serious Citation 1, Item 15b, is affirmed with a penalty of \$0.00.

Serious Citation 1, Item 15c, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 16, is affirmed with a penalty of \$6,530.00.  
Serious Citation 1, Item 17, is affirmed with a penalty of \$8,570.00.  
Serious Citation 1, Item 18, is affirmed with a penalty of \$8,570.00.  
Serious Citation 1, Item 19a, is affirmed with a penalty of \$8,570.00.  
Serious Citation 1, Item 19b, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 20a, is affirmed with a penalty of \$8,570.00.  
Serious Citation 1, Item 20b, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 20c, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 20d, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 21a, is affirmed with a penalty of \$8,570.00.  
Serious Citation 1, Item 21b, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 22, is affirmed with a penalty of \$10,080.00.  
Serious Citation 1, Item 23a, is affirmed with a penalty of \$8,570.00.  
Serious Citation 1, Item 23b, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 23c, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 23d, is affirmed with a penalty of \$0.00.  
Repeat Citation 2, Item 1, is affirmed with a penalty of \$62,355.00.  
Other-Than-Serious Citation 3, Item 1, is affirmed with a penalty of \$0.00.  
Other-Than-Serious Citation 3, Item 2, is affirmed with a penalty of \$0.00.  
Other-Than-Serious Citation 3, Item 3, is affirmed with a penalty of \$0.00.  
Other-Than-Serious Citation 3, Item 4, is affirmed with a penalty of \$0.00.  
Other-Than-Serious Citation 3, Item 5, is affirmed with a penalty of \$0.00.  
**TOTAL PROPOSED PENALTIES: \$249,565.00**  
**TOTAL FINAL PENALTIES: \$249,565.00**

**Inspection Number 1252954, January 11, 2018 - Health Complaint**

Serious Citation 1, Item 1a, is affirmed with a penalty of \$6,530.00.

Serious Citation 1, Item 1b, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 1c, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 2, is affirmed with a penalty of \$4,490.00.  
Serious Citation 1, Item 3, is affirmed with a penalty of \$8,570.00.  
Serious Citation 1, Item 4, is affirmed with a penalty of \$4,490.00.  
Other-Than-Serious Citation 2, Item 1, is affirmed with a penalty of \$0.00.  
Other-Than-Serious Citation 2, Item 2, is affirmed with a penalty of \$0.00.  
Other-Than-Serious Citation 2, Item 3, is affirmed with a penalty of \$0.00.  
Other-Than-Serious Citation 2, Item 4, is affirmed with a penalty of \$0.00.  
Other-Than-Serious Citation 2, Item 5, is affirmed with a penalty of \$0.00.  
TOTAL PROPOSED PENALTIES: \$24,080.00  
**TOTAL FINAL PENALTIES: \$24,080.00**

**Inspection Number 1301902, Citations Issued June 28, 2018 - Health Complaint**

Serious Citation 1, Item 1, is affirmed with a penalty of \$8,065.00.  
Serious Citation 1, Item 2a, is affirmed with a penalty of \$8,065.00.  
Serious Citation 1, Item 2b, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 2c, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 2d, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 2e, is affirmed with a penalty of \$0.00.  
Serious Citation 1, Item 3, is affirmed with a penalty of \$8,065.00.  
Other-Than-Serious Citation 2, Item 1 is affirmed with no penalty.  
TOTAL PROPOSED PENALTIES: \$24,195.00  
**TOTAL FINAL PENALTIES: \$24,195.00**

**Inspection Number 1373262, Citations Issued March 24, 2019 - Safety Complaint**

Serious Citation 1, Item 1, is affirmed with a penalty of \$6,985.00.

Serious Citation 1, Item 2, is affirmed with a penalty of \$9,170.00.

Repeat Citation 2, Item 1, is affirmed with a penalty of \$35,100.00

TOTAL PROPOSED PENALTIES: \$51,255.00

**TOTAL FINAL PENALTIES: \$51,255.00**

**Inspection Number 1382316, Citations Issued May 9, 2019 - Employer Reported Referral**

Repeat Citation 1, Item 1, is affirmed with a penalty of \$63,630.00.

TOTAL PROPOSED PENALTIES: \$63,630.00

**TOTAL FINAL PENALTIES: \$63,630.00.**

**Inspection Number 1409078, Citations Issued September 20, 2019 - Health Complaint**

Serious Citation 1, Item 1, is affirmed with a penalty of \$8,295.00.

Serious Citation 1, Item 2, is affirmed with a penalty of \$6,985.00.

Serious Citation 1, Item 3, is affirmed with a penalty of \$6,985.00.

Serious Citation 1, Item 4, is affirmed with a penalty of \$6,985.00.

Serious Citation 1, Item 5, is affirmed with a penalty of \$12,726.00.

Other-Than-Serious Citation 2, Item 1, is affirmed with a penalty of \$0.00

TOTAL PENALTIES: \$41,976.00

**TOTAL FINAL PENALTIES: \$41,976.00**

**Inspection Number 1402102, Citations Issued November 19, 2019 – Safety Complaint**

a. Serious Citation 1, Item 1, is affirmed with a penalty of \$12,725.00.

b. Other Than Serious Citation 1, Item 2, is affirmed with a penalty of \$0.00.

TOTAL PROPOSED PENALTIES: \$12,725.00

**TOTAL FINAL PENALTIES: \$12,725.00**

**TOTAL PROPOSED PENALTIES FOR ALL INSPECTIONS: \$509,427.00**

**TOTAL FINAL PENALTIES FOR ALL INSPECTIONS: \$500,000.00**

## ATTACHMENT B

### Yokohama Tire Manufacturing Virginia, LLC

#### Safety Projects Review

**1. Elevators**

Description: Implement and maintain an Elevator Maintenance Control Plan (EMCP) specific to the needs of Yokohama Tire Manufacturing Virginia.

**2. A-Line Pit Lighting**

Description: Installation of LED fixture for press pit repair lighting.

**3. Lower Rings**

Description: Conversion of original electric lower ring motors to a hydraulic motor upgrade.

**4. PA System**

Description: Complete repairs to seven locations in D500 and locker rooms.  
Conduct another plant wide audit utilizing the Joint Safety Committee during the 3rd Quarter, 2022.  
Issue an OPL to employees to notify their supervisor when they have PA speakers in their area that are inaudible or inoperable.

**5. Squeeze Motor Project**

Description: Restoration of the bolster screw procedure to its original manufacturing operating condition.