

**BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA**

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

WATERS CONSTRUCTION COMPANY,
INC.

RESPONDENT.

DOCKET NO. OSHANC 2006-4592
OSHA INSPECTION NO. 309034924
CSHO ID NO. T3994

**ORDER DENYING MOTION TO
SET ASIDE FINAL ORDER**

THIS MATTER was heard by the undersigned on May 10, 2006 in Charlotte, North Carolina.

The complainant was represented by Linda A. Kimbell, Assistant Attorney General; the respondent was represented by Miles S. Levine of Goodman, Carr, Laughrun, Levine and Murray, PA.

On April 3, 2006, respondent filed one document containing a motion to set aside final order pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, request to contest violation and request for expedited hearing. On April 7, 2006, the complainant filed a response, requesting that all relief requested by respondent be denied, except that the complainant joined in respondent's request for an expedited hearing.

The May 10, 2006 hearing was held for the purpose of considering respondent's motion to set aside final order and request to contest violation. This hearing was conducted as an evidentiary hearing instead of a hearing on affidavits, by agreement of the parties. The following persons testified: William W. (ðWesð) Waters, II, an officer with respondent; Lee Peacock, a health compliance officer for complainant; and Robby Jones, complainant's district supervisor for occupational safety and health. The parties also offered a number of documents, which were admitted into evidence without objection.

After hearing and receiving the evidence and considering the arguments of counsel, the undersigned makes the following:

FINDINGS OF FACT

1. The complainant as Commissioner of Labor is charged by law with overseeing compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the ðActð).
2. The respondent is a North Carolina corporation located in Charlotte, North Carolina. It is engaged in the business of residential construction.
3. On April 26, 2005, Lee Peacock, then a safety compliance officer for the complainant, conducted an inspection of a construction site on Alexander Road in Charlotte, North Carolina. This inspection was the result of a referral from Duke Power Company that a house was being constructed on Alexander Road in the Lost Tree subdivision and that the structure was within five (5) feet of a high voltage power line.
4. When Mr. Peacock arrived at the site, he observed three sites along Alexander Road at the entrance of the Lost Tree subdivision. On one of these sites, a partially constructed house was in close proximity to some overhead power lines. The two other sites contained mostly footings or a foundation, but no vertical construction.
5. On the sites, Mr. Peacock found building permits posted for 8104 and 8122 Alexander Road, but no permit for 8032 Alexander Road.
6. During his inspection, Mr. Peacock measured the distance from the partially constructed house to the power lines to be 38 inches to 46 inches. He also measured the distance from the power lines to a pump jack scaffold and platform adjacent to the house to be 36 inches. Mr. Peacock determined the power lines to be 24,000 volts, with 13,000 volts phase to phase. The power lines were energized and were not insulated.
7. During his inspection, Mr. Peacock learned that two subcontractors, R&D Masonry and Bobby Little, were working on the house in close proximity to the power lines. Employees of these subcontractors said they were working pursuant to verbal subcontract with respondent and were being paid by Wes Waters. As a result, Mr. Peacock issued and posted a notice of imminent danger for this site on the site. This notice must be and was approved in advance by the district supervisor, bureau chief and assistant director of North Carolina OSH.
8. Mr. Peacock conducted an opening conference on April 26, 2005 with Bill Waters, father of Wes Waters. Bill Waters told Mr. Peacock that he (Bill) was president and owner of the respondent. He said that Wes Waters had been dealing with Duke Power with reference to the power lines.
9. Mr. Peacock met with Jonathan Evans and three other employees of Duke Power Company who advised Mr. Peacock that they had advised Wes Waters of the 10 foot clearance required between the power lines and the house and that they had tried to secure a right of way from the owner of the lot but those discussions had not been concluded.
10. No mention was made by either of the Mr. Waters to Mr. Peacock during this period that respondent was not the owner or general contractor of the property along Alexander Road. At the closing conference, both Mr. William Waters and Mr. Wes Waters advised Mr. Peacock that the houses were being constructed for family members, but provided no documentation to show that the respondent was not the general contractor.
11. On June 1, 2005, Mr. Peacock cited respondent with three willful serious violations of the Act relating to the close proximity of workers constructing the house to the uninsulated high voltage power lines. The basis for the willful citation items was the knowledge of Wes Waters that this hazard needed to be abated but nevertheless allowing construction to continue while this dangerous condition existed and workers and subcontractors were exposed to the hazard. The proposed penalties for these willful serious violations was \$28,000.00.
12. The respondent was also cited with three additional serious violations of the Act concerning inspections and guardrails relating to the same conditions, with proposed penalties of \$2,800.00, making the total proposed penalties \$30,800.00.
13. Based on his observations of the permits on the sites, Mr. Peacock cited respondent for violations existing at the site located at 8122 Alexander Road. After the citations were issued, complainant subsequently learned that the house under construction had a street address of 8032 Alexander Road. However, the citations items taken together clearly indicated an Alexander Road jobsite on which workers were installing roof trusses. Construction on only one of the three sites had progressed to the point that roof trusses could be installed. The other two houses were barely out of the ground, no where near the power lines. The power lines and their proximity to this one structure was clearly visible to any one in the area. Although the address was incorrect, there could be no confusion or misunderstanding about which site was in violation.
14. The respondent received notice of these citations at its registered office address of 7620 Baltusrol Lane, Charlotte, North Carolina. This address is a residence with a home office that is not staffed daily. Wes Waters stops by to pick up the mail and stated he is the only person authorized to do so, although occasionally the cleaning people will bring in the mail. Wes Waters testified he does not live at that address but that his father, Bill Waters stays there at the times he is not in Florida.
15. The respondent received the copies of the citations and notice of penalty. Wes Waters timely completed, signed and returned the OSHA-2 form requesting an informal conference.
16. The informal conference was held on July 13, 2005. The attendees were Robby Jones and Wes Waters. Mr. Waters told Mr. Jones that the respondent was not involved with the construction of the house in proximity to the power lines but rather the house was being constructed personally by Bill Waters for another family member. He brought no documents to evidence his assertions.
17. At this point there is a conflict on the evidence as to what transpired next. Mr. Waters testified that Mr. Jones agreed to look into the merit of his assertions concerning the respondent's culpability. Mr. Jones testified that he told Mr. Waters that Mr. Waters needed to produce for Mr. Jones the documents evidencing respondent's position and that he must do so by July 22, 2005.
18. On this evidentiary conflict, the testimony of Mr. Jones is more credible. Contemporaneously with the informal conference, Mr. Jones wrote a memo to file entered into evidence which corroborates his testimony concerning the obligation of Mr. Waters to document his assertions and the deadline given. Moreover, while some of the records that might evidence these assertions are in the public domain (such as building permits and land records), others, such as records of sub contractors and payment of subcontractors are private records not available to complainant without a subpoena.
19. Mr. Waters did not provide any records to Mr. Jones and Mr. Jones sent respondent a letter dated July 25, 2005 advising that the citations and penalties would not be changed because Mr. Waters had provided no documentation to challenge the citations and penalties as proposed. This letter also advised that respondent had fifteen days to formally contest the citations and penalties.
20. This letter was sent by certified mail to respondent at its 7620 Baltusrol Lane address but was returned to Mr. Jones ðunclaimedð. Mr. Jones then re-sent the letter by first class mail to the same address, and this copy was not returned.
21. On July 25, 2005, Mr. Peacock telephoned Wes Waters to discuss the abatement of the hazard.
22. Two subsequent letters, on August 31, 2005 and October 20, 2005 were sent to respondent by first class mail at the 7620 Baltusrol Lane address. These letters, which were not returned, put respondent on notice that the complainant was proceeding with collection efforts on the citation penalties of \$30,800.00.
23. Wes Waters testified that the respondent had no difficulties with delivery of mail during that period of time.
24. The respondent took no further action to contest the citations and penalties until after the complainant obtained a civil judgment against the respondent for such penalties and docketed the judgment in Mecklenburg County, where respondent owns real estate. The existence of this judgment created an encumbrance on respondent's real estate and was discovered during a title search incident to the closing of the sale of a parcel of respondent's property.
25. Contrary to the assertions of Wes Waters that the Alexander Road house was not part of Lost Tree subdivision and was constructed by Bill Waters for another family member, the complainant offered into evidence maps, photographs and documents from Realtor.com which showed the following:
 - a) The sites with addresses of 8104 and 8122 Alexander Road contain houses which do not face Alexander Road but rather face Lost Oak Road;
 - b) The house at 8032 Alexander Road, the site of the citation violations, is the only house in the subdivision which faces Alexander Road and is shown in a Realtor.com website promotion as being built by respondent and brokered for sale to the public by respondent; and
 - c) The house at 8032 Alexander Road sits on Lot 2 of the Lost Tree subdivision as platted for recording and is one of 24 numbered lots indicated on the preliminary subdivision plan approval filed by William W. Waters on January 24, 2005.
26. During the time of this inspection, Wes Waters claimed to be president of respondent, but Bill Waters told Lee Peacock the he (Bill Waters) was president. From annual reports for respondent required to be filed with the Secretary of State, the president is listed as William W. Waters, which could refer to either Wes or Bill. When asked during cross examination if his signature was on such documents, Wes Waters testified that he could not tell as his and his father's (Bill) signatures were very similar.
27. The respondent had several opportunities to notify complainant that it desired to contest the citations and penalties after the informal conference but did not do so. These opportunities occurred after receipt of the July 25 telephone call from Lee Peacock, the July 25 letter from Robby Jones (resent by regular mail), the August 31 letter from complainant and the October 20 letter from complainant. This is not the behavior of a reasonable and prudent person in the handling of that person's business affairs.
28. The expectation by Wes Waters that Robby Jones would gather all the documents necessary to determine the appropriateness of continuing to assert respondent's culpability for the citations and penalties, in light of the evidence already gathered by complainant to indicate respondent's culpability (which had resulted in the issuance of the citations) was not the behavior of a reasonable and prudent person in the handling of that person's business affairs.

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

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are restated and incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The respondent is subject to the provisions of the Act.
3. The burden of proof is on the respondent to show some basis for relief pursuant to Rule 60(6) and to show a meritorious defense. The respondent has failed to carry that burden of proof.
4. The credible evidence supports the issuance of the citations, the imposition of the penalties, and the handling of this matter subsequent to such issuance and imposition.
5. Conversely, the credible evidence does not support the respondent's Rule 60(6) motion and does not support any change to the citation items or the penalties imposed.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

1. The respondent's Rule 60(6) motion is denied;
2. The citation items and penalties are re-affirmed; and
3. All violations not previously abated shall be immediately abated.

This 25th day of July, 2006.