

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

BEST RATE TREE & LAWN SERVICE,

RESPONDENT.

OSHANC NO: 2006-4672
INSPECTION NUMBER: 310360839
CSHO ID: G3284

ORDER

THIS MATTER was heard by the undersigned on April 18, 2007 in Charlotte, North Carolina.

The complainant was represented by Tawanda Foster-Williams, Assistant Attorney General; the respondent appeared through its president, Troy Lampkin.

This matter was before the undersigned on the respondent's motion for contestment, based on its notice of contest dated December 13, 2006. Since the respondent received the citations and notifications of penalty in this matter by certified mail on October 17, 2006, it was required to submit its notice of contest by November 7, 2006 (fifteen (15) working days after October 17, 2006). Since respondent did not do so timely, the citations became uncontested and became a final order. Therefore, its notice of contest is treated as a motion pursuant to Rule 60 (b) of the North Carolina Rules of Civil Procedure. This was the only matter at issue before the undersigned.

After hearing and receiving the evidence and hearing the arguments of the parties, the undersigned makes the following

FINDINGS OF FACT

1. The complainant is charged by law with supervising compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").
2. The respondent is a North Carolina corporation located in Waxhaw, Union County, North Carolina.
3. Beginning on September 5, 2006 and continuing until September 19, 2006 Ed Simco, a safety compliance officer with the North Carolina Department of Labor, conducted a fatality inspection of the respondent and its work site of 4717 Magnolia Ridge in Waxhaw, North Carolina.
4. This inspection arose from the receipt on September 1, 2006 by complainant of a notification from the Union County Coroner's Office that an employee of respondent had been killed in a work-related accident on May 1, 2006. The employee died on May 2, 2006.
5. The respondent did not report this fatality to the complainant, despite the requirements of 29 CFR 1904.39 (a) that impose upon the respondent the duty to report a work- related fatality to complainant within (8) hours of the death of the employee. The respondent, through Troy Lampkin thought the authorities, not the respondent, were responsible for this reporting.
6. Mr. Simco commenced contacting the respondent on September 6, 2006, the day after he received the file. He attempted telephone contact with the respondent daily for three straight days, leaving messages but receiving no return phone calls or communications.
7. Mr. Simco resumed attempting to contact the respondent the next week beginning on September 12th. Mr Lampkin's assistant finally returned Mr. Simco's call and said Mr. Lampkin was out of town until September 14, 2006, on which date Mr. Lampkin would telephone Mr. Simco.
8. Mr. Lampkin did not telephone Mr. Simco on September 14th but Mr. Simco was able to reach Mr. Lampkin by telephone on that date. Mr. Lampkin suggested a meeting on September 18th and asked Mr. Simco to contact him on that date to arrange a time. When Mr. Simco was able to contact Mr. Lampkin, Mr. Lampkin suggested a time and place that Mr. Simco was logistically unable to do.
9. Mr. Simco and Mr. Lampkin did meet on September 19, 2006 at 11:00am at the Burger King in Waxhaw. Although Mr. Simco had requested of Mr. Lampkin that he bring the employees present at the work site when the fatality took place, Mr. Lampkin did not bring those employees to the meeting, but instead brought his company's safety officer Roger Billups and his office manager Marie Macon.
10. At this meeting, Mr. Lampkin received and signed an OSHA Form 59 notifying respondent of its rights to an informal conference and to contest any citations, including the time periods for doing so.
11. The citations were issued on October 16, 2006 and served on the respondent by certified mail on October 17, 2006.
12. Mr. Lampkin was apparently in Australia from November 1st to November 14th. He instructed his assistant to fax an extension of the time to contest the citation to the complainant on November 9, 2006, which she did. However, the fifteen (15) working days time period for a contestment ended on November 7th.
13. This request for an extension represented that Mr. Lampkin would address the matter when he returned the next week (November 14th).
14. Mr. Lampkin did not address the citations until December 14, 2006, when he mailed an OSHA Form 2 to the complainant, contesting the citations.
15. Mr. Lampkin and respondent had ample opportunity to timely comply with the provisions of the Act, had they wanted to contest the citations, notwithstanding Mr. Lampkin's time out of the country.

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

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The respondent is subject to the provisions of the Act.
3. The respondent has failed to prove by the greater weight of the evidence that it should be allowed to contest the citations in this matter, notwithstanding its noncompliance with the provisions of the Act governing contestment. There is no evidence that Mr. Lampkin or respondent conducted the handling of this matter with the degree of care that a business person gives his or her important business matters. On the contrary, the evidence shows that Mr. Lampkin was not a prudent business person in the handling of this matter, which he admitted during the hearing.

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

1. The respondent's motion to contest the citations is denied.
2. The citations issued in this matter are affirmed.
3. The respondent shall pay the citation penalties within twenty (20) days of the filing date of this order.
4. All violations not previously abated shall be immediately abated.

This 27th day of April, 2007.

RICHARD M. KOCH
HEARING EXAMINER