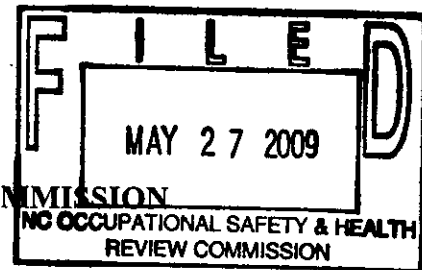


BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA



COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

Complainant,

v.

WILKIE CONSTRUCTION COMPANY INC.

and its successors,

Respondent.

) DOCKET NO.: OSHANC 2008-4806

) INSPECTION NO.: 312210172

) CSHO ID.: F2621

ORDER

APPEARANCES: Complainant:

Jane T. Hautin
Special Deputy Attorney General
North Carolina Department of Justice

Respondent:

None

BEFORE:

Hearing Examiner:

Carroll D. Tuttle

THIS MATTER came on for consideration in Courtroom #6 of the Caldwell County Courthouse in Lenoir, North Carolina by the undersigned on May 19, 2009 pursuant to a Notice of Hearing dated April 6, 2009.

The Respondent did not appear at the May 19, 2009 hearing.

The undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly:

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed a citation issued to enforce the Occupational Safety and Health Act of North Carolina (hereinafter referred to as "OSHANC").

2. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of OSHANC.

DATABASE

5/27/09 mhd

5/26/09
CLASS
KT

3. Respondent is a corporation and, as an employer, is subject to the provisions of OSHANC.

4. Beginning on June 20, 2008, Chip Thomas, a Safety Compliance Officer for Complainant's Occupational Safety and Health Division, inspected the Respondent's worksite at 1st United Methodist Church at 9 Lakeside Drive in Granite Falls, North Carolina (hereinafter referred to as the "site").

5. As a result of the inspection, on June 25, 2009, a citation was issued to Respondent alleging a serious violation of 29 CFR § 1926.501(b)(13).

6. Respondent timely filed its Notice of Contest and this Commission has jurisdiction over the subject matter and the parties to this action.

7. The notice of this hearing was mailed to Greg C. Ahlum, the Respondent's counsel of record, by certified mail on April 6, 2009.

8. The hearing in this matter was called to order at 10:00 AM on May 19, 2009 by the undersigned Hearing Examiner. At this time, no representative of the Respondent was present. The hearing remained open for over one-half hour to allow time for the Respondent or a representative to make an appearance.

9. Neither the Respondent nor a representative appeared at the May 19, 2009 hearing.

10. Neither the Respondent nor anyone acting on its behalf contacted the undersigned on May 19, 2009 to seek a continuance of the scheduled hearing or to explain the Respondent's failure to appear.

11. Rule .0503 of the Rules of Procedure of the North Carolina Occupational Safety and Health Review Commission provides that:

(a) Subject to the provisions of Paragraph (c) of this Rule, the failure of a party to appear at a hearing shall be deemed to be a waiver of all rights to participate and be heard in the hearing. Unjustifiable failure to appear may result in a declaration of default and a decision against the defaulting party in accordance with Rule .0309(a) of this Chapter. Such parties shall be served with a copy of the decision of the Board.

(b) Requests for rehearing based on justifiable failure to appear must be made, in the absence of extraordinary circumstances, within five days after the scheduled hearing date.

(c) The Board or the hearing examiner, upon a timely showing of good cause, may excuse such failure to appear. In such event, the hearing may be rescheduled.

12. Pursuant to Rule .0309 of the Rules of Procedure of the North Carolina Occupational Safety and Health Review Commission:

(a) Sanctions. Failure to file or serve any pleading or otherwise proceed as provided

by these rules may result in a declaration of default and a decision against the defaulting party. The declaration and decision may be initiated by the hearing examiner or Review Board or result from the motion of a party to the hearing examiner, Review Board, or Review Board Chairman. If the decision is made by a hearing examiner or the Review Board Chairman, the decision will become the decision of the Review Board unless review is initiated by any Review Board member or by the appeal of the defaulting party.

(b) Review. Review of a decision against a defaulting party, whether made by the hearing examiner or Review Board Chairman, must be directed by a Review Board member or sought by a party within 30 days of the filing date of the decision.

13. The Respondent's failure to appear at the hearing in this matter on May 19, 2009 effectively serves as a waiver of all rights to participate and be heard in the hearing.

14. With respect to the alleged violation of 29 CFR 1926.501(b)(13), Respondent failed to ensure that each employee of its subcontractor Max Roofing engaged in residential construction activities six feet or more above lower levels was protected by guardrail systems, a safety net system, or personal fall arrest system. The Respondent was the general contractor and the correcting and controlling authority, and the subcontractor Max Roofing's employees were exposed to the hazard of a fall to lower levels; there was the possibility of an accident, the probable result of which would be death or serious physical injury; the Respondent was aware of or with reasonable diligence could have been aware of the condition; and a penalty of \$700.00 was calculated in accordance with the Complainant's Field Operations Manual.

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. This action was properly brought, and the undersigned has jurisdiction to hear this matter.
3. The Respondent is subject to the provisions of the Act.
4. The Respondent is a defaulting party for its failure to attend the May 19, 2009 hearing.
5. The Respondent has violated 29 CFR 1926.501(b)(13). The violation is a serious violation.
6. The penalty was properly calculated in accordance with the Complainant's Field Operations Manual, and is just and fair.

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

ORDER

1. Citation Number One, Item 1 is affirmed as a serious violation of 29 CFR 1926.501(b)(13) with a penalty of \$700.00.

2. Respondent shall have 30 days from the filing of this Order in which to seek review of this decision, pursuant to Review Commission Rule .0309(b). If the Respondent does not seek review within the 30 days, the citation and its proposed penalty are deemed final.

3. All penalties shall be paid within 20 days of the date upon which the citations and penalties are deemed final.

4. All violations not previously abated shall be immediately abated.

This is the 20th day of May, 2009.



Carroll D. Tuttle
Hearing Examiner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

**GREG C. AHLUM
JOHNSTON ALLISON HORD PA
1065 EAST MOREHEAD STREET
CHARLOTTE NC 28204**

by depositing same the United States Mail, Certified Mail, postage prepaid at Raleigh, North Carolina, and upon:

**JANE HAUTIN
NC DEPARTMENT OF JUSTICE
Labor Section
P O Box 629
Raleigh NC 27602-0629**

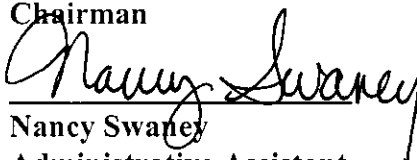
by depositing a copy of the same in the United States Mail, First Class;

**NC DEPARTMENT OF LABOR
Legal Affairs Division
1101 Mail Service Center
Raleigh, North Carolina 27699-1101**

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 29th DAY OF May, 2009.

**OSCAR A. KELLER, JR.
Chairman**



**Nancy Swaney
Administrative Assistant,
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
(919) 733-3589 FAX: (919) 733-3020**