BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

B & R HOMES & DEVELOPMENT, INC.,

RESPONDENT.

DOCKET NO. OSHANC 96-3516
OSHA INSPECTION NO. 300258985
CSHO ID NO. W4297

ORDER

APPEARANCES:

Complainant:
Ralf F. Haskell
Special Deputy Attorney General
North Carolina Department of Justice

Respondent:

No Appearance

BEFORE:

Hearing Examiner: Carroll D. Tuttle

THIS CAUSE came on for hearing and was heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on August 26, 1999 at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was present and represented by Ralf F. Haskell, Special Deputy Attorney General. The Respondent was not present.

Based upon the evidence presented at the hearing, including a certified copy of Complainant's investigation report which was submitted into evidence, and with due consideration of arguments and contentions presented, 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 citations issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).

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 the Act (N.C.G.S. § 95-133).

3. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).

4. The undersigned has jurisdiction over the case (N.C.G.S. § 95-135).

5. At the time of the inspection referenced herein, Respondent was a North Carolina corporation which was in the business of cutting and removing trees.

6. The inspection site was 106 Lochwood East in Cary, North Carolina.

7. On September 16, 1996, Respondent's work crew arrived at 106 Lochwood East, Cary, North Carolina, for the purpose of removing trees from the yard of the private residence located at the address. One of the operations to be performed was to "top" a tree which was to be cut down. Respondent's employee, Miguel Vallejo-Benitez, was selected to "top" the tree. In order to gain access to the upper portion of the tree to perform this procedure, Mr. Vallejo-Benitez sat on the ball of a crane owned and operated by Tidewater Cranes & Rigging. Mr. Vallejo-Benitez held onto the cable above the ball and was lifted by the crane to a height of approximately 40 - 60 feet above the ground. As he attempted to swing one leg over a branch of a tree in an attempt to transfer to the tree, he lost his grip and fell to the ground suffering critical injuries. While being raised on the ball, Mr. Vallejo-Benitez was not wearing a safety belt or harness , hard hat, safety glasses, or gloves.

8. During the period between September 20, 1996 and October 4, 1996, Safety Compliance Officer Rod Wilce, employed by the North Carolina Department of Labor, inspected Respondent's worksite located at 106 Lochwood East, in Cary, North

Carolina, hereinafter referred to as "the site." Officer Wilce properly entered onto Respondent's site and properly conducted the inspection pursuant to coverage of the accident in a local newspaper.

9. Roxanne Dees, President of Respondent, consented to the inspection.

10. On November 22, 1996, as a result of the inspection, Complainant issued three citations, carrying the following proposed abatement dates and penalties:

CITATION NUMBER ONE (Willful Serious)

Item No.:	Standard	Abatement Date	Penalty
1	NCGS 95-129(1)	12/10/96	$28,000.00
2	29 CFR 1910.180(h)(3)(v)	12/10/96	$28,000.00

CITATION NUMBER TWO (Serious)

Item No.:	Standard	Abatement Date	Penalty
1	1910.266(d)(1)(iii)	12/10/96	$225.00
2	1910.266(d)(1)(v)	12/10/96	$225.00
3	1910.266(d)(1)(vi)	12/10/96	$375.00
4	1910.266(d)(1)(vii)(A) & (B)	12/10/96	no penalty

CITATION NUMBER THREE (Nonserious)

Item No.:	Standard	Abatement Date	Penalty
1	29 CFR 1910.132(d)(1)	12/10/96	no penalty
1	29 CFR 1910.132(d)(2)	12/10/96	no penalty

11. The proposed penalties were calculated in accordance with the procedures and formula set forth in the North Carolina Department of Labor's Field Operations Manual, and after due consideration of the Respondent's size and history. No consideration was given for good faith due to the willful designation of one or more of the violations.

12. On July 9, 1999**,** the Review Board served upon Respondent a Notice of Hearing setting this matter for hearing before the undersigned on August 26, 1999. This Notice of Hearing was served upon Respondent by certified mail addressed to Respondent at the address set forth by Respondent in its initial pleading filed

in this matter: B & R Homes & Development, Inc., 514 Daniels Street, Suite 345, Raleigh, North Carolina, 27605 (attention Roxanne Dees, President). This certified mail was returned to the Review Board undelivered for reason that it was either not accepted, or that the Respondent was no longer at this address. Further, upon assertion by counsel for Complainant made at the onset of the hearing herein, upon being informed that Respondent may no longer be in business the Complainant attempted to

locate the Respondent at said address and determined that Respondent was no longer located at the address.

13. Rule .0106 of the Rules of Procedure of the Safety and Health Review Board provides that the initial pleading filed by any person must contain the employer's name, address and phone number. Rule .0106 further provides that any change in such information must be communicated properly in writing to the Review Board, and that a party who fails to furnish such information shall be deemed to have waived the right to notice and service under the rules of the Review Board. Respondent, therefore, has waived its right to service of the Notice of Hearing and to notice of the scheduled hearing in this matter as a result of its failure to furnish its current address and telephone number to the Review Board.

CITATION NUMBER 1, ITEM 1

14. Citation Number One, Item 1, alleges a willful serious violation of N.C.G.S. 95-129(1) in that the employer did not furnish to each of its employees conditions of employment and a place of employment free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to fall hazards.

15. Evidence showed that while performing tree removal from September 11, 1996 to September 16, 1996, it was common practice for one or more of Respondent's employees to "ride the ball" or "ride the hook" of cranes without any fall protection. In fact, Respondent, through its superintendent, Guy Byrd, at times instructed its employees to "ride the ball" or "ride the hook." Additionally, Mr. Byrd, himself, at

times, rode the headache ball while being lifted by the crane.

16. From September 11, 1996 to September 16, 1996, Respondent routinely permitted one or more of its employees to work at elevations exceeding 6 feet above the surface below without benefit of fall protection. Respondent was aware that employees were not wearing fall protection when working above 6 feet.

17. Respondent was aware, or with reasonable diligence should have been aware, that riding a headache ball or hook without being appropriately tied off presented a fall hazard that would likely result in death or serious bodily injury. For instance, Thomas Mosses, an employee of the crane company hired to assist Respondent in its tree removal operations, stated to Mr. Byrd prior to the incident on September 16 resulting in Mr. Vallejo-Benitez's death that it was his company's policy "not to raise a man using a crane."

18. Despite its knowledge of this hazard, on September 16, 1996 the Respondent, with plain indifference to and an intentional disregard for the safety of its employee, permitted Mr. Vallejo-Benitez to ride the headache ball of the crane 40 to 60 feet in the air in order that he could transfer onto the branch of the tree he was to "top." This was further done with the knowledge that Mr. Vallejo-Benitez was not wearing any form of fall protection.

CITATION NUMBER 1, ITEM 2

19. Citation Number One, Item 2, alleges a willful serious violation of 29 CFR 1910.180(h)(3)(v) in that the employer did not prohibit crane operations, including hoisting, lowering, swinging or traveling when there was a person on the hook or load.

20. Evidence showed that from September 11, 1996 to September 16, 1996, one or more of Respondent's employees was "riding the ball" or "riding the hook" of cranes.

21. Respondent's management permitted the employees to "ride the ball", and on occasion instructed

them to ride the ball.

22. Respondent was aware, or with reasonable diligence should have been aware, that riding a headache ball or hook was prohibited, and that doing so without being appropriately tied off presented a fall hazard that would likely result in death or serious bodily injury.

23. Despite its knowledge of this hazard, on September 16, 1996 the Respondent, with plain indifference to and an intentional disregard for the safety of its employee, and the requirements of the cited standard, allowed Mr. Vallejo-Benitez to ride the headache ball of a crane 40 to 60 feet in the air in order that he could transfer onto the branch of the tree he was to" top." This was further done with the knowledge that Mr. Vallejo-Benitez was not wearing any form of fall protection.

24. Respondent's plain indifference and intentional disregard for the safety of Mr. Aljendro-Benitz in allowing him to ride the headache ball of the crane 40 to 60 feet in the air without being tied off resulted in Mr. Vallejo-Benitz's death.

CITATION NUMBER 2, ITEM 1

25. Citation Number Two, Item 1, alleges a serious violation of 29 CFR 1910.266(d)(1)(iii) in that the employer did not provide, at no cost to the employee,

and assure that each employee handling wire rope, wears hand protection which provides adequate protection from puncture wounds, cuts and lacerations.

26. Evidence showed that Respondent allowed one or more of its employees to "ride the ball" of a crane.

27. The employees "riding the ball" were holding onto the wire rope cable.

28. The employees "riding the ball" were not using any hand protection such as gloves which provided adequate protection from puncture wounds, cuts and lacerations.

29. The Respondent exposed its employees to the hazards of handling wire rope resulting in cuts, puncture wounds or lacerations.

30. The Respondent was aware of this hazardous condition or with reasonable diligence should have been aware of it.

CITATION NUMBER 2, ITEM 2

31. Citation Number Two, Item 2, alleges a serious violation of 29 CFR 1910.266(d)(1)(v) in that the employer did not assure that each employee wore appropriate foot protection where needed, such as heavy-duty logging boots. For instance, the employer did not assure that each employee who operated a chain saw wore foot protection which is constructed with cut-resistant material which will protect the employee against contact with a running chain saw.

32. Evidence showed that Respondent's supervisor on-site engaged in logging operations while wearing tennis shoes.

33. Tennis shoes are not approved foot protection for logging operations.

34. Evidence showed that Respondent exposed its employees to the hazards of performing logging operations without wearing appropriate safety footwear, which could result in crushed, broken, or cut feet caused by either the movement of heavy logs or equipment which is a part of the logging industry or by the operation of chain saws while cutting trees.

35. The Respondent was aware of this hazardous condition or with reasonable diligence should have been aware of it.

CITATION NUMBER 2, ITEM 3

36. Citation Number Two, Item 3, alleges a serious violation of 29 CFR 1910.266(d)(1)(vi) in that the employer did not provide, at no cost to the employee, and assure that each employee who works in an area where there is a potential for head injury due to falling or flying objects wears head protection meeting the requirements of subpart I of Part 1910.

37. Evidence showed that one or more of Respondent's employees was working in an area where there was a potential for head injury from falling or flying objects without head protection.

38. The employer did not provide, at no cost to the employee, head protection for employees working in an area where there was a potential for head injury from falling or flying objects without head protection.

39. Evidence showed that Respondent exposed its employees to the hazards of being hit in the head by limbs, objects or equipment falling from trees or the crane, or from other overhead hazards resulting in serious head injury or permanent disability.

CITATION NUMBER 2, ITEM 4

40. Citation Number Two, Item 4, alleges a serious violation of 29 CFR 1910.266(d)(1)(vii)(A)&(B) in that the employer did not, at no cost to the employee, provide and assure that each employee wore eye protection meeting the requirements of subpart I of Part 1910 where there is potential for eye injury due to falling or flying objects; and/or face protection meeting the requirements of subpart I of Part 1910 where there is a potential for facial injury such as, but not limited to, operating a chipper. Logger-type mesh screens may be worn by employees performing chain saw operations and yarding.

41. Evidence showed that one or more of Respondent's employees were working in an eye injury hazard area without eye protection.

42. Eye injury hazards were present in the worksite.

43. Evidence showed that Respondent exposed its employees to the hazards of being struck in the eye or sustaining corneal abrasions.

44. The Respondent was aware of this hazardous condition or with reasonable diligence should have been aware of it.

CITATION NUMBER 3, ITEM 1

45. Citation Number Three, Item 1, alleges a nonserious violation of 29 CFR 1910.132(d)(1) in that the employer did not assess the workplace to determine if hazards are present, or likely to be present, which necessitated the use of personal protective equipment.

46. A proper assessment of the work area would have revealed the need for appropriate personal protective equipment, such as gloves, cut- resistant work boots, eye protection and hard hats, due to the recognized hazards at the site.

47. Evidence showed that Respondent did not provide and have each employee use personal protective equipment appropriate to the recognized hazards on the jobsite.

48. The Respondent was aware of the hazardous condition or with reasonable diligence should have been aware of it.

CITATION NUMBER 3, ITEM 2

49. Citation Number Three, Item 2, alleges a nonserious violation of 29 CFR 1910.132(d)(2) in that the employer did not verify through written certification that the required workplace hazard assessment had been completed.

50. Evidence showed that Respondent did not provide written certification of a workplace hazard assessment on the jobsite.

51. The Respondent was aware of the hazardous condition or with reasonable diligence could have been aware of it.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court concludes as a matter of law the following:

1. This Court has jurisdiction of this cause and the parties are properly before the Court.

2. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).

3. Respondent violated the general duty clause, 95-129(1) as set forth in Item 1 of Citation Number One. Further, the violation was willful.

4. Respondent violated 29 CFR 1910.180(h)(3)(v) as set forth in Item 2 of Citation Number One. Further, the violation was willful.

5. Respondent violated 29 CFR 1910.266(d)(1)(iii) as set forth in Item 1 of Citation Number Two. Further, the violation was serious.

6. Respondent violated 29 CFR 1910.266 (d)(1)(v) as set forth in Item 2 of Citation Number Two. Further, the violation was serious.

7. Respondent violated 29 CFR 1910.266 (d)(1)(vi) as set forth in Item 3 of Citation Number Two. Further, the violation was serious.

8. Respondent violated 29 CFR 1910.266 (d)(1)(vii)(A) & (B) as set forth in Item 4 of Citation Number Two. Further, the violation was serious.

9. Respondent violated 29 CFR 1910.132(d)(1) as set forth in Item 1 of Citation Number Three. Further, the violation was nonserious.

10. Respondent violated 29 CFR 1910.132(d)(2) as set forth in Item 2 of Citation Number Three. Further, the violation was nonserious.

11. After reviewing the evidence, including each of the items cited, and the size and history of Respondent, the undersigned finds that the proposed penalty for each item set forth in Citation Numbers One, Two and Three were properly calculated and are appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

1. Citation Number One, Item 1, alleging a willful serious violation of N.C.G.S. 95-129(1), and the proposed penalty of $28,000 for this item, is affirmed;

2. Citation Number One, Item 2, alleging a willful serious violation of 29 CFR 1910.180(h)(3)(v) , and the proposed penalty of $28,000 for this item, is affirmed;

3. Citation Number Two, Item 1, alleging a serious violation of 29 CFR 1910.266(d)(1)(iii), and the proposed penalty of $225.00 for this item, is affirmed;

4. Citation Number Two, Item 2, alleging a serious violation of 29 CFR 1910.266(d)(1)(v), and the proposed penalty of $225.00 for this item, is affirmed;

5. Citation Number Two, Item 3, alleging a serious violation of 29 CFR 1910.266(d)(1)(vi), and the proposed penalty of $375.00 for this item, is affirmed;

6. Citation Number Two, Item 4, alleging a nonserious violation of 29 CFR 1910.266(d)(1)(vi) (A)(B) is affirmed;

7. Citation Number Three, Item 1, alleging a nonserious violation of 29 CFR 1910.132(d)(1) is affirmed;

8. Citation Number Three, Item 2, alleging a serious violation of 29 CFR 1910.132(d)(2) is affirmed; and,

9. The proposed penalty of $56,825.00 is affirmed.

This the 26th day of September, 2000.

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Carroll D. Tuttle
Hearing Examiner