

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD  
OF NORTH CAROLINA**

COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

DOCKET NO. OSHANC 99-3308  
OSHA INSPECTION NO. 302639067  
CSHO ID NO. A4624

PUBLIC WORKS COMMISSION OF THE  
CITY OF FAYETTEVILLE,

**ORDER**

RESPONDENT.

**APPEARANCES:**

**Complainant:**

**Linda S. Kimbell**

**Assistant Attorney General**

**North Carolina Department of Justice**

**Respondent:**

**James R. Nance, Jr.**

**REID, LEWIS, DEESE, NANCE & PERSON**

**Attorneys for Respondent**

**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 June 16, 2000, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Ms. Linda S. Kimbell, Assistant Attorney General. The Respondent was represented by Mr. James R. Nance, Jr., of Reid, Lewis, Deese, Nance & Person, Attorneys for Respondent.

Complainant first Moved the Court to Dismiss Citation No. 1, Item 1a; Citation No. 1, Item 1e; and Citation No. 1, Item 1g. Without objection, the Motion was allowed.

Complainant Moved the Court to Amend Citation No. 1, Item 1b, by deleting the second sub-paragraph (a). Without objection, the Motion was allowed.

Based upon the evidence presented at the hearing, and with due consideration of the arguments and contentions of all parties, 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 received by the Complainant, North Carolina Department of Labor, on or about June 7, 1999 contesting a citation issued April 15, 1999, to Respondent, Public Works Commission of the City of Fayetteville 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 an agency of local government, duly organized and existing under the law of North Carolina and maintains a place of business in Fayetteville, North Carolina. Respondent is in the business of providing electric and water utilities.

4. 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).

5. On March 25, 1999, Safety Compliance Officer Lafayette Atkinson, employed by the North Carolina Department of Labor, inspected a work site located at 1800 Bragg Boulevard, between Pilot Avenue and Winston Avenue, in Fayetteville. The job site was a tree trimming operation conducted by Rowe Tree Company (hereinafter referred to as "Rowe") working under a contract with Respondent.

6. At the time of the inspection, Respondent's Project Coordinator, Mr. James Reno, was on the job site as part of his duties which include identifying trees to be cut and checking various job sites to confirm that the work was being performed. Mr. Reno's job did not include any supervision of Rowe personnel or of the actual work. His job also included determining that work billed by Rowe had actually been performed prior to payment by Respondent.

7. The work being performed by Rowe at the site was right-of-way clearing under a contractual agreement that initially, at least, was based upon a purchase order

arrangement. Respondent's Exhibit No. 18 is a copy of the Purchase Order which indicated "right of way tree trimming services not to exceed \$75,000.00" and was dated November 24, 1998.

8. Respondent had an independent consultant study the use of outside contractors to perform right-of-way clearing work versus in-house right-of-way clearing by Respondent's employees. The study concluded that outside contractors would be more efficient. As a result of that study, Respondent contracted with Rowe to perform right-of-way clearing at this particular location. At the time of the inspection, the work was being performed by Rowe under the purchase order contractual arrangement and Mr. Reno happened to be at the site at the time of the inspection in his capacity as Project Coordinator. The testimony at the hearing revealed that Complainant's Exhibits 1, the contract prepared by ACRT, and Complainant's Exhibit 2, the line clearance specifications, may not have been created at the time of the inspection but came later.

9. Complainant's position is that the work site was a multi-employer work site with Respondent as the Contractor and Rowe as it's sub-contractor. Respondent's position is that the site was solely Rowe's work site and Respondent's only connection was that it had contracted with Rowe as an independent contractor to perform tree trimming work for Respondent. Respondent's Project Coordinator happened to be at the site only to check to see that the work was being performed.

10. Respondent's only employee at the site was Mr. James Reno and his testimony as well as others indicated that he had no supervisory responsibility of the work or the workers. All the work being performed was done by Rowe employees under Rowe's supervision under the contract with Respondent.

11. An opening conference was held with Mr. David Holloway, a safety official with Respondent, after he was called by Mr. Reno.

12. During the course of the inspection, Officer Atkinson took photographs, made notes, interviewed employees and obtained documents.

13. A closing conference was later held with Mr. Holloway, Mr. Marcus Tunstall and a Mr. Copeland, an operations manager with Respondent.

14. Complainant's evidence centered on the contractual agreements between Rowe and Respondent. The issues of control and responsibility for the work being performed by Rowe were determined by the "Right of Way Clearing Contract" (hereinafter referred to as "the contract") which is Complainant's Exhibit 1 and the "Distribution Line Clearance Specifications for trimming, removal and reclearing of trees and brush along energized primary, secondary, service and street light wires"

(hereinafter referred to as "line clearance specifications") which is Complainant's Exhibit 2.

15. Although somewhat confusing, it appears that the initial agreement with Rowe was based upon a purchase order arrangement beginning March 25, 1999, based upon a Purchase Order dated November 25, 1998. The work to be performed was based upon an understanding of the work to be performed between Rowe and Respondent. The actual contract documents did not come until later and were based upon form documents prepared by a consultant (ACRT) who did the Line clearance study for Respondent. Complainant's evidence seemed to be that even though the work was initiated by a purchase order, the terms and conditions were to be based upon the consultant's form documents although those documents did not come until later. Mr. Rowe understood that he contracted to do line clearing work and he knew what to do because he had done this kind of work for years. He did not know much about the consultant's documents and Rowe's signature did not appear on any contract documents.

16. It was clear however from Mr. Rowe's testimony that he was working as an independent contractor with full responsibility for the work to be performed. He dictated how the work was performed and was responsible for supervision. Respondent had no supervisory responsibility and assumed none. Rowe acknowledged that he had misled Respondent regarding the training of some of his employees because he led Respondent to believe that his employees were qualified line clearance tree trimmers. Rowe had previously performed tree clearing work for Carolina Power & Light Company, other utilities, the Department of Transportation and PD Electric.

17. The evidence indicates that there was a disconnect between the actual agreement between Rowe and Respondent initiated by the purchase order and what the later documents supplied by the consultant stated regarding the responsibility for workplace safety as well as other directions on how to perform the work.

18. The contract and the line clearance specifications contained detailed instructions regarding personnel safety and training, equipment, hours of work and the amount of experience workers are expected to have in order to do the work. The documents even break down the required work experience between foremen and trainees by class as well as probationary employees.

19. Complainant argued that Respondent's contract documents give Respondent as well as Rowe the responsibility for workplace safety and training of Rowe's employees including ultimate responsibility for making sure that OSHA regulations are complied with.

20. After carefully considering the evidence regarding the contractual arrangement between Rowe and Respondent as well as the testimony of all witnesses, the Court finds that the ACRT contract documents do not, in fact, reflect the agreement between Rowe and Respondent. The actual agreement was made March 25, 1999, by purchase order. It was based in part upon Rowe's past work history and experience. It is clear that Respondent contracted with Rowe to do the line clearance tree trimming work through the purchase order. Rowe performed the line clearance work which Respondent contracted with him to perform and Rowe performed it as an independent contractor.

21. During and after the time the work was being performed, Respondent obtained the form documents from ACRT and sent copies to Rowe. None of these documents were dated or signed by Rowe or even by Respondent for that matter. There was no evidence of any contract revision, additional consideration or meeting of the minds regarding adopting the terms in the ACRT documents as part of the original agreement between Rowe and Respondent. Respondent's counsel stated to the Court that Respondent's position was that these documents were part of the contract but the court can find no logical evidence to support that position.

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

### **CONCLUSIONS OF LAW**

1. The foregoing findings of fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. This Court has jurisdiction of this cause and the parties are properly before the Court.
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. At the time of the inspection, Rowe was working as an independent Contractor solely responsible for its workers and the supervision of its workers including workplace safety. The work site was Rowe's worksite and not Respondents.
5. All the remaining items of Citation No. 1 are based upon requirements of the Act imposed upon the employer responsible for workplace safety at this particular site.

### **ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Citation No. 1 and each sub-part be and the same is hereby dismissed.

This 26th day of April, 2001.

Carroll D. Tuttle  
Administrative Law Judge Presiding