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5-9-2012

CAROLYN KINKADE and DOLAN KINKADE
d/b/a BETTERWAY TERMITE AND PEST
CONTROL, Respondents.

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**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF AGRICULTURE**

IN THE MATTER OF:)	
)	
CAROLYN KINKADE and)	
DOLAN KINKADE)	
d/b/a)	
BETTERWAY TERMITE AND PEST)	
CONTROL,)	Docket No. 01.05-114049J
)	
Respondents.)	

INITIAL ORDER OF DEFAULT

**NOTICE OF DEFAULT ENTERED AGAINST CAROLYN KINKADE, DOLAN KINKADE
AND BETTERWAY TERMITE AND PEST CONTROL**

This matter came on to be heard on May 9, 2012 in Nashville, Tennessee, via teleconference hearing, before Joyce Grimes Safley, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Finance and Administration. Mr. Keith D. Hodges, Assistant General Counsel for the Tennessee Department of Agriculture, represented the State. Neither of the Respondents, nor anyone on Respondents' behalf, were present at the hearing.

The issues presented at this hearing was whether or not Respondents' commercial pest control charter should be revoked for failure to comply with the requirements of the Tennessee Application of Pesticides Act of 1978, T.C.A. §62-21-101, *et seq.*; whether the Wood Destroying Organisms (WDO) license held by Respondent Dolan Kinkade should be revoked for failure to comply with the requirements of the Tennessee Application of Pesticides Act of 1978, T.C.A. §62-

21-101, *et seq.*; whether the Industrial, Institutional, Structural, and Health Related Pest Control (C07) certification held by Respondent Dolan Kinkade should be revoked for failure to comply with the requirements of the Tennessee Application of Pesticides Act of 1978, T.C.A. §62-21-101, *et seq.*, and whether or not Respondents should be ordered to pay civil penalties in the amount of \$3200.00.

At the beginning of the hearing, when it became apparent that none of the Respondents would appear for the scheduled hearing, the State moved for Default and further moved to present its proof.

Ms. Kathy Booker, Pesticide Administrator for the Tennessee Department of Agriculture testified regarding the numerous attempts made to contact Respondents and give notice of the scheduled hearing. Mr. Hodges, the attorney for the State, noted that the notices sent via certified mail regarding this hearing were “returned” and not accepted.

Ms. Jamie Ross, Inspector, TDA, testified that she had spoken with Mary Beth Lewis, Carolyn Kinkade’s daughter and Dolan Kinkade’s sister, and had asked Ms. Lewis for current telephone numbers and current addresses for Respondents. Ms. Lewis refused to give current information to Ms. Ross. Additionally, Ms. Ross telephoned Ms. Lewis on May 1, 2012 and informed Ms. Lewis that a hearing was scheduled in this matter for May 9, 2012. Ms. Lewis stated that she would inform the Respondents about the hearing, and have them call Ms. Ross. The Respondents did not telephone Ms. Ross or otherwise communicate with the Department of Agriculture.

Respondents did not accept the Notices of Hearing via Certified Mail, and the Notice of Hearing was returned to the Department of Agriculture.

Rule 4.04 (11) of the *TENNESSEE RULES OF CIVIL PROCEDURE* addresses service of notice when such notice is mailed by return-receipt mail and is returned “unclaimed”. It states as follows:

When service of a summons, process, or notice is provided for or permitted by registered or certified mail under the laws of Tennessee and the addressee or the addressee’s agent refuses to accept delivery and it is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing. For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is “unclaimed,” or other similar notation, is sufficient evidence of the defendant’s refusal to accept delivery. [effective July 1, 2004.]

It is determined that the State made reasonable and proper efforts to serve the notice upon the Respondents. It is further determined that the State complied with applicable laws and regulations regarding notice to Respondents, and took all reasonable steps to serve Respondents.

Respondents did not appear for the hearing.

T.C.A. § 4-5-309 states:

Default.---(a) If a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge...may hold the party in default and either adjourn the proceedings or conduct them without the participation of that party, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings. (Emphasis added.)

The Department of Agriculture moved for an entry of Default , and further moved to proceed with its proof. Both motions were **GRANTED**.

Findings of Fact

1. Ms. Kathy Booker, Pesticides Administrator, Tennessee Department of Agriculture testified at the hearing of this matter.

2. Respondents Carolyn Kinkade and Dolan Kinkade are commercial pest control operators doing business as Betterway Termite and Pest Control. Charter #678 was issued to “Betterway Termite and Pest Control”, authorizing it to engage as a commercial pest control operator pursuant to T.C.A. §62-21-103(a).

3. Betterway Termite and Pest Control is not a corporation, an LLC, or an artificial entity. Accordingly, Respondents Carolyn Kinkade and Dolan Kinkade are individually liable for Betterway Pest Control’s acts and omissions.

4. On July 2, 2008, Inspector Jamie Ross, Tennessee Department of Agriculture, conducted an inspection at the Respondents’ business office located at 1388 Dearing Road, Memphis, Tennessee.

5. Based upon Respondent’s records, Inspector Ross discovered that Respondent Dolan Kinkade had made commercial pesticide applications at three different businesses in Memphis, Tennessee on May 29, 2008 and June 1, 2008.

6. Respondent’s surety bond, required by T.C.A. §62-21-107(a), was cancelled on April 26, 2008.

7. Respondent made commercial pest applications without having a surety bond in effect.

8. Respondent's occurrence liability insurance, required by T.C.A. §62-21-108, expired on January 18, 2009. Respondent did not renew or obtain the required liability insurance.

9. During Inspector Ross's inspection, she found that Respondents' records for pest applications made by Respondent Dolan Kinkade at 3046 Woodland Grove, Lakeland, Tennessee on February 19, 2008; 4685 Park Avenue, Memphis, Tennessee on March 6, 2008; 3992 Plymouth Avenue, Memphis, Tennessee on April 15, 2008; 6738 Whitten Pine Drive, Memphis, Tennessee on May 29, 2008; and 3640 South Lloyd Circle, Memphis, Tennessee on June 1, 2008 were missing information required by Tennessee Department of Agriculture RULE 0080-6-14-.12.¹

¹ **RULE 0080-06-14-.12 --- RECORDKEEPING REQUIREMENTS FOR COMMERCIAL PEST CONTROL OPERATORS AND COMMERCIAL APPLICATORS.**

(1) All commercial applicators and pest control operators shall keep true and accurate records of both restricted and non-restricted pesticide use, retain such record for two (2) years, and make the original records and copies thereof available to the Commissioner of Agriculture or his designee.

(2) The records must show:

- (a) The applicator name(s) and TDA-assigned ID number;
- (b) The pesticide used;
- (c) The target pest(s);
- (d) The crop, plant, house, business, or building the pesticide is applied on or to and the location thereof; including the physical address or Farm Services Agency number;
- (e) The application rate;
- (f) The percentage of mixed-use dilution;
- (g) The landowner, agent or other person employing such applicator;
- (h) The date of service; and
- (i) The amount of pesticide used.

Authority: T.C.A. §§ 62-21-105, 62-21-118.

5. Inspector Ross also discovered, during her inspection, that Respondents did not use the dilution rate mandated by the product label, in violation of T.C.A. §62-21-116.

6. Respondent Dolan Kinkade was unable to produce a termite service agreement for the application made at 4685 Park Avenue. The failure to have a termite service agreement was a violation of T.C.A. §62-21-114 (a)(1).

7. On July 20, 2011, the Department of Agriculture received a complaint from Ms. Beth Brooks regarding pesticide applications made by Respondent Carolyn Kinkade on November 5, 2010 at 3154 Joffre Avenue, and 192 Marne Street, in Memphis, Tennessee.

8. At the time Respondent Kinkade made the pesticide applications for Ms. Brooks, the Respondents did not have a surety bond or liability insurance.

9. The Tennessee Department of Agriculture issued a Notice of Violation and Enforcement Action to Respondents on August 20, 2010.

10. Respondent Carolyn Kinkade was charged and convicted of four Class A misdemeanors under T.C.A. §62-21-120 in connection with the Beth Brooks complaint.

11. The Department initiated this action against the Respondent by a "Complaint and Notice of Hearing" filed on November 4, 2011.

CONCLUSIONS OF LAW

1. The Department proved, by a preponderance of the evidence, that Respondent failed to comply with Charter requirements mandated by T.C.A. §62-21-107(a) and T.C.A. §62-21-108.

2. Respondents violated T.C.A. §62-21-107(a) by conducting business as a pest control operator without a bond.

3. Respondents violated TENNESSEE DEPARTMENT OF AGRICULTURE RULE 0080-6-14-.12 by failing to keep information and records required for pest control application operators.

4. Respondents violated T.C.A. §62-21-116 by failing to use dilution rates prescribed by pesticide product labels.

5. Respondents violated T.C.A. §62-21-114(a)(1) by failing to either obtain or keep a record of a termite service agreement at the 4685 Park Avenue location.

6. Respondents violated T.C.A. §62-21-108 by engaging in the business of commercial pest control operators without current liability insurance.

7. Accordingly, the Respondents' pest control charter issued to Betterway Termite and Pest Control (Charter #678), the Wood Destroying Organisms (WDO) license, and the Industrial, Institutional, Structural, and Health Related Pest Control (C07) certification held by Respondent Dolan Kinkade are hereby **REVOKED**.

8. Respondents are **ASSESSED and ORDERED** to pay \$3200.00 in civil penalties to the Department of Agriculture.

8. Pursuant to T.C.A. §62-21-130, the actual and reasonable costs of this case are assessed against Respondent. The Department is ordered to file a bill of costs with the Administrative Procedures Division and to serve the same

upon Respondent. Such costs shall be paid by Respondents within thirty days of receipt of the bill of costs.

It is so ordered.

This Order entered and effective this 22 day of May, 2012

A handwritten signature in black ink that reads "Thomas G. Stovall". The signature is written in a cursive style with a large, looping initial 'T'.

Thomas G. Stovall, Director
Administrative Procedures Division