

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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT, DOCKET NO. OSHANC 2001-4019
v. OSHA INSPECTION NO. 304255979
CSHO ID NO. W2477

SAM WARD dba FREEPORT GUTTER &
STEEL

ORDER

RESPONDENT:
APPEARANCES:

Complainant:

Linda Kimbell
Assistant Attorney General
North Carolina Department of Justice

Respondent: NA

BEFORE:

Hearing Examiner: Charles R. Brewer

THIS MATTER came on for consideration by the undersigned pursuant to an Order and notice of hearing dated May 6, 2003. The hearing was held in Room 124 of the Old YWCA Building in Raleigh, North Carolina. Complainant was represented by Assistant Attorney General Linda Kimbell. Respondent did not appear for the hearing.

Based upon the evidence presented at the hearing and with due consideration of arguments and contentions of counsel, 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.
3. Respondent is a sole proprietor and, as an employer, is subject to the provisions of OSHANC.
5. Beginning On March 14, 2001, Carl Weatherington, a Safety Compliance Officer for Complainant's Occupational Safety and Health Division, inspected the Respondent in conjunction with a construction inspection at the St. James Plantation Marina in Southport, North Carolina (hereinafter referred to as the "site").
6. As a result of the inspection, on March 27, 2001, a citation was issued to Respondent alleging a number of serious violations.
7. Respondent timely filed its Notice of Contest and this Board has jurisdiction over the subject matter and the parties to this action.
8. This matter was scheduled to be heard on January 31, 2002. Prior to the hearing, the parties reached a verbal settlement. Based on this resolution, the scheduled hearing was continued.
9. Counsel for Complainant reduced the verbal agreement to writing. On February 19, 2002, the Stipulation and Notice of Settlement, along with a Consent Order and Notice and Certification of Posting, was mailed to Respondent for signature and posting in accordance with the Rules of Procedure of the Safety and Health Review Board.
10. The signed agreement was not returned to Complainant. In August 2002, Counsel for Complainant contacted Respondent to inquire about the status of the agreement. At that time, Respondent reaffirmed the agreement but requested that a payment plan be added to the terms.
11. On August 27, 2002, Counsel for Complainant sent a second Stipulation and Notice of Settlement, which had been revised to include a payment plan, to Respondent. In all other respects, the revised agreement contained terms identical to the original. The agreement is attached to this Order and is incorporated herein by reference.
12. Respondent did not sign and return the revised agreement.
13. On February 23, 2003, Complainant moved the Safety and Health Review Board to hold Respondent in contempt of its Rules of Procedure and to order Respondent to sign, post, and return the Stipulation and Notice of Settlement and Consent Order to Complainant's Counsel.
14. On May 6, 2003, the undersigned entered an Order directing Respondent to sign, post, and return the Stipulation and Notice of Settlement and Consent Order to Complainant or, failing that, to appear on August 12, 2003, for a hearing on Complainant's Motion.
15. Prior to the hearing, Counsel for Complainant had confirmed with the Administrative Assistant for the Safety and Health Review Board that Respondent had received the May 6 Order and had been notified of the hearing date.
16. At the hearing on August 12, 2003, Counsel for Complainant stated that Respondent had not complied with the terms of the May 6 Order by signing, posting, and returning the settlement agreement. As of the hearing date, Counsel for Complainant had not had any communication from Respondent.
17. At the hearing, Counsel for Complainant requested the undersigned to approve the settlement agreement between the parties and issue an Order to that effect. Such an Order would enable Complainant to close out the matter as a contested case.

CONCLUSIONS OF LAW

1. This action was properly brought, and the undersigned has jurisdiction to hear this matter.
2. The Stipulation and Notice of Settlement mailed to Respondent on August 27, 2002, is a valid rendering of the terms of the settlement reached by the parties to this matter.
3. By failing to sign, post, and return the Stipulation and Notice of Settlement and Consent Order or to appear at the hearing of August 12, 2003, Respondent is deemed in default of the Order entered by the undersigned on May 6, 2003.

ORDER

1. The Stipulation and Notice of Settlement is affirmed.
2. Respondent is ordered to pay the penalty of \$2,240.00 pursuant to the payment schedule set out in paragraph 5 of the Stipulations. If the Respondent does not pay each monthly installment as agreed upon, all remaining installments are immediately due and payable and the Complainant may institute collection proceedings as allowed by law. Respondent agrees to pay attorneys' fees to Complainant in the event the Complainant must institute proceedings to collect the debt.

This the 24th day of October, 2003.

Charles R. Brewer
Hearing Examiner

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SAM WARD dba FREEPORT GUTTER & STEEL
and its successors
2945 Parramore Shores
Tallahassee, FL 32310

STIPULATION AND NOTICE OF SETTLEMENT

RESPONDENT:
NOW COME the parties in the above-captioned action, pursuant to Rule .0701 of the Rules of Procedure adopted by the Safety and Health Review Board of North Carolina, and respectfully show unto the Hearing Examiner as follows:

FACTS

1. Respondent, Sam Ward, is owner and does business as Freeport Gutter & Steel, located in Tallahassee, Florida.
2. On March 14, 2001, Carl Weatherington, an Occupational Safety and Health Officer with the North Carolina Department of Labor, conducted an inspection of Respondent's worksite located at 2554 St. James Drive SE, St. James Plantation Marina, Southport, North Carolina.
3. As a result of the inspection, on March 27, 2001, Complainant issued the following Citation:

CITATION NUMBER ONE (Serious)

Item No.	Standard	Abatement Date	Penalty
1a	29 CFR 1926.750(b)(1)(i)	Immediate	\$1,400.00
1b	29 CFR 1926.503(a)(1)	05/11/2001	Grouped
1c	29 CFR 1926.20(b)(1)	05/11/2001	Grouped
1d	29 CFR 1926.20(b)(2)	05/11/2001	Grouped
2a	29 CFR 1926.100(a)	Immediate	\$1,400.00
2b	29 CFR 1926.21(b)(2)	05/11/2001	Grouped
3	29 CFR 1926.752(a)(1)	Immediate	\$1,400.00

4. The Respondent submitted a timely Notice of Contest, dated May 3, 2001.
5. The parties having reached a Settlement Agreement now seek approval of said Agreement by the Hearing Examiner.

STIPULATIONS

Effective upon approval of this Stipulation and Notice of Settlement, the parties to this action hereby agree and stipulate to the following settlement of the matters at issue herein:

1. Complainant agrees to make the following amendments to the Citations:
 - a) Reduce the penalty for Citation One, Items 1a to 1d to \$1,120.00;
 - b) Reduce the penalty for Citation One, Items 2a and 2b to \$1,120.00;
 - c) >Delete Citation One, Item 3 and its proposed penalty.
2. In consideration of the above, Respondent agrees to withdraw its Notice of Contest to the citation as amended.
3. Respondent further agrees that within 60 days of the approval of this Agreement by the Review Board, he will establish and implement a Disciplinary Policy to enforce safe work rules at his North Carolina construction worksites. Respondent agrees that all employees who make suggestions or complaints shall have the same protection provided employees under Article 21, Chapter 95 of the General Statutes.
4. The parties agree to bear their own attorney's fees, costs, and other expenses that have been incurred in connection with any stage of these proceedings up to and including the filing of this Stipulation and Notice of Settlement.
5. Upon approval of this Stipulation and Notice of Settlement by the Hearing Examiner, the Respondent agrees to pay the new proposed penalty of \$2,240.00 in four equal monthly installments of \$560, with the first payment to be paid within ten (10) days following the receipt of the Order approving the Stipulation and Notice of Settlement, and each successive payment of \$560.00 to be paid by the tenth of each month thereafter until paid in full.
6. Respondent agrees that by signing this Stipulation and Notice of Settlement and upon approval of said Stipulation and Notice of Settlement by the Hearing Examiner, its Notice of Contest is withdrawn as a matter of law. In any subsequent proceeding with respect to matters covered by this Stipulation and Notice of Settlement brought directly under the Act by Complainant, this Agreement shall have the full force and effect of a final order.
7. The parties agree that there are no other matters that remain to be decided, and there has been no employee objection to the reasonableness of any abatement period.
8. Respondent shall post this Stipulation and Notice of Settlement in accordance with Rules .0107(e), .0107(f), .0107(h), and .0701(c) of the Rules of Procedure of the Safety and Health Review Board of North Carolina.

WHEREFORE, the parties to this action hereby respectfully request approval of this Stipulation and Notice of Settlement.

This the day of , 2002.

APPROVED BY:

Howard J. Laurie
District Supervisor
Occupational Safety and Health Division

ROY COOPER
Attorney General

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Special Deputy Attorney General
North Carolina Department of Justice
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ATTORNEYS FOR COMPLAINANT

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RESPONDENT