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

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 02-4142  
OSHA INSPECTION NO. 305447328  
CSHO ID NO. C4131

v.

MCJAST INC., DBA AMERICAN  
CAROLINA STAMPING

**ORDER**

RESPONDENT.

**SAFETY STANDARDS AND/OR STATUTES AT ISSUE**

1. Rule of Procedure .0601(b):

**DECISIONS OF HEARING EXAMINER**

(b) The hearing examiner shall sign the decision, and said decision shall be effected from the date it is filed with the offices of the Review Board. Upon filing of the decision, jurisdiction shall rest solely in the Board, and all motions, petitions, and other pleadings filed subsequent to such issuance shall be addressed to the Board.

2. Rule of Procedure .0503:

**FAILURE TO APPEAR**

(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.

3. Rule of Procedure .0308(c):

**Motions**

(c) Motions shall, in the ordinary course of proceedings, be heard and disposed of by hearing examiners to whom the case is assigned or by the Review Board when the case is before the Review Board as a whole.

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**DECISION OF THE BOARD**

Having reviewed and considered the record, the Board hereby grants the Motion to Reschedule the Hearing and remands the case back to a Hearing Examiner different from the Hearing Examiner who made the original decision, for a full hearing on the merits and grants the Motion to Amend filed by the Complainant with the Board on August 21, 2002 and makes the following Findings of Fact, Conclusions of Law, Discussion and Order:

## **FINDINGS OF FACT**

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(9).
4. The employer (Respondent), McJest Inc, dba American Carolina Stamping (hereinafter American Carolina Stamping) is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. American Carolina Stamping is a business located at US Route Old #64, Penrose, North Carolina.
6. On May 23, 2002, a Compliance Officer with the North Carolina Department of Labor, inspected the work site located at US Route Old #64, Penrose, North Carolina.
7. On June 12, 2002, as a result of the inspection citations were issued alleging six serious and two nonserious violations.
8. The Respondent's Notice of Contest was filed with the Review Board on June 24, 2002.
9. On June 24, 2002, a Notice of Docketing was mailed to Respondent by certified mail, return receipt requested.
10. On June 26, 2002, the Notice of Docketing was received by Respondent as is evidenced by a Return Receipt signed by Therese C. McCall.
11. In a telephone conversation on August 12, 2002, the Respondent's owner, Mr. Steve McNabb after being informed that his Statement of Position was past due indicated that his name was misspelled and the name of his company was wrong and that he would send in the Statement of Position when the Board sends him another Statement of Position, presumably one that had been corrected.
12. On August 21, 2002 Complainant filed a Motion to Amend with the Board requesting that Respondent's name be amended on the caption to "McJast, Inc. dba American Carolina Stamping" and indicating that the contact person is Steve McNabb.
13. On September 13, 2002, Respondent filed a motion (incorrectly designated as a Motion to Amend) opposing the Motion to Amend.
14. On September 18, 2002, the Honorable Charles R. Brewer issued an order deferring his ruling on the Motion to Amend until the Hearing.
15. On November 13, 2002, the Board mailed a Notice of Hearing to all parties setting the case for hearing on December 13, 2002.
16. On November 20, 2002, the Complainant filed a Motion to Continue Hearing with the Board with Respondent not objecting to the continuance.
17. On November 20, 2002, the Honorable Charles R. Brewer issued an order granting the motion for continuance, said order stating:

It is ORDERED that the hearing for the above-referenced matter will be removed from its original hearing date of December 13, 2002, and replaced with a hearing date of February 28, 2002, at the Buncombe County Courthouse, Room 204, 2<sup>nd</sup> Floor, in the County Commissioners' Chambers, 60 Court Plaza, Asheville, North Carolina at 9:00 a.m.

18. On December 31, 2002, Judge Brewer's order referenced above was filed with the Board and mailed to the Respondent by Certified Mail, Return Receipt Requested.
19. On January 9, 2003, said order continuing the hearing was received by Respondent as is evidenced by a green Return Receipt signed by Amy Miller on January 9, 2003.
20. On February 27, 2003, Therese Chambers from Respondent's office called the Board to verify the location of the Hearing that was to be heard the next day and was given the information.
21. On February 28, 2003, the Honorable Charles R. Brewer waited until 9:25 for the Respondent to show up and indicated to counsel for Complainant who had shown up that he would dismiss the Respondent's notice of contest for failure to show up.
22. On February 28, 2003 the Honorable Charles R. Brewer issued an order dismissing the notice of contest and upholding the citations and penalties of \$500.00 and assessing an additional penalty of \$5,000.00 for the Respondent's failure to appear.
23. On February 28, 2003, Steve McNabb owner of Respondent showed up at the Buncombe County Courthouse at 8:40 a.m. in Room 402 due to the fact that he had transposed the numbers and written "402" instead of "204" for the room number where the hearing was to be held. When no one showed up for the hearing in Room 402, Mr. McNabb inquired of the clerk's office and was told that the hearing was being held in Room 204 and he arrived at 9:35 a.m. but everyone had left by then.
24. On March 7, 2003, Respondent filed a Motion to Reschedule with the Board setting out the fact found above in finding of fact numbered 23 and apologizing to the court.

## **CONCLUSIONS OF LAW**

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

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The Board has jurisdiction of this cause and the parties are properly before this Board.
3. The Respondent has shown good cause for his failure to appear before the Hearing Examiner for the Hearing held on February 28, 2003.
4. The Board has the authority to hear and decide the Motion to Amend filed by the Complainant.

## **DISCUSSION**

This is a motion to reschedule a hearing that the Respondent missed by 10 minutes due to the transposition of the numbers for the Room number. Respondent was diligent in having his secretary call the Board the day before the Hearing to confirm the date and time and location of the hearing. Respondent was diligent in showing up at the courthouse 20 minutes ahead of time and then inquiring of the Clerk's office after waiting for 15 minutes past 9:00 a.m., the time scheduled for the meeting. The Board encourages that parties have their day in Court and that for disputes over citations that cannot be settled by the parties, that the dispute be determined by a neutral adjudicator after a presentation of the facts and legal issues by the parties. The Respondent's mistake in

transposing the numbers for the hearing room coupled with his due diligence in inquiring of the Board about the scheduling of the hearing amounts to a showing of good cause for his failure to appear at the hearing.

In the interest of judicial economy and since the motion to reschedule is before the full Board as a whole, pursuant to Board Rule .0308(c) the Board will decide the Motion to Amend filed by Complainant and will grant the Motion to Amend so that the caption will read "McJast, Inc. d/b/a American Carolina Stamping" and that the contact person is Steve McNabb. The issuing of the citations against Mc Jest, Inc dba American Carolina Stamping did not prejudice the Respondent. It was a clerical error involving the misspelling of the name by one letter. The citation correctly named the company by which the Respondent was doing business. The Respondent received notice of the citation and knew that it was against his company and is not prejudiced in any way by the granting of the motion to amend.

## **ORDER**

**THEREFORE**, it is **ORDERED** that Respondent's Motion to Reschedule is granted and the case is ordered to be set by the Board for a hearing on the merits at the earliest possible time, to be heard by a Hearing Examiner different from the Hearing Examiner who originally heard the case. It is further **ORDERED** that the Complainant's Motion to Amend is granted and the caption is to read:

McJast, Inc., d/b/a American Carolina Stamping

and that Respondent's contact person is Steve McNabb. It is also **ORDERED** that Respondent file his Statement of Position with the Board within 20 days from the day he receives this order.

This the 17th day of April, 2003.

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OSCAR A. KELLER, JR., CHAIRMAN

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RICHARD G. PEARSON, MEMBER

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JANICE SMITH GERALD, MEMBER