

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

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2002-4168  
OSHA INSPECTION NO. 305042947  
CSHO ID NO. M1375

v.

HAMPTON ROADS MECHANICAL  
CONTRACTORS, INC.,

**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.

4. Rule of Procedure .0309 FAILURE TO OBEY RULES

(a) Sanctions. Failure to file or serve any pleading or otherwise proceed as provided by these rules, may result in a declaration of default and a decision against the defaulting party. The declaration and decision may be initiated by the hearing examiner or Review

Board or result from the motion of a party to the hearing examiner, Review Board, or Review Board Chairman. If the decision is made by a hearing examiner or the Review Board Chairman, the decision will become the decision of the Review Board unless review is initiated by any Review Board member or by the appeal of the defaulting party.

(b) Review. Review of a decision against a defaulting party, whether made by the hearing examiner or Review Board Chairman, must be directed by a Review Board member or sought by a party within 30 days of the filing date of the decision.

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## **DECISION OF THE BOARD**

Having reviewed and considered the record, the Board reverses the Order of the Hearing Examiner and orders that the case be rescheduled for a full hearing on the merits 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(10).
4. The employer (Respondent), Hampton Roads Mechanical Contractors, Inc. (hereinafter Hampton Roads) is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. Hampton Roads is a business whose home office is located at 932 Corporate Lane, Chesapeake, Virginia.
6. On July 2, 2002 a Compliance Officer with the North Carolina Department of Labor, inspected a work site located at 1704 Weeksville Road, Elizabeth City, North Carolina.
7. On August 5, 2002, as a result of the inspection citations were issued containing numerous serious citations containing violations of the asbestos standard with penalties totaling \$700.00.
8. The Respondent's Notice of Contest contesting the citations was timely filed with the Review Board on August 27, 2002.
9. On September 6, 2002, a Statement of Position form in which Respondent requested formal pleadings and also indicated on the back of the form that they disagreed with each of the citations, was timely filed with the Board
10. On September 19, 2002, a formal Complaint was filed with the Board by the Department of Labor.
11. In a letter dated September 24, 2002 and addressed to the North Carolina Department of Labor and forwarded to the Board on October 30, 2002, Respondent indicated that he had mistakenly checked the box requesting formal pleadings and that he had intended to request another informal hearing and requested that the Complaint be rescinded.
12. On November 19, 2002, Chairman Oscar A. Keller, Jr. issued an order rescinding the Complaint and ordering that the parties engage in a pre-hearing conference to discuss settlement of the citations.
13. By letter dated December 17, 2002 Sonya M. Calloway, counsel for Complainant advised the Board that a pre-hearing conference was held as directed by the Chairman's order of November 19, 2002.

14. A hearing was scheduled to be held before the Honorable Carroll D. Tuttle on June 27, 2003.
15. On June 27, 2003, Sonya M. Calloway Assistant Attorney General, North Carolina Department of Justice representing the Complainant appeared at the hearing and James R. Driver, Sr. who had signed all prior correspondence and documents with the Board as Project Manager for Respondent, appeared with a letter purporting to give Mr. Driver permission to act on behalf of Respondent.
16. Mr. Driver was an employee of Tidewater Mechanical Contractors, Inc. and was not an employee of Respondent either at the time of the inspection or at the time of the hearing and pursuant to Board Rules was not allowed to represent Respondent at the hearing. No representatives of Respondent appeared at the hearing.
17. Complainant moved for a declaration of default and a default judgment pursuant to Board Rule .0503.
18. On July 23, 2003, the Honorable Carroll D. Tuttle issued an order dismissing the Notice of Contest and affirming the citations and penalties.
19. Said order was filed with the Board on July 30, 2003.
20. On August 8, 2003 in a telephone conversation with a representative of the Board, the Respondent through its secretary, Connie, indicated that it was not aware that Mr. Driver could not represent them at the hearing and requested another hearing.
21. Respondent was told by a representative of the Board to appeal the order within 30 days of the filing date of the order.
22. By letter dated August 13, 2003 and filed with the Board on August 18, Respondent timely petitioned for review of the Hearing Examiner's order and requested that it be given the opportunity to support its case with documentation.
23. By letter dated August 18, 2003, counsel for Complainant opposed the request for a rehearing and indicated that the court explained to Mr. Driver that a party must request a rehearing for a justifiable failure to appear within 5 days of the scheduled hearing date.
24. The Board is treating the above telephone conversation of Respondent referenced in finding of fact # 20 and letter from Respondent referenced above in finding of fact # 22 as a Motion and Request for a Rehearing pursuant to Board Rule .0503 and/or an appeal of a default judgment pursuant to Board Rule .0309(b).

## **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. Respondent made a good faith effort to have someone represent it at the hearing.
4. Notice in open court that a Respondent has 5 days after the hearing to appeal a default judgment to a person that the court has determined has no authority to represent Respondent does not serve to give Respondent notice of that fact.
5. Respondent's record of complying with the Board's filing dates, his good faith effort to have Mr. Driver represent it at the hearing and his status as a pro se litigant amounts to extraordinary circumstances and good cause for a justifiable failure to appear.

6. The Respondent has met the 30 day deadline for filing an appeal of default judgment pursuant to Board Rule .0309(b).

## **DISCUSSION**

The Board is once again faced with a request for a rehearing from a pro se employer. This is also the second request from the same employer requesting relief from a mistake made by the employer because of unfamiliarity with the Board's rules. "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." McJast, Inc., dba American Carolina Stamping, 7 NCOSHD \_\_\_\_ (RB 2003). To give the Respondent his day in court, the Board will grant the Respondent's motion and reschedule the hearing. If the Respondent does not secure an attorney, it is highly recommended that the Respondent read and study the Board Rules. A copy of the Rules can be gotten from the Board or can be accessed online at <http://www.oshrb.state.nc.us/ruleshomeframe.html>. The Board may not be so generous if a third request for relief from a Board Rule is made by the Respondent.

## **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.

This the 17th day of September, 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