

**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 2002-4109
OSHA INSPECTION NO. 304738909
CSHO ID NO. B9614

v.

MASTER WOODCRAFT INCORPORATED
and its successors,

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.

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 before a different hearing examiner beginning with a Notice of Docketing with the correct Inspection number 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), Master Woodcraft, Incorporated (hereinafter Master Woodcraft) is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. Master Woodcraft is a business located at 1312 College Street, Oxford, North Carolina.

6. On December 10, 2001, a Compliance Officer with the North Carolina Department of Labor, inspected the work site located at 1312 College Street, Oxford, North Carolina.

7. On January 28, 2002, as a result of the inspection citations were issued containing numerous failure to abate, serious and repeat violations with penalties totaling \$27,150.00.

8. The Respondent's Notice of Contest contesting the citations issued with inspection number 304738909 was filed with the Review Board on April 1, 2002.

9. The correct inspection number for the citations was 304738909, however, the failure to abate citation indicate that the citations that were not abated were for violations issued in a previous inspection with an Original Inspection Number of 304259260.

10. A clerical error was made listing the inspection number on the Notice of Docketing and all court documents thereafter as 304259260.

11. The citations issued with the inspection number of 304259260 were not contested by Respondent.

12. On April 2, 2002, a Notice of Docketing with the incorrect inspection number of 304259260 was mailed to Respondent by certified mail, return receipt requested.

13. On April 3, 2002, the Notice of Docketing was received by Respondent as is evidenced by a Return Receipt signed by Louis B. Moss.

14. On May 3, 2002, a Statement of Position with respect to the incorrect inspection number 304259260 was filed with the Board by fax from the Department of Justice after originally being faxed to the Raleigh, North Carolina field office located at Chapanoke road.

15. On March 13, 2003, a Notice of Hearing referencing the incorrect inspection number of 304259260 was mailed to Respondent setting a hearing date of April 16, 2003.

16. In a letter dated April 7, 2003 and addressed to the Commissioner of Labor and Safety & Health Review Board but not received by the Board until May 6, 2003 as part of a fax from the North Carolina Department of Labor, Division of Occupational Safety and Health, Mr. Louis B. Moss, President of Respondent, stated:

Please research your records. All items on this inspection had been taken care of a year or so ago.

17. In that same letter dated April 7, 2003, Mr. Moss stated:

As per enclosed, I am scheduled to be at an International Trade Show exhibiting at Tampa, Florida thru April 13.

At age 85, under present circumstances, and my explanations, I bring these facts to your attention, having consideration for your plans.

I hope to return to N.C. approx. April 13, P.M, and will return to Oxford after medical consultation with my Duke Medical Center specialists.

Your understanding and consideration would be appreciated.

18. On April 16, 2003, a hearing was held before the Honorable Charles R. Brewer. Representatives of the Complainant appeared but Respondent did not.

19. On April 21, the Honorable Charles R. Brewer issued an order finding the Respondent in default for failure to attend the hearing and ordering that the Respondent's Notice of Contest was stricken and the citations and proposed penalties were deemed final.

20. Said order was filed with the Board on April 28, 2003.

21. By fax dated May 2, 2003 and addressed to the honorable C.R. Brewer and to Doris S. Hinton of the Safety and Health Review Board but faxed to the Occupational Safety and Health Division, Mr. Moss indicates that he had asked for a continuance on April 7, 2003 and that he had advised the Agency to review its files, and that this case had been closed last year. Mr. Moss also stated:

I cannot come to Raleigh which is the same distance either way from Oxford. If you can arrange for an intelligent individual to visit with me in Oxford, to review the files, etc., everyone's time will be saved.

22. Said fax with the above information was faxed to the Board on May 6, 2003.

23. The Board is treating the above fax and letters as a Motion and Request for a Rehearing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Chairman 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 Notice of Docketing and all subsequent court document which referenced the incorrect Inspection Number of 304259260 failed to appraise Respondent of the safety and health regulations that he was alleged to have violated.

4. The fact that the citations issued in the inspection numbered 304259260 were not contested and were not the subject of the hearing but the Notice of Hearing indicated that they were the subject of the Hearing combined with Respondent's many requests for someone to review the files to see that the Inspection numbered 304259260 had been resolved amounts to good cause to reschedule the Hearing starting with a Notice of Docketing with the correct inspection number of 304738909.

DISCUSSION

This is a motion to reschedule a hearing that indicated that it was to determine all matters with respect to contested Citation Number B9614-304259260. This information was incorrect in that Citation numbered 304259260 had not been contested and was not at issue in the hearing. The Citation numbered 304738909 was the citation that the Respondent has contested and was at issue in the case with OSHANC Number 2002-4109. The Notice of Docketing and all other court documents issued by the Board incorrectly indicated that the citations that were the subject of the contestment were for inspection numbered 304259260. Mr. Moss understandably filed his Statement of Position indicating that it was for Inspection Numbered 304259260 and the items that he discussed in the Statement of Position were the items that were cited in Inspection numbered 304259260. In a letter dated April 7, 2003 and addressed jointly to the Commissioner of Labor and to the Safety and Health Review Board but sent to the Department of Labor, Mr. Moss indicated that "All items on this inspection had been taken care of a year or so ago." This letter should have been, but was not forwarded to the Safety and Health Review Board before the hearing. Respondents are supposed to send the documents directly to the Board, however, when Respondents send documents to the OSH Division that are addressed and/or meant to be sent to the Safety and Health Review Board, copies should be forwarded to the Board. The Board will then decide whether to sanction a Respondent for not following its rules.

In Mr. Moss's letter of April 7, 2003, Mr. Moss also brings attention to the fact that he would be out of town at a trade show until a few days before the proposed hearing, that he is of the advanced age of 85 and that he has health problems and he asks for the Boards and the Commissioner's understanding and consideration. It is not altogether clear that Mr. Moss is asking for a continuance, however, if the letter had been forwarded to the Board, a representative of the Board could have called Mr. Moss and asked what he was requesting.

Mr. Moss is admonished that Board Rule .0108 requires that all papers other than the Notice of Contest shall be filed with the Board and copies shall be served on all other parties pursuant to Board Rule .0107. The Board's address, phone number and fax number is clearly included on the Notice of Docketing and Notice of Hearing. All documents relating to this case shall be filed with the Board at the following address:

Safety and Health Review Board
217 West Jones Street
Raleigh, NC 27603-1336
Phone: (919) 733-3589
Fax: (919) 733-3020

In addition, all other documents relating to this case shall be served on the Department of Labor through its legal representative at the following address:

NC Department of Justice - Labor Section
PO Box 629
Raleigh, NC 27602-0629

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. The Board is to start the case by issuing a new Notice of Docketing with the correct OSH Inspection number.

This the 10th day of June, 2003.

OSCAR A. KELLER, JR., CHAIRMAN

RICHARD G. PEARSON, MEMBER

JANICE SMITH GERALD, MEMBER