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

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

PIEDMONT ELECTRIC
MEMBERSHIP CORPORATION

RESPONDENT.

OSHANC NO. 2002-4192
OSHA INSPECTION NO. 305409757
CSHO ID NO. E0292

ORDER

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Hearing Examiner for the Safety and Health Review Board of North Carolina, on March 19, 2003 at the Vernon Building, 522 South Lexington Avenue, Burlington, North Carolina. The Hearing was scheduled in response to the following motions which were filed on February 6, 2003 by George T. Hicks (herein referred to as "Petitioner"): "Motion to Intervene of George T. Hicks and Motion for Expedited Hearing", and a "Motion To Be Heard Regarding Proposed Settlement and Motion for Expedited Hearing".

The Petitioner was represented at this Hearing by Mark R. McGrath, Attorney, Faison & Gillespie, Durham, North Carolina. The Complainant was represented by Jane Gilchrist, Assistant Attorney General, North Carolina Department of Justice and Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice. The Respondent was represented by William E. Burton, III, Attorney, Smith Moore, LLP, 300 North Greene Street, Greensboro, North Carolina.

Subsequent to the filing of the Motions by Petitioner on February 6, 2003, on February 11, 2003 Complainant filed a Motion for Extension of Time in which to respond to Petitioner's Motions, requesting an extension from February 17, 2003 to February 27, 2003. Complainant's Motion recited that neither Respondent nor Petitioner's attorney, Mark R. McGrath objected to the Motion.

On February 14, 2003 Respondent filed a Motion for Extension of Time in which to respond to Petitioner's Motions, requesting an extension from February 17, 2003 to February 27, 2003. Respondent's Motion recited that Complainant did not object to the extension; Respondent's Motion also stated that an attempt had been made to contact Mr. McGrath but Respondent had not been successful in contacting Mr. McGrath prior to the filing of Respondent's Motion for Extension of Tine. Respondent noted for the record that Mr McGrath did not object to Complainant's Motion for Extension of Time, and the extended period coincided with that requested by Complainant.

The Undersigned received no objection from Mr. McGrath, and Complainant's Motion for Extension of Time and Respondent's Motion for Extension of Time were **GRANTED**. The responses from Complainant and Respondent (collectively the "Responses") were timely delivered, and Petitioner was informed by the Undersigned that he could respond to the Responses at the Hearing which would be scheduled.

During a phone conference on or about March 4, 2003, by agreement of Complainant, Respondent and Petitioner, the Undersigned scheduled the Hearing for March 19, 2003 in the offices of the Undersigned.

The only matter before the Undersigned at this Hearing deals with the procedural issues, that is whether the non-employee Petitioner should be granted intervenor status for purposes of being heard with respect to the terms of a settlement between Complainant and Respondent when the settlement had already been fully negotiated and memorialized in writing and a Stipulation and Notice of Settlement had been sent to Respondent, and posted by Respondent, prior to the time Petitioner filed its motion to intervene and request to be heard on the settlement.. The Hearing is not for presenting of evidence and finding of facts with respect to whether or not there were serious violations of the Act as alleged in the Citation. The Hearing is not for determining whether there was negligence on the part of Respondent or whether Respondent has any civil or criminal liability with respect to the incident which occurred on June 4, 2002.

Complainant "has sole prosecutorial discretion under the Occupational Safety and Health Act," Wilson v North Carolina, OSHANC No. 94-3159, 96CVS07748 (Superior Court, Wake County, North Carolina, July 25, 1977), and the "orderly administration of the provisions of the Act would be thwarted if individual employees could determine the propriety of prosecution of alleged violations of the Act." Payne v Fieldcrest Cannon, Inc., OSHANC No. 91-2027, 4 NCOSHD 584, 589 (Hearing Examiner, June 1, 1992).

In exercising prosecutorial discretion the Complainant has the "authority to withdraw citations and enter settlement discussions" with cited employers. Payne v Fieldcrest Cannon, Inc., OSHANC No.91-2027, 4 NCOSHD 805, 806 (Review Board, January 29, 1993).

The Rules of Procedure for the Safety and Health Review Board of North Carolina (the "Rules") govern the conduct of the Review Board. Rule .0202 sets forth the requirements for permissive intervention. Rule .0202(a) provides that "A petition for leave to intervene may be filed at any stage of a proceeding before a commencement of the hearing." Rule .0202(b) provides that "The petition shall set forth the interest of the petitioner in the proceeding and show that the participation of the petitioner will assist in the determination of the issues in question, and that the intervention will not unnecessarily delay the proceeding." Rule .0202(c) provides that "The Board or the hearing examiner may grant a petition for intervention to such an extent and upon such terms as the Board or the hearing examiner shall determine."

The Petitioner has the burden of proof with respect to showing the interest of the petitioner in the proceeding. In this case the Petitioner has shown that its interest in the proceeding is that Petitioner was the person injured in a work related accident on June 4, 2002 and that an investigation of the accident was undertaken by Complainant based on a complaint filed by Petitioner's daughter and that the Citation was issued by Complainant based on that investigation. This interest was not disputed by Complainant or Respondent.

The Petitioner has the burden of proof with respect to showing that its participation will assist in the determination of the issues in question. In Brooks v Perdue Farms, Inc., OSHANC No. 89-1660, 3 NCOSHD 618, 623-24 (Review Board, February 8, 1990) a non-employee's petition to intervene was denied because the employee did not have specialized knowledge that the Division of Occupational Safety and Health did not possess. In this case, the Petitioner has alleged that it has undertaken an investigation and that the results of its investigation clearly show that Respondent was negligent; Petitioner alleged 20 different conclusions which it stated can be shown by its investigation. However Petitioner did not argue the specific facts that it could present nor did it argue that these facts were not already known to Complainant when settlement negotiations were in process. Further, Petitioner did not demonstrate how the information allegedly known to Respondent would, or could, have assisted in the determination of the issues in question.

In order to establish a serious violation, the Complainant has the burden of showing by preponderance of evidence that (1) the cited standard applies; (2) the terms of the standard were not met; (3) employees were exposed to or had access to the violative conditions; (4) the Respondent knew or could have known of the violative conditions with the exercise of reasonable diligence; and (5) there was a possibility of an accident the probable result of which would be death or serious physical injury.

When serious physical injury is established, either by evidence or by acknowledgment of the Respondent, then, for purposes of Complainant carrying its burden of proof, there is no additional value in having the injury described in great detail. In fact, the Undersigned's policy at a hearing on the merits is to not allow repetitive testimony with respect to any specific element which is not denied by the Respondent. In this matter, the Respondent does not deny that Mr. Hicks sustained serious injury.

In determining whether there has been a serious violation of the Act as set forth in the Citation issued to Respondent, the issue is whether each of the essential elements can be proven by the preponderance of evidence. Negligence is not one of the essential elements.

Petitioner's own Motions suggest that Petitioner's primarily interest is in insuring that the settlement "assign appropriate responsibility to the Respondent", and Petitioner states that "Petitioner vigorously opposes any attempt ...to settle this contested case in a manner that would assign Respondent with anything less than full responsibility for the Petitioner's injuries." Mr. McGrath expressly states in his letter to Ms. Gilchrist that "the Hicks family would be willing to your forgiveness of the monetary penalties, but would have a considerable problem with the withdrawal of the citations." All of these statements appear to be directed at obtaining for the Hicks family a declaration of liability on the part of Respondent with respect to having caused the injuries sustained by Mr. Hicks. These statements do not appear to have as their objective determining whether there has been a violation of the specified standard referenced in the Citation and whether the assessed penalty is fair and equitable with respect to the Act's application to the Respondent and to other employers in North Carolina.

The Petitioner has the burden of proof with respect to showing that its intervention will not unnecessarily delay the proceeding. Petitioner presents no support with respect to this element except its allegation that its participation will not delay the proceedings in any way and stating at the Hearing that the participation could be completed in 'one hour'. Petitioner demanded 'meaningful participation' but did not provide the criteria which would have to be satisfied in order to have such meaningful participation. Based on Petitioner's petition the Undesigned would not be able to comply with Rule .0202 in identifying the extent to which and terms upon which the Petitioner should be allowed to intervene. Petitioner's arguments on this element are not persuasive that its intervention would not unnecessarily delay the proceeding. It is noteworthy that negotiations with respect to disposition of the matter by settlement agreement had been undertaken and were completed, the settlement agreement had been memorialized in a written Stipulation and Notice of Settlement, and the Stipulation and Notice of Settlement had been forwarded to Respondent on January 30, 2003 and had been posted by Respondent on February 3, 2003. All of these events had taken place and were completed prior to Petitioner filing any motion with respect to its intervention and prior to any discussions by Petitioner with Complainant regarding intervention.

Petitioner cites Boise Cascade Corporation, 14 BNA OSHC 1993, 1991 CCH OSHD 29 (No 89-3087, 1991) ("Boise") as supporting its position that Petitioner should be heard during the adjudicatory process and that the Act's "goal of a safe and healthful workplace requires a cooperative endeavor that can only be accomplished through the assistance and involvement of employees", and that "Congress intended the Secretary to ensure that the views and concerns of employees have been taken into consideration in the exercise of his prosecutorial discretion", and that the absence of an opportunity for employees to offer input into a settlement agreement would constitute an abuse of discretion on the part of the Secretary. Petitioner further relies on General Electric Co., 14 BNA 763, 1990 CCH OSHD 29,072 (No. 88-2265, 1990) ("GE") which expressed the principle that every effort should be made to provide employees with the opportunity for input in the settlement process as much as practicable. It is noteworthy that in GE the holding was that when the Secretary and the employee seek to settle a case which is pending before the Commission, any affected employees or their representatives who have already elected party status (emphasis added) should be given the opportunity to offer their input to the proposed Settlement before it is executed and submitted to the Commission or a judge for approval. It is also noteworthy that in Boise the Union seeking to have input into the settlement negotiations was a party prior to the commencement of the settlement negotiations.

FINDINGS OF FACT

Based upon the record and the oral arguments presented at the Hearing, the Undersigned makes the following Findings of Fact:

1. 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 and with enforcement of the Occupational Safety and Health Act of North Carolina (the "Act"). Complainant brings this action pursuant to North Carolina General Statute 95-133.

2. Respondent is an entity duly organized and existing under the laws of the State of North Carolina.

3. Respondent is an "employer" within the meaning of NCGS §95-127(10) .

4. This Court has jurisdiction over the Respondent and Complainant and the Petitioner and the subject matter of this Hearing.

5. All notices required by the Act and by any applicable procedural and substantive rules have been given.

6. Neither Complainant, Respondent nor Petitioner has any procedural objection to this Hearing.

7. Mr Hicks, an employee of Carolina Power & Light Company was working at Respondent's worksite on June 4, 2002 and came into contact with energized parts and was seriously injured as a result of sustaining a massive electric shock.

8. The incident was reported to the North Carolina Division of Occupational Safety and Health by Mr. Hicks' daughter; however it appears that she reported the incident naming Carolina Power & Light Company as the party responsible for her father's injuries.

9. An inspection was conducted on or about June 19, 2002, and a Citation was issued on or about September 5, 2002. A copy of the Citation was mailed to Mr. Hick's daughter. Respondent timely filed a Notice of Contest on or about October 30, 2002.

10. Complainant and Respondent entered into settlement negotiations commencing in December 2002 and a settlement agreement was reached under the terms of which Complainant agreed to withdraw, or delete, Citation One Item 1 and Citation One, Item 2, and Respondent agreed that it will place a sign at each locked access point at each substation (the first sentence of the sign will contain a triangle with an exclamation point inside and the work "WARNING"; the second sentence will contain:"This substation is energized."; the third sentence will contain: "Pursuant to OSHA regulations all conductors and equipment shall be treated as energized until tested or otherwise determined to be de-energized or until grounded."; the bottom left corner will contain:"Keep Out! If opened or unlocked, immediately contract Piedmont Electric Membership Corporation at _____."; the bottom right corner will contain the standard ANSI danger symbol for electricity, which is an outline of a hand print with an electric bolt in the hand print.). The Settlement Agreement also provides that the Respondent's Notice of Contest is withdrawn as a matter of law.

11. On or about January 30, 2003 the Settlement Agreement was sent to Respondent for signature and posting; a copy of the Settlement Agreement was posted on February 3, 2003.

12. On February 5, 2003 Mr. McGrath, attorney for Petitioner, called Ms. Gilchrist to discuss the case and was informed that a settlement agreement had been reached.

13. On February 6, 2003 Mr. McGrath had another telephone call with Ms. Gilchrist concerning the case and the Settlement Agreement.

14. On February 6, 2003 Petitioner filed a "Motion to Intervene of George T. Hicks and Motion for Expedited Hearing" and a "Motion To Be Heard Regarding Proposed Settlement and Motion for Expedited Hearing".

15. The original signed Settlement Agreement from Respondent was received by the Review Board on February 7, 2003.

16. Complainant filed a Motion for Extension of Time on February 11, 2003, and Respondent filed a Motion for Extension of Time on February 14, 2003. Neither Motion was objected to by Petitioner and was Granted.

17. On February 20, 2003 Julie M. Perry, Paralegal for Faison & Gillespie filed with the Review Board a copy of a letter dated February 12, 2003 to the North Carolina Attorney Generals Office from Mark McGrath (the "McGrath Feb 12 Letter"). This letter was addressed to Ms. Jane Gilchrist and recites, among other things, that Mr. McGrath spoke with Ms. Gilchrist on Wednesday February 5, 2003 regarding the matter of Commissioner v Piedmont Electric Membership Corporation, at which Ms. Gilchrist informed Mr. McGrath that "a settlement had been reached between the Department of Labor and Piedmont Electric", a draft document had been forwarded to Respondent's counsel and that she "anticipated that the settlement would be formalized in two or three weeks".

18. The McGrath Feb 12 Letter does not recite that, during the February 5 phone call, Mr. McGrath requested Ms. Gilchrist delay the settlement or take any other specific action in the matter.

19. The McGrath Feb 12 Letter states that on the next morning (ie the morning of Thursday February 6, 2003) Mr. McGrath again spoke with Ms. Gilchrist and "discussed the Board rules relating to intervention and motions for expedited hearings". The McGrath Feb 12 Letter includes among other statements:

> "You indicated that it would likely be some time before the settlement was consummated because, among other things, you did not know if Piedmont had yet posted the proposed settlement. Late Friday night I received a copy of the settlement agreement from Gilbert Jackson that had been signed by you, Tom Hayes and Will Burton. When we spoke on Thursday you gave me no indication that a settlement agreement might be executed on the very date when we were speaking."
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> "I want to make a few points regarding our client's interest in these proceedings. First, Theresa Fox, the daughter of George Hicks, is the complainant in this matter. She is the one who reported the incident to the Division of Occupational Safety and Health, and she remains the complainant of record."
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> "...it [Mr. Hicks' physical condition] is pitiful to behold. This is not some trumped up personal injury claim..."
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> "...we have it on good authority that Piedmont, far from acknowledging its negligence and the catastrophic injuries caused by it, had been informing its employees that Mr. Hicks' injuries were minor. We have also learned that Piedmont has communicated to its employees during safety meetings that the incident was attributable to negligence on the part of Mr. Hicks and that Piedmont was not to blame for his injuries. This hardly sounds like the kind of penitence and remorse one would expect from an employer who received two serious OSHA citations."
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> "...it seems a deviation from fundamental fairness, if not due process, to keep the complainant completely in the dark regarding a proposed settlement that, in effect, exonerates the cited employer with little more than a slap on the wrist."
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> "...this is not the first time Piedmont has found itself in the midst of a serious OSHA investigation. Two other workers, Larry Oakley and Jeffrey Scott Parker, have been killed in the last 2 to 3 years while working on Piedmont property. I want to make sure that these prior incidents are being considered as you move toward formalization of the proposed settlement."
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> "...what makes the proposed settlement all the more galling to the Hicks family is the lack of any new information or evidence tending to exonerate Piedmont. I hope you can imagine how difficult it was to inform the Hicks family that the case against Piedmont was, in essence, being dropped and that there was no exculpatory evidence that had come to light in the OSHA investigation to prompt the Department's apparent change of heart."
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> "Jane, I am not trying to be difficult or impinge upon your prosecutorial discretion. I simply want to make sure that the Hicks family be given at least some degree of input regarding the proposed settlement. Given all that they have suffered, I am having difficulty with the apparent rush to formalize this settlement without their participation. For whatever it might be worth, the Hicks family would be willing to your forgiveness of the monetary penalties, but would have a considerable problem with the withdrawal of the citations."

20. Mr. McGrath acknowledges in the McGrath Feb 12 Letter that the Board's procedural rules make no specific provision for giving notice of proposed settlements to a complainant who is not an employee.

21. The posting of the Settlement Agreement was completed on February 21, 2003. No employee objections were received.

22. By mutual consent of Petitioner, Respondent and Complainant a Hearing was scheduled for March 19, 2003 in the offices of the Undersigned. Respondent and Complainant each presented briefs in opposition to Petitioner's Motions.

23. No evidence was presented at the Hearing, the Hearing being limited to oral argument of counsel for Petitioner, Complainant and Respondent.

24. Mr. McGrath's arguments presented at the Hearing were not inconsistent with the statements made in the McGrath Feb 12 Letter.

25. Mr. McGrath filed two separate motions in this matter. The first was captioned "Motion to Intervene of George T. Hicks And Motion For Expedited Hearing"("First Motion"). The First Motion set forth numerous factual allegations. The First Motion further alleged that "Petitioner has conducted an extensive investigation regarding the cause and circumstances of the above-described incident. This investigation has revealed that the Petitioner's injuries were caused by the negligent conduct of Respondent." Petitioner then in the First Motion alleges 20 different acts which Petitioner alleges support its conclusion that "injuries were caused by the negligent conduct of Respondent". The First Motion further states that the North Carolina Division of Occupational Safety and Health (the "Division") "issued two citations to Respondent". The First Motion also states that "Since the issuance of the citations, Petitioner has vigorously followed the progress of the Division's investigation." Further, the First Motion states that "Petitioner vigorously opposes any attempt by the Division, the Attorney General's office or the Board to settle this contested case in a manner that would assign Respondent with anything less than full responsibility for the Petitioner's injuries." The First Motion also states that "As set forth more fully above, Petitioner, through his undersigned counsel has conducted an extensive investigation regarding the circumstances surrounding the June 4, 2002 incident. This investigation clearly reveals that the incident was the result of egregious negligence on the part of the Respondent." The First Motion also states that "Petitioner respectfully submits that his participation in these proceedings will assist in the determination of the issues in question. Among other things, Petitioner has valuable information regarding the circumstances of the incident and the circumstances and events preceding the incident. Significantly, Petitioner has not yet been contacted by the Division or Ms. Gilchrist to provide any such information."

26. Although the First Motion sets forth in detail the injuries sustained by the Petitioner and 20 different but specific incidents of alleged "negligent conduct of Respondent" it only alleges with generality that Petitioner's "participation in these proceedings will assist in the determination of the issues in question".

27. The second motion filed by Petitioner was the "Motion to be Heard Regarding Proposed Settlement and Motion for Expedited Hearing" (the "Second Motion"). The Petitioner states in the first paragraph of the Second Motion that Petitioner "Pursuant to Rules .0107(h)(1) and .0308(d) of the Rules of Procedure for the Safety and Health Review Board of North Carolina, Petitioner George T. Hicks ("Petitioner") hereby moves the Safety and Health Review Board of North Carolina (the "Board"for an expedited hearing on its Motion to Intervene, Motion for Extension of Abatement Period and Request for Hearing". At the Hearing when the Undersigned asked for specifics concerning the extension of the abatement period, Petitioner withdrew its motion with respect to 'extension of abatement period'. There was no issue with respect to the abatement period. The record shows that abatement was immediate.

28. The Second Motion was similar to the First Motion and repeats among other allegations that "the circumstances surrounding the June 4, 2002 incident so clearly indicated that it was caused by the negligence of Respondent..." The First Motion and the Second Motion are collectively referred to herein as the "Petitioner's Motions".

29. Petitioner's Motions do not contain any statements which demonstrate that Petitioner is aware of all of the elements which must be established by Complainant in order for it to carry its burden of proof with respect to establishing a serious violation at a Hearing on the merits. Further at oral argument when Petitioner was asked to identify the elements required to establish a serious violation, Petitioner focused exclusively on the existence of conditions at the time of the incident and the seriousness of the injury. Petitioner did not identify the manner in which the conditions he could recite would establish that the conditions were in violation of the cited standards or that such conditions were unknown to Complainant; Petitioner did not acknowledge any additional required elements such as the requirement for employer knowledge. Neither did Petitioner address the complicating issues involved when there is a multi-employer worksite. Further, Petitioner did not demonstrate a full understanding of the standard procedures with respect to the process of settlement, such as the lapse of time between the agreement of the complainant and respondent, the posting and the submission of the signed settlement agreement to a Hearing Officer for approval and execution.

30. Based on Petitioner's Motions and on oral argument presented by Petitioner, the Petitioner could provide in great detail personal first-hand knowledge with respect to the serious injuries sustained by Mr. Hicks on June 4, 2002. However, both Respondent and Complainant acknowledged that Mr. Hicks' injuries were serious. That matter was undisputed and recognized by both Complainant and Respondent.

31. In contrast to the statements of Petitioner that Respondent was issued two citations, the Respondent was issued only one Citation. The Citation which was issued consisted of two alleged violations. Further, each alleged violation was set forth in the alternative. The Undersigned takes judicial notice that historically violations are issued in the alternative when the Division is not sure at the time of issuing the Citation which standard is applicable or which standard can be supported by the evidence.

32. No oral argument was presented to support the statement in the Petitioner's Motions that Petitioner had "vigorously followed the progress of the Division's investigation". A copy of the Citation was mailed to Petitioner's daughter who filed the complaint. It appears that after the issuance of the Citation Mr. McGrath requested copies of Complainant's investigative material; however, it appears that the primary contact by Petitioner with the Division commenced with the phone call on February 5, 2003.

33. Prior to the February 5, 2003 phone call by Mr. McGrath to Ms. Gilchrist, Complainant and Respondent had followed procedures set forth in the Rules of Procedure of the Safety and Health Review Board of North Carolina with respect to settlement conferences and had in fact reached a settlement with respect to the manner in which the Citation would be disposed.

34. The issuance of a Citation to an employer does not establish that the employer is liable for the violation alleged in the Citation.

35. At the Hearing when Mr. McGrath was asked to identify the substantive right of Mr. Hicks under the Act which would be impaired by the Settlement Agreement between Complainant and Respondent, Mr. McGrath responded in essence as follows: that the Complainant is within its prosecutory right to enter into a settlement agreement, however Mr. Hicks should have the right to be heard, to participate, to be considered since he is among the class of workers who is to be protected, and therefore Petitioner should be heard as to whether Complainant worked within its authority to protect persons working on the site.

36. At the Hearing when Mr. McGrath was asked to identify his evidence that the Settlement Agreement between Complainant and Respondent is an unreasonable settlement, inconsistent with the purpose of the Act, Mr. McGrath responded in essence that the Settlement Agreement is an unreasonable settlement and inconsistent with the purpose of the Act because Mr. Hicks did not get to participate.

37. At the Hearing Mr. McGrath stated that Petitioner's intervention would not delay the matter because it could be taken care of in about 1 hour during which the Petitioner could provide information with respect to the conditions at the time of the injury, the sort of injury suffered, and the track record of Respondent. No argument was presented that this information was not known by Complainant at the time of settlement negotiations.

38. If Petitioner is not granted intervenor status based on Petitioner's First Motion, then Petitioner would have no standing with respect to Petitioner's Second Motion to be heard regarding the proposed settlement. Rule 0107(h)(1) provides that "a hearing shall be held on request of any party, intervenor, employee, or authorized employee representative..." Unless intervenor status is granted Petitioner would be neither a party, intervenor, employee nor authorized employee representative.

39. At the time of the Hearing there was pending a civil action file against Respondent seeking recovery with respect to the injuries sustained by Mr. Hicks on June 4, 2002.

40. The rules of criminal procedure do not require the prosecutor to contact the victim of the alleged crime if the prosecutor decides to not prosecute the matter or enter into some sort of agreement with the accused party.

41. Under the Rules Petitioner is not an 'affected employee' since he is not an employee of Respondent.

42. The Rules provide that an employee of a respondent can have either party status or intervenor status; a former employee of a respondent can have intervenor status but not party status; a non-employee of a respondent can have intervenor status but not party status.

43. Petitioner could have moved for intervenor status at any time after the Citation was issued in September. Had Petitioner requested and been granted intervenor status Petitioner would have been allowed to participate in the proceedings to the extent granted in the Order granting intervenor status. Petitioner's motions to intervene were filed after completion of the settlement negotiations and after the Settlement Agreement had been sent by the Complainant to the Respondent for signature and after Respondent had posted the Settlement Agreement as required by the Act.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Undersigned concludes as a matter of law the following:

1. This Court has jurisdiction of this cause and the parties are properly before the Court.

2 Petitioner did not carry the burden of proof with respect to establishing the elements of Rule .0202 requiring that the petitioner show that the participation of the petitioner will assist in the determination of the issues in question and that the intervention will not unnecessarily delay the proceeding.

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Petitioner's Motion To Intervene is DENIED.

2. Petitioner's Motion To Be Heard Regarding Proposed Settlement is DENIED.

Effective the 18th day of April 2003.

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R. Joyce Garrett, Hearing Examine