

**BEFORE THE NORTH CAROLINA OCCUPATIONAL  
SAFETY AND HEALTH REVIEW COMMISSION**

COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2003-4249  
OSHA INSPECTION NO. 305746349  
CSHO ID NO. R2396

v.

CAROLINA TILTUP CONSTRUCTION,  
INC.

**ORDER**

RESPONDENT.

APPEARANCES:

Complainant:

Linda Kimbell  
Assistant Attorney General  
North Carolina Department of Justice

Respondent:

None

BEFORE:

Hearing Examiner:

R Joyce Garrett

THIS MATTER came on for consideration in Courtroom 3D at the Guilford County Courthouse in Greensboro, North Carolina by the undersigned on April 26, 2006, pursuant to a Notice of Hearing dated February 22, 2006.

The Respondent did not appear at the April 26, 2006 hearing. Assistant Attorney General Linda Kimbell, representing Complainant, by Affidavit informed the Court that based on information from the Respondent's registered agent, John F. Hanzel, Esq., the Respondent ceased business operations at least two years ago and that the whereabouts of the Respondent's President/owner is unknown to Mr. Hanzel.

The Complainant submitted a certified copy of its case file including the investigative report (the "Case File") and accompanying affidavit, which was received in evidence. Such file was accepted without objection as prima facie evidence of the existence of the violations alleged in the Citation and Notification of Penalty and the appropriateness of the proposed penalties.

Based on the foregoing, and after receiving and reviewing the Case File, 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. The 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. At the time of the inspection and issuance of the Citation and Notification of Penalty, the Respondent was a corporation which had a place of business in Charlotte, North Carolina.
4. The Respondent is an "employer" within the meaning of NCGS §95-127(10). The Respondent's employees relative to the Citation are "employees" within the meaning of NCGS §95-127(9).
5. All parties are properly named in the Citation.
6. All notices required by the Act and by any applicable procedural and substantive rules have been given.
7. Beginning on August 5, 2002, Tim Hogan, a Safety Compliance Officer for the Complainant's Occupational Safety and Health Division, inspected the Respondent's worksite at 2912 South Elm/Eugene Street in Greensboro, North Carolina (hereinafter referred to as the "site") where a Home Depot store was under construction .
8. The inspection was conducted pursuant to notification of an accident which resulted in fatal injuries to three employees working on the site.
9. As a result of the inspection, on February 4, 2003, a Citation and Notification of Penalty was issued to the Respondent alleging serious violations of OSHA standards.
10. The Respondent timely filed its Notice of Contest and this Commission has jurisdiction over the subject matter and the parties to this action.
11. The notice of this hearing was mailed to John F. Hanzel, Esq., the Respondent's registered agent on February 22, 2006. The "Return Receipt" shows that the registered agent accepted service of the Hearing Notice on behalf of the Respondent.
12. On or about April 17, 2006, Linda Kimbell, Assistant Attorney General representing the Complainant, contacted Mr. Hanzel to determine if the Respondent would be represented at the hearing.
13. Mr. Hanzel provided information that the Respondent had not conducted business operations for at least two years and the whereabouts of the Respondent's President/owner, Mr. Bill Cooper, had been unknown to Mr. Hanzel for that time period. Mr. Hanzel had no address to which to forward the Notice of Hearing.
14. The hearing in this matter was called to order at 10:00 AM on April 26, 2006, by the undersigned Hearing Examiner. At this time, no representative of the Respondent was present. The hearing remained open for 45 minutes in order to allow time for the Respondent or a representative to make an appearance.
15. Neither the Respondent nor a representative of the Respondent appeared.
16. Neither the Respondent nor anyone on its behalf contacted the undersigned to seek a continuance of this matter.
17. Rule .0503 of the Rules of Procedure of the North Carolina Occupational Safety and Health Review Commission provides that:
  - (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.
18. Pursuant to Rules of Procedure, Rule .0309:
  - (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.
19. The Respondent's failure to appear at the hearing in this matter on April 26, 2006, effectively serves as a waiver of all rights to participate and be heard in the hearing and as a waiver of any objection to the Complainant's evidence.
20. With respect to the alleged violation of 29 CFR 1926.21(b)(2), Respondent did not provide training to its employees on specific OSHA standards pertaining to tilt-up construction; Respondent did not train employees that temporary braces for approximately 14 tilt-up panels should not be removed prior to all permanent connections to the structure being completed; as a result of such failure there was a possibility of an accident the probable result of which would be serious physical injury by Respondent's employees; employees were exposed to the work condition; Respondent was aware or with reasonable diligence could have been aware of the condition; a penalty of \$2,800.00 was calculated in accordance with the Complainant's Field Operations Manual.
21. With respect to the alleged violation of 29 CFR 1926.704(a), Respondent did not adequately support precast concrete wall units, structured framing and tilt-up panels until permanent connections were completed; employees were exposed to the work condition; there was a possibility of an accident the probable result of which would be serious physical injury; Respondent was aware of or with reasonable diligence could have been aware of the condition; a penalty of \$2,800.00 was calculated in accordance with the Complainant's Field Operations Manual.
22. Respondent did not within 5 days of the date of the Hearing request a rehearing or show cause why a rehearing should be granted, pursuant to its rights under Review Commission Rule of Procedure .0503(b).

Based on the foregoing Findings of Fact, the undersigned makes the following:

**CONCLUSIONS OF LAW**

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The Respondent is subject to the provisions of the Act.
3. This action was properly brought and the undersigned has jurisdiction to hear this matter.
4. The Respondent is a defaulting party for its failure to attend the Hearing.
5. The Respondent has violated the cited provisions of the Act. Such violations are serious violations.
6. The penalties were properly calculated in accordance with the Complainant's Field Operations Manual and are just and fair.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED that:

**ORDER**

1. Citation Number One, Item 1 is affirmed as a serious violation of 29 CFR 1926.21(b)(2) with a penalty of \$2,800.00.
2. Citation Number One, Item 2 is affirmed as a serious violation of 29 CFR 1926.704(a) with a penalty of \$2,800.00.
3. Respondent shall have 30 days from the filing of this Order in which to seek review of this decision, pursuant to Review Commission Rule .0309(b). If the Respondent does not seek review within the 30 days, the citations and their proposed penalties are deemed final.
4. All penalties shall be paid within 20 days of the date on which the citations and penalties are deemed final.
5. All violations not previously abated shall be immediately abated.

This the 26th day of June, 2006.

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R. Joyce Garrett  
Hearing Examiner