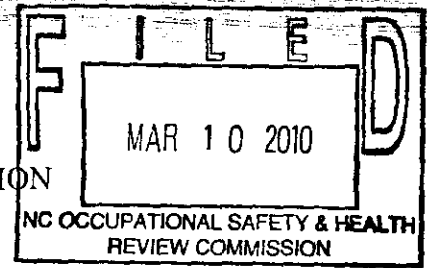


SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2009-4883
OSHA INSPECTION NO. 311941561
CSHO ID: B7568

vs.

C.P. BUCKNER STEEL ERECTION, INC.
and its successors

ORDER

Respondent.

THIS CAUSE came on for a 60(b) hearing at the request of the Respondent and after reviewing the file and Respondent's Response to Complainant's Motion to Dismiss in order to hear testimony regarding Respondent's excusable neglect and a meritorious defense. This cause was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on November 23, 2009, at the North Carolina Medical Society Boardroom, 222 North Person Street in Raleigh, North Carolina.

The complainant was represented by Ms. Tawanda Foster-Williams, Assistant Attorney General and the respondent was represented by attorney M. Riana Smith, Safran Law Offices. Present for the hearing for the Department of Labor, OSHA Division, was Mr. Brian Walls, Mr. Thomas O'Connell and Mr. Phil Hooper. Present at the hearing for the respondent was Mr. Chip Pocock.

After reviewing the evidence presented at the hearing, with due consideration of the arguments and contentions of all parties, and reviewing relevant legal authority, Respondent's position statement and memo, Response to Complainant's Motion to Dismiss, Respondent's Pre-Hearing Brief (after the hearing allowed as a Post-Hearing Brief), Complainant's post-hearing brief, and the record file, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

Findings of Fact

1. On December 23, 2008, a citation was issued and a citation package was sent certified mail, return receipt requested, to Respondent alleging violations of 29 C.F.R. 1926.550(a)(15)(iv) and 29 C.F.R. 1926.550(a)(15)(i) as a result of several injuries to Respondent employees that occurred on August 28, 2008. (see exhibit C-1)
2. As evidenced by the return receipt, Respondent received the citation package on December 29, 2008. (see exhibit C-2)
3. On January 8, 2009 Respondent, through its Safety and Risk Manager, Chop Pocock ("Pocock"), requested an informal conference via email and on January 14, 2009 a written request was received by Complainant via United States Mail.
4. In response to Respondent's request for an informal conference, Phil Hooper ("Hooper"), Bureau Chief-East with the North Carolina Department of Labor, made several attempts to schedule the informal conference.
5. On January 5, 2009, Pocock signed the Employer and Employee Rights and Responsibilities Form (OSHA 59) notifying and informing Respondent that Respondent had 15 working days from receipt of a notice of "no change" to contest a citation if a notice of "No Change" was issued. (see exhibit C-3)

6. Serious health related issues, including hospitalization and surgery on February 25, 2009, prevented Pocock from scheduling an informal conference with Hooper and kept him out of the office a number of days during the time period at issue in this case.
7. On February 9, 2009, a no change letter dated February 6, 2009, was sent to Respondent certified mail return receipt requested informing Respondent that the conference deadline was January 24, 2009 and that Respondent had fifteen (15) working days from receipt of the no change letter to contest the citations.
8. As evidenced by the return receipt, the "No Change" letter dated February 6, 2009 was received by Respondent on February 10, 2009.
9. The deadline for contesting the citations was March 3, 2009.
10. Pocock is the only employee at CP Buckner responsible for handling Citation and Notifications from NIOSH.
11. Respondent has no procedure in place for handling Citations and Notifications when Pocock is not in the office.
12. Pocock returned to the office on March 2, 2009 and drafted a letter ("Letter") to Tom O'Connell, Safety and Health Compliance Supervisor contesting the citation and proposed penalty. (see exhibit C-6)
13. On March 10, 2010, the Letter was sent to Tom O'Connell overnight via Federal Express and received by Complainant on March 11, 2009. (see exhibit C-7)
14. Pocock was not sure why there was a delay in mailing the Letter.
15. The delay was unintentional.

CONCLUSIONS OF LAW

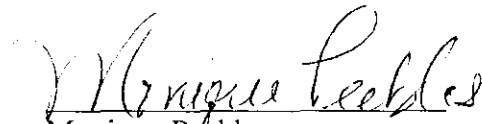
1. The foregoing Findings of Fact are incorporated as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The Respondent did not conduct his business as a reasonably prudent business person would do in the context of this litigation for violations of safety and health regulations.
3. The unintentional delay by Pocock, caused in part by serious medical issues, in conjunction with Respondent not having a procedure in place to attend to

NCOSHA Citations and Notifications when Pocock is out of the office was insufficient to amount to excusable neglect pursuant to NCGS § 95-137 (b)(1) and therefore unnecessary to address Respondent's contention of a meritorious defense.

4. Pursuant to NCGS § 95-137 (b)(1), on March 3, 2009, the citations and proposed penalties became a Final Order of the Review Commission.

NOW, THEREFORE, it is hereby ORDERED that Complainant's Motion to Dismiss the Respondent's Notice of Contest is granted and the Final Order is upheld with the penalty of \$6,300.00.

Entered this 28 day of February, 2010.


Monique Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

PERRY SAFRAN
SAFRAN LAW OFFICES
120 SOUTH BOYLAN AVENUE
RALEIGH NC 27603

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

TAWANDA FOSTER-WILLIAMS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

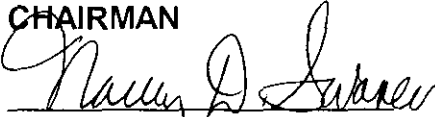
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 10th DAY OF March 2010.

OSCAR A. KELLER, JR.
CHAIRMAN



Nancy D. Swaney
Administrative Assistant
NC Occupational Safety & Health Review Commission
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Raleigh, NC 27699-1101
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