

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

FILED

**COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)**

JAN 23 2023

COMPLAINANT,)

NC OSH Review Commission

v.)

FINAL ORDER

**McMillan Contracting, Inc.)
and its successors,)**

**OSHANC NO: 2020-6245
INSPECTION NO.: 318179553**

RESPONDENT.)

THIS MATTER was duly noticed and came on for hearing before the undersigned on January 20, 2023 at 10:00 a.m. via the Lifesize video platform. The Commissioner of Labor (“Complainant”) was represented by Assistant Attorney General Sage A. Boyd. Respondent did not appear.

FINDINGS OF FACT

1. On or around January 3, 2020 The North Carolina Department of Labor – Occupational Safety and Health Division conducted an inspection of Respondent’s worksite located at 193 Sandy Springs Rd., Aberdeen, North Carolina where Respondent was the contractor installing sewer system piping and manhole risers for a new home subdivision’s sewer system. As a result of the inspection, Complainant issued two citations. The first citation, containing six items, was for a serious violation of Occupational Safety and Health Standards pertaining to unsafe work practices undertaken in the excavation of a trench, exposing employees to serious injury or death. The second citation was for a nonserious violation for failing to maintain proper safety equipment on a work vehicle.
2. Respondent contested the Citation and Notification of Penalty in an Employer’s Statement of Position filed with the Commission on April 27, 2020.
3. This matter was originally brought on for hearing on August 25, 2022 pursuant to a Notice of Hearing served by the N.C. Occupational Safety and Health Commission on or around June 22, 2022.
4. When this matter was called for hearing on August 25, 2022 the following party representataives were present: Ms. Sage Boyd, Assistant Attorney General, Department of Justice, representing the Complainant Commissioner of Labor and Mr. David McMillan, represensting the Respondent.

5. At the opening of the August 25, 2022 hearing the parties informed the undersigned Hearing Examiner that a negotiated resolution had been reached between the parties regarding all matters in dispute. However, Respondent's representative requested additional time to review the settlement documents prior to executing the agreement. The undersigned ordered that the hearing be continued until September 26, 2022 in order to give the parties sufficient time to execute the settlement agreement documents.
6. Between August 26, 2022 and November 16, 2022 Complainant's attorney made multiple attempts to communicate with Mr. McMillan via telephone, email, post office box address, and a physical address that he had provided to Ms. Boyd and to the Commission. Complainant's attorney also communicated directly with Ms. Betsey Corney, who is identified as the corporation's Secretary in Respondent's 2021 Annual Report filed with the North Carolina Secretary of State.
7. The parties were unable to complete any negotiated resolution between August 26, 2022 and November 16, 2022. Therefore, the matter was placed back on the Commission's active docket.
8. A Notice of Hearing was served on or around November 22, 2022 notifying the parties that the matter would be called for hearing on January 20, 2023 at 10:00 a.m. via internet and/or telephone. A website link was provided in the Notice of Hearing.
9. The Commission's file shows that Mr. David McMillan was sent a Notice of Hearing for the January 20, 2023 hearing, via U.S. Certified Mail, Return Receipt Requested, to both his post office box address and to the physical address that he had provided to the Commission.
10. The Commission's file shows that on December 2, 2022 Mr. McMillan personally signed the Domestic Return Receipt (USPS Form 3811) for the Notice of Hearing that was addressed as follows: "David McMillan, McMillan Contracting, Post Office Box 218, Parkton, NC 28371."
11. After calling the January 20, 2023 Hearing to Order, Complainant made an oral motion to dismiss Respondent's Contestment of the Citations, or, in the alternative for a Declaration of Default and Decision against the Respondent based on Respondent's failure to appear for the hearing and pursuant to the Commission's Rules .0503 and .0309.
12. Complainant's Motion was taken under advisement and the hearing proceeded with the presentation of evidence by the Complainant.
13. Complainant offered the following exhibits into evidence:
Complainant's Exhibit #1 – A Certified Copy of the Inspection File for Inspection No. 31817953(the inspection of Respondent's worksite referenced in paragraph #1, above);
Complainant's Exhibit #2 – consisting of thirteen photographs of Respondent's worksite taken from the public right-of-way; and,

Complainant's Exhibit #3 – consisting of sixty-eight photographs taken at Respondent's worksite as the inspector conducted the Opening Conference.

14. Complainant's Exhibits were admitted into evidence and are part of the Record in this matter.
15. Complainant offered testimony from witness Jim Zepede, Safety Consultant for the N.C. OSH Division who was the Compliance Safety and Health Officer who, along with another Compliance Safety and Health Officer employed by Division, conducted the January 3, 2020 inspection.
16. Mr. Zepede testified that Respondent's employees were exposed to the risk of serious injury and death where Respondent was constructing a trench to bury sewer pipes. Mr. Zepede observed and documented, *inter alia*, the following serious hazards to which employees were exposed:
 - a) employees were not wearing hard hats and were working below the bucket of a track excavator;
 - b) the operator of the track excavator left the excavator unattended and left the excavator's bucket approximately four feet above the ground in an area where employees were walking;
 - c) employees who used the excavator were not provided with a seatbelt to use while operating the machinery;
 - d) employees were working in a trench that was over six feet deep and one hundred forty-five feet long with no means of egress available; and,
 - e) said employees who were working without hard hats, in the above-described trench that had no means of egress, were exposed to additional cave-in hazards because a five foot tall spoil pile was only twelve inches from the edge of the excavation.
17. Mr. Zepede also testified that he observed that, and he illustrated his testimony with the photographs that he had taken showing that, the soil on the edge of the excavation had signs of potential cave-in but that the vertical walls of the trench had no protective system, such as a trench box, to protect employees who were working in the trench.
18. Mr. Zepede further testified that the Respondent had failed to provide a fire extinguisher for employees who operated the hydraulic excavator used to perform the excavation operations.
19. The Serious Classification for all of the items included in Citation #1 was appropriate.
20. The Non-Serious Classification for the item included in Citation #2 was appropriate.
21. The penalties for the citations were correctly calculated in accordance with the NCDOL-OSH Division Field Operations Manual (FOM), Chapter VI.

22. Testimony and evidence was presented at the hearing approximately between 10:00 a.m. and 11:00 a.m. During that time, there was no indication that anyone representing the Respondent in this matter attempted to sign on to the Lifesize video platform or utilize the telephone link to join the hearing; nor was there any indication of an attempt to contact Commission staff.

CONCLUSIONS OF LAW

1. Pursuant to N.C.G.S. § 95-135, the Review Commission has jurisdiction over the parties and subject matter to this action.
2. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Act, including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. §§95-133 et seq.
3. Respondent is an "employer" within the meaning of N.C.G.S. §95-127(11). The employees observed during the inspection were "employees" within the meaning of N.C.G.S. §95-127(10).
4. Rule .0503 of the Rules of Procedure for the Safety and Health Review Commission of North Carolina ("Commission") provides that "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 at the hearing" and that an "[u]njustifiable failure to appear may result in a declaration of default and a decision against the defaulting party in accordance with Rule .0309(a)."
5. Commission Rule .0309 provides that the failure of a party to follow the Commission's rules may result in a declaration of default and a decision against the offending party.
6. The Respondent's failure to appear is an Unjustified Failure to Appear where Respondent's representative previously participated in proceedings associated with this matter, acknowledged receipt of the Notice of Hearing for the January 20, 2023 hearing, and, where there were no attempts by Respondent to communicate either with Commission staff or with Complainant's attorney regarding the properly noticed hearing.
7. The Respondent is, therefore, deemed to have defaulted in the contestment of the citations and penalties that were issued by the Complainant and judgment against the Respondent should be entered.
8. Furthermore, however, the preponderance of evidence presented at the hearing demonstrated that the standards cited by Complainant in its Citation and Notification of Penalty (Compl. Ex. #1), were applicable, that a hazard existed to which employees were exposed; that the hazard created the possibility of an accident; that the substantially probable result of an accident could be death or serious physical injury; and that the employer knew or should have known of the condition or conduct which created the hazard. Rule .0514(a) of the Rules of Procedure, Safety & Health Rev. Bd. of N.C.

(eff. April 1993); *Comm'r of Labor v Liggett Group, Inc.*, OSHANC 94-3175 (Nov. 1 1996).

Based on the foregoing Findings of Fact and Conclusions of Law, JUDGMENT against the Respondent is entered on all citations; the violations contained in Complainant's Citation and Notice of Penalty are AFFIRMED and the Respondent is ORDERED to pay the penalty of \$12,800 within FIFTEEN working days of receipt of this Order. Pursuant to N.C. Gen. Stat. §147-86.23 interest shall be charged at the rate of five percent (5%) per year on a past-due account receivable from the date the account receivable was due until it is paid. In addition, late payment may result in additional penalty payments. 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.

This the 20th day of January 2023.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner
maleon@leonlaw.org

CERTIFICATE OF SERVICE

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

DAVID MCMILLAN
MCMILLAN CONTRACTING, INC.
PO BOX 218
PARKTON, NC 28371

DAVID MCMILLAN
MCMILLAN CONTRACTING, INC.
4414 WAVETREE DR.
FAYETTEVILLE, NC 28306

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:


RORY AGAN
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

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

via email to carla.rose@labor.nc.gov.

THIS THE 25 DAY OF January 2023.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
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