

BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

BUTLER TRAILER MANUFACTURING
CO.,

RESPONDENT.

DOCKET NO. OSHANC 93-2795
OSHA INSPECTION NO. 18487355
CSHO ID NO. G1025

**ORDER REMANDING CASE
FOR REHEARING**

APPEARANCES Complainant: Sherra R. Smith, Assistant Attorney General

Respondent: Thomas A. Farr of Maupin, Taylor, Ellis & Adams, P.A.

BEFORE Review Board: Hugh Wilson, Member, sitting in for Robin E. Hudson, Chair

Kenneth K. Kiser, Member

Carroll D. Tuttle, Designee for this hearing

DECISION OF THE REVIEW BOARD

This cause was heard at or about 9:00 A.M. on the 9th day of December, 1994 in the Conference Room in the office of the Safety and Health Review Board of North Carolina at 217 West Jones Street, Raleigh, North Carolina. This matter came to be heard on Respondent's Petition for Review pursuant to Board Rule .0602 and Respondent's Motion for Expedited Decision by Review Board after an order was issued denying Respondent's Motion to Excuse Failure to Appear and Reschedule Hearing. The Board first heard arguments on the Motion for Expedited Petition because an order allowing that motion would obviate any need to make a decision on the Petition for Review.

ISSUES PRESENTED

1. Did the Chairman of the Review Board abuse his discretion when he failed to grant Respondent's second Motion for a Continuance?
2. Did the Review Board abuse its discretion when it failed to give the Respondent timely notice of the denial of the Motion to Continue prior to the Hearing?
3. Does the failure of the Respondent to make a request for a rehearing within 5 days of the hearing as is required by Board Rule .0503(c) bar the Respondent from being granted a rehearing?
4. Did the failure of Respondent's out-of-state counsel to associate North Carolina counsel as is required by Board Rule .0203(a) bar the Respondent from being granted a rehearing?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. Rule .0502 of the Rules of Procedure of the Review Board:

- (a) Postponement of a hearing ordinarily will not be allowed.
- (b) Except in the case of an extreme emergency, unusual circumstances, for good cause shown, or

upon consent by all parties, no such request will be considered unless received in writing at least three days in advance of the time set for the hearing.

2. Rule .0503 of the Rules of Procedure of the Review Board:

(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 .0203(a) of the Rules of Procedure of the Review Board which provides in pertinent part:

(a)In accordance with rules of the North Carolina State Bar which govern the practice of law in North Carolina, an out-of-state attorney-at-law must be associated with a North Carolina attorney-at-law in order to appear before either the Review Board or its hearing examiners.

Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
2. The employer (Respondent) Butler Trailer Manufacturing Co. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
3. From January 29, 1993 through February 4, 1993, the Respondent was inspected by the North Carolina Department of Labor as a general scheduled inspection assigned from a general industry list.
4. On June 6, 1993, Respondent was issued a citation alleging two serious violations and a citation alleging five non-serious violations with a total assessed penalty in the amount of \$750.00.
5. Respondent through its out-of-state attorney, Robert E. Rader, Jr. of Dallas, Texas, timely served its notice of contest on the OSH Division on June 15, 1993 which was filed with the Review Board on June 17, 1993.
6. Respondent requested and was served with a formal Complaint, filed a formal Answer and a Motion for Production of Documents.
7. A hearing was set before the Honorable R. Joyce Garrett for November 17, 1993.
8. Respondent through its out-of-state attorney, Robert E. Rader, Jr. filed a Motion for Continuance with the Review Board on October 27, 1993 stating that he had a conflict in that he was scheduled for a week-long trial in District Court in Dallas, Texas starting on November 15, 1993.
9. On November 3, 1993, the chairman of the Review Board issued an Order granting the Motion for Continuance and stated the following:

Postponement of hearings are ordinarily not allowed. Rule .0502(a). Legitimate conflicts provide a basis for considering continuing a hearing where no prejudice exists to the other party and where the need for expeditious resolution of the contest is not unduly hindered.

The undersigned finds that Respondent has a legitimate conflict. That the Commissioner has not interposed an objection. And that a resolution of the contest will not be unduly delayed as a result of the continuance.

THEREFORE it is **ORDERED** that Respondent's Motion for Continuance is **GRANTED**. This matter will be rescheduled for a hearing in December, 1993 or January, 1994. Respondent should immediately forward to the Board any dates it is unable to attend a hearing during those months. Respondent is further reminded of Board Rule .0203(a) which requires attorneys not licensed to practice in North Carolina to associate a North Carolina attorney to appear and practice before the Board.

10. By letter dated November 12, 1993, Attorney Rader advised the Board that he was available to try the case on January 5, 6, 7, 11 or 12 and that his preference would be to schedule the case in mid-February.

11. On February 14, 1994 a Notice of Hearing was sent out to the parties setting a hearing for March 16, 1994 before the Honorable R. Joyce Garrett. March 16, 1994 was not one of the dates on which Attorney Rader had indicated that he was available for the hearing.

12. Respondent through its attorney, Robert E. Rader, Jr. made an Unopposed Motion for Continuance which was filed with the Board on March 4, 1994. In the cover letter, Attorney Rader indicated that his calendar is normally full for 60 days in advance and that he and the Complainant's counsel would be available April 19-22 or April 26-29 of 1994.

13. On March 14, 1994, Complainant's counsel, Assistant Attorney General Sherra R. Smith contacted the Review Board and asked if the Hearing set for March 16, 1994 had been continued and was informed that the Review Board Chairman had orally denied the Unopposed Motion for Continuance.

14. On March 14, 1994, Assistant Attorney General Sherra R. Smith contacted Attorney Rader's office and informed them that his Motion for Continuance had been denied.

15. By letter dated March 15, 1994 and faxed to the Review Board on that same date, Attorney Rader explained that because of a prior obligation in federal court he could not be in North Carolina on March 16 and that he had an expert witness who also was not available on March 16. He stated that he believed that his motion for continuance should have been granted and he objected to the Review Board holding a hearing on March 16 when they were unable to appear. He also stated that he presumed that if the hearing was held a default judgement would be entered and he requested that a copy of the order be sent as quickly as possible so that they could exercise their appeal rights.

16. On March 16, 1994 a hearing was held before the Honorable R. Joyce Garrett on the merits with Sherra R. Smith, Assistant Attorney General representing the Complainant and with no appearance by the Respondent, Butler Trailer Manufacturing Co., or its counsel, Robert E. Rader, Jr.

17. On March 28, 1994, 12 days after the hearing, J. B. Kelly, Chairman of the Review Board issued an Order denying the Motion for Continuance of the hearing that was scheduled and held on March 16, 1994. In his order Chairman Kelly stated that the matter had been continued once already and that further continuances would unduly delay the resolution of the matter.

18. On March 29, 1994, the Hearing Examiner entered her Order affirming all of the citations and the penalties totaling \$750.00 and ordering the Respondent to pay all of the penalties assessed and to abate the violative conditions giving rise to the citations. This order was filed with the Review Board on April 5, 1994.

19. On April 6, 1994, 21 days after the Hearing, pursuant to Rule .0503(c), Respondent through its attorneys, Robert E. Rader and associated North Carolina counsel, Thomas A. Farr, filed a Motion for Order Excusing Failure to Appear and Reschedule Hearing.
20. On April 28, 1994, pursuant to Rule .0602, Respondent through its attorneys, Robert E. Rader and associated North Carolina counsel, Thomas A. Farr, timely filed a Petition for Review and Motion for Stay.
21. On June 30, 1994, Robin E. Hudson, acting for Chairman J. B. Kelly issued an Order Denying Respondent's Motion for Order Excusing Failure to Appear and Reschedule Hearing stating that pursuant to Rule .0503(b) a party has 5 days after the scheduled hearing date to request a hearing and that 21 days passed before Respondent moved to have the hearing rescheduled.
22. On June 30, 1994 Robin E. Hudson, acting for Chairman J. B. Kelly issued an Order Granting Petition for Review.
23. On July 12, Respondent through its attorneys, Robert E. Rader and associated North Carolina counsel, Thomas A. Farr, pursuant to Board Rule .0308, filed a Motion for Expedited Decision by Full Review Board requesting that the full Board grant Respondent's Motion for Order Excusing Failure to Appear and Reschedule Hearing.
24. The Respondent and the Complainant through their respective attorneys filed briefs with the Review Board.

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 chairman of the Review Board abused his discretion when he failed to give the Respondent timely notice of the denial of the Motion to Continue prior to the Hearing.
3. The chairman of the Review Board abused his discretion when he scheduled the hearing for March 16, 1994 which was a date two months after the chairman ordered the hearing to be held in his Order of November 8, 1993 and which was a date two months after the available hearing dates provided by the Respondent's counsel in response to the chairman's Order of November 8, 1993.
4. The failure of the Respondent to make a request for rehearing within five days as is required by Board Rule .0503(b) "in the absence of extraordinary circumstances" does not bar the Respondent from being granted a rehearing.
5. The failure of the Respondent's out-of-state counsel to timely associate North Carolina counsel does not bar the Respondent from being granted a rehearing.

DISCUSSION

This case came to the Review Board by two avenues, one was a petition to review the final decision of the hearing examiner on the merits pursuant to Board Rule .0602 and the other was a motion pursuant to Board Rule .0308(d) for an expedited hearing by the full board on the Respondent's Motion for Order Excusing Failure to Appear and Reschedule Hearing. In essence, the motion for an expedited hearing is an appeal of the Review Board Chairman's denial of the motion for a continuance which was announced two days before the Hearing. Pursuant to Board Rule .0308(d) an "appeal of a denial of motion may be heard by the full Review Board in its discretion". In its discretion, the Board heard the appeal of the denial of the motion for a continuance first, as part of the Petition for Review because an order allowing that motion would obviate any need to make a decision on the merits of the Petition for Review. Since the Board has chosen to hear the appeal of the denial of the Motion for a continuance as part of the Petition for Review, there is no need to make a decision on whether a request for rehearing was timely made pursuant to Board Rule .0503(b).

Pursuant to N.C.G.S. § 95-135(i) the "report, decision, or determination of the Board upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record." (emphasis added). The Respondent claims that the Review Board Chairman abused his discretion when he denied the second motion for a continuance.

. . . it is the policy of the Review Board to move expeditiously to hearing To do otherwise would be contrary to the policy of the North Carolina OSHA law that employees in our state be provided with safe and healthful workplaces. This policy is incorporated in the Review Board's Rule of Procedure .0502 which provides, 'postponement of a hearing ordinarily will not be allowed'. This is not a policy followed only in the breach, as are some analogous policies in the procedural rules of other state and federal agencies. Continuances, in fact, are granted but rarely.

Brooks v. Yates Construction Co. Inc., 2 NCOSHD 983, 990 (RB 1986). If continuances are in fact granted but rarely, then second continuances are granted even more rarely. The Respondent had been granted one continuance and the Chairman found that further continuances would unduly delay the resolution of the matter.

The standard of review for the denial of a motion for continuance is an abuse of discretion. See, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981). "In determining whether to grant or deny a motion for continuance, the administrative law judge should be guided by rules of fairness and impartiality, as his action is solely within his discretion and will not be disturbed in the absence of abuse thereof." R.P. Drywall, Inc., 1974-1975 OSHC 23,426 at 23,427-23,428 (dicta in opinion by Commissioner Cleary).

However, the failure to give the Respondent timely notice of the denial of the continuance violates those rules of fairness which should guide a judicial officer in deciding on motions for continuances and was an abuse of discretion on the part of the Chairman. The Respondent's attorney who practices in Dallas, Texas was given oral notice of the denial of the continuance two days before the hearing by the counsel for the Complainant. A written denial of the motion for continuance was filed 12 days after the actual hearing was held. In addition, the Order granting the first continuance rescheduled the hearing for December, 1993 or January, 1994 and ordered the Respondent to inform the Board of any dates in those months that it was unavailable for hearing. In November of 1993, in response to that order five dates in January, 1994 were provided to the Review Board by the Respondent's counsel as available hearing dates. None of the available hearing dates in January that Respondent's counsel gave were chosen as the date of the hearing. Instead, the hearing was scheduled for March 16, 1994, a date two months after the available hearing dates that were given by the Respondent's counsel. It is the policy of the Review Board to permit the parties to have the opportunity to be heard. Brooks v. Carolina Concrete Pipe Company, 2 NCOSHD 738, at 742 (RB 1986). This failure to give the Respondent timely notice of the denial of the continuance coupled with the scheduling of the hearing for a date two months later than the Chair had ordered and for which the Respondent's counsel was not available, without contacting Respondent's counsel to inquire about future available dates violates those rules of fairness that should guide a judicial officer in making discretionary decisions and does not provide the Respondent with a meaningful opportunity to be heard. Considering these circumstances continuing the hearing to April of 1994, approximately one month after the hearing to one of the dates which Respondent's counsel had indicated that he was available would not have unduly delayed the resolution of the case and would not have prejudiced the Complainant. If the Board had scheduled the hearing for one of the dates that the Respondent had indicated that he was available and he had then requested a continuance, there would have been no abuse of discretion if the continuance had been denied and Respondent's counsel had been given timely notice of the denial.

The complainant has made the argument that the failure of the Respondent's out-of-state counsel to associate with North Carolina counsel as is required by Board Rule .0203(a) should preclude it from being granted a rehearing. It is true that the timely association of North Carolina counsel who was familiar with the practices and procedures of the Review Board could have precluded the problems that occurred with this case but that failure by itself does not bar the Respondent from being given an opportunity to be heard on the merits of its case. In the future the Review Board may not be so generous with those out-of-state counsel who experience procedural problems and who do not timely associate North Carolina counsel.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the decision of the hearing examiner is reversed and this cause is remanded for a rehearing on the merits. The rehearing is to be scheduled before an administrative law judge other than the one who conducted the first hearing.

This the 31st day of July, 1995.

HUGH M. WILSON, (CHAIR BY DESIGNATION)

KENNETH K. KISER, MEMBER

CARROLL D. TUTTLE, (MEMBER BY DESIGNATION)