

NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 04 CVS 7835

P. F. PLUMBING CONTRACTORS, INC.
And its successors,

OSHANC NO. 03-4265

Petitioner,

ORDER

v.

CHERIE K. BERRY, COMMISSIONER OF
LABOR OF
THE STATE OF NORTH CAROLINA

Respondent.

This matter comes before this Court upon the Petition of P. F. Plumbing Contractors, Inc. ("Petitioner") for Judicial Review of the Order of the Safety and Health Review Board of North Carolina ("Review Board"). Following a hearing in a contested case on January 20, 2004, Administrative Law Judge Ellen R. Gelbin entered an Order dated February 19, 2004, upholding the North Carolina Department of Labor's issuance of one citation with three items to the Petitioner for Petitioner's serious violations of OSHA standards 29 C.F.R. §1926.652(a)(1) by allowing one or more of its employees to be working in an open trench 5 feet deep or more without adequate cave-in protection; 29 C.F.R. § 1926.651(j)(2) by allowing excavated or other materials to be deposited within 2 feet of their open trench without using retaining devices sufficient to prevent the material or equipment from falling or rolling into the excavation; and 29 C.F.R. §1926.651(k)(1) by failing to have a competent person inspect their open trench for evidence of a hazardous situation. Petitioner timely file its Petition for Review of the Order with the Review Board and the matter was heard on September 14, 2004. On November 8, 2004, the Review Board entered an Order affirming Judge Gelbin's decision (OSHANC No 2003-4265). Petitioner timely filed its Petition for Judicial Review and Motion to Stay Penalty ("Petition") on December 8, 2004, in which the Petitioner asserted that the Review Board's decision was not supported by substantial evidence and that it was arbitrary and capricious.

This Court held a hearing in this matter on October 6, 2005. Present at this hearing were Randolph M. James, counsel for the Petitioner, and Newton G. Pritchett, Jr., Assistant Attorney General, counsel for the Respondent. The Court heard argument on the Petition and has considered the full record in this case, including all briefs as to the issues presented and the entire record of proceedings before the Review Board.

Based on the consideration of these matters, this Court makes the following FINDINGS and CONCLUSIONS pursuant to N.C. Gen Stat. §§95-141 and 150B-51:

(1) The proper standard for review of an agency decision is determined by the nature of the error asserted in judicial review. For an asserted error of fact, the standard of review for the Court is the "whole record" test, which requires the Court to examine the entirety of the administrative record to determine whether the administrative agency's decision is supported by substantial evidence and whether it is not arbitrary, capricious or an abuse of discretion.

(2) The Review Board's Findings of Fact, Conclusions of Law, and Order with respect to whether Petitioner committed serious violations of the standards contained in 29 C.F.R. §1926.652(a)(1), 1926.651(j)(2) and 1926.651(k)(1) are supported by competent, material and substantial evidence and are not otherwise erroneous.

(3) The Review Board's Findings of Fact, Conclusions of Law, and Order with respect to whether Petitioner committed serious violations of the standards contained in 29 C.F.R. §§1926.652(a)(1), 1926.651(j)(2) and 1926.65) (k)(1) are not arbitrary, capricious or an abuse of discretion.

(4) Because there is no error of law or fact as to the Review Board's Findings of Fact, Conclusions of Law, and Order with respect to its ruling that Petitioner committed a serious violation of 29 C.F.R. §1926.652(a)(1), as alleged in Citation One, Item 1a, with an assessed penalty of \$1,050.00; a serious violation of 29 C.F.R. §1926.651(j)(2) as alleged in Citation One, Item 1b, with the penalty grouped with Citation One, Item 1a; and a serious violation of 29 C.F.R. §1926.651(k)(1) as alleged in Citation One, Item 1c, with the penalty grouped with Citation One, Item 1a, the Order of the Review Board is upheld.

Based on the foregoing, Petitioner's exceptions as set forth in the Petition for Judicial Review and Motion to Stay Penalty are without merit and are accordingly overruled.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Order of the North Carolina Safety and Health Review Board in this case is AFFIRMED.

IT IS FURTHER ORDERED that Petitioner is to abate the violations and to pay the assessed penalty of \$1,050.00 within thirty (30) days of the filing of this Order.

This ORDER was entered out of session with the prior consent of both parties.

This the 25th day of October, 2005

Judson D. DeRamus, Jr.
Judge Presiding
October 3, 2005 Civil Session