

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2001-4024
OSHA INSPECTION NO. 304257942
CSHO ID NO. B9614

v.

STRUCTURAL STEEL PRODUCTS, INC.,
and its sucesors,

ORDER

RESPONDENT.

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C.G.S. § 95-135(c) which provides in pertinent part:

. . .On matters properly before the Board the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the Board. The issuance of subpoenas, orders to take depositions, orders requiring interrogatories and other procedural matters of evidence issued by the chairman shall not be subject to review.

DECISION OF THE CHAIR

Having reviewed and considered the record, the Chairman of the Safety and Health Review Board of North Carolina hereby denies the motion for review and remands the case back to the Hearing Examiner for a full hearing on the merits and makes the following Findings of Fact, Conclusions of Law, Discussion and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(9).
4. The employer (Respondent), Structural Steel Products, Inc, is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. Structural Steel is a North Carolina corporation with its principle office located at 8027 Highway 70 West, Clayton, North Carolina.
6. On April 30, 2001, Health Compliance Officers Nicole Brown and Kim Brightwell (hereinafter "HCO Brown and HCO Brightwell") with the North Carolina Department of Labor, inspected a work site located at 8027 Highway 70 West, Clayton, NC pursuant to a Site Specific Targeting inspection plan.
7. On June 20, 2001, as a result of the inspection citations were issued alleging numerous serious and nonserious violations.

8. The Respondent's Notice of Contest was filed with the Review Board on July 3, 2001.
9. On July 13, 2001, the Respondent filed its Statement of Position with the Review Board denying all violations, penalties and abatement dates.
10. On July 25, 2002, a hearing was held before Hearing Examiner Monique M. Peebles. Over the objections of the Complainant, the hearing was limited to hearing a Motion to Suppress Evidence and Dismiss on the basis that the Commissioner exceeded her scope of consent in conducting a comprehensive inspection.
11. The issue presented in the Motion to Dismiss was whether the comprehensive inspection after the records review inspection was without administrative probable cause and was therefore an unreasonable search in violation of the 4th Amendment to the U. S. Constitution.
12. Both parties submitted post-hearing briefs.
13. On September 23, 2002, the Honorable Monique M. Peebles issued an order denying the Respondent's Motion to Dismiss.
14. Hearing Examiner Peebles Order denying the Respondent's Motion to Dismiss does not constitute a final determination of the case and is interlocutory.
15. On October 23, 2002, Respondent filed a Petition for Review.
16. On October 30, 2002, Complainant filed a Motion to Dismiss and Conditional Cross-Petition for Review.
17. On November 18, 2002 Respondent filed a Motion for Extension of Time to respond to Complainant's Motion To Dismiss.
18. On November 20, 2002, Respondent filed its Response in Opposition to Complainant's Motion to Dismiss.
19. On December 10, 2002, Chairman Keller granted Respondent's Motion for an Extension of Time to respond to Complainant's Motion to Dismiss.
20. N.C.G.S. § 95-135(c) provides that ". . . the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the Board. The issuance of subpoenas . . . and other procedural matters of evidence issued by the chairman shall not be subject to review."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Chairman concludes as a matter of law as follows:

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 Board has jurisdiction of this cause and the parties are properly before this Board.
3. The appeal of the Hearing Examiner's denial of the Motion to Dismiss based on the contention that the Commissioner exceeded her scope of consent in conducting a comprehensive inspection is an interlocutory appeal.
4. The Chairman of the Review Board has the statutory authority pursuant to N.C.G.S. § 95-135(c) to issue orders involving evidentiary matters which are not subject to review and has the authority to hear this Petition.
5. The order appealed from in this case involves a 4th Amendment constitutional question and therefore involves a substantial right.

6. The right to appeal the issue of the alleged deprivation of constitutional rights is not lost if the case is heard on the merits and a final judgment is reached in that the denial of the motion to dismiss can be appealed along with the appeal on the merits in the event of an adverse judgment.

7. The administration of justice and judicial economy will be served by remanding the case for a hearing on the merits while preserving the right to appeal the denial of the Motion to Dismiss for alleged lack of probable cause in conducting the comprehensive inspection.

DISCUSSION

This is an appeal of a decision of a hearing examiner denying Respondent's motion to dismiss. The Respondent's motion to dismiss was based on a request to suppress evidence because of an alleged lack of administrative probable cause in conducting the inspection. The appeal of this order is an interlocutory matter and "is subject to review only if the Board determines a review is appropriate". Brooks v. H. B. Zachry Company, 2 NCOSHD 341, 349 (RB 1982). An appeal from an interlocutory order may be heard if the order affects a substantial right.

It is well settled that an interlocutory order affects a substantial right if the order "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991)

Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999). The order appealed from in this case involves a 4th Amendment constitutional question and therefore involves a substantial right, however, that right will not be lost if a hearing on the merits is held and a final judgment is made, because the denial of the motion to suppress the evidence and dismiss the case can be appealed if an adverse final judgment is entered against the Respondent.

Pursuant to N.C.G.S. § 95-135(c), the Chairman of the Review Board has the discretion to issue orders involving "procedural matters of evidence" which are not subject to review. This statute which allows the Chairman to make orders with respect to discovery and other procedural matters of evidence without subsequent review is "representative of the overall purpose of the Act, which is to provide for expeditious hearing of OSHA cases in which conditions may affect the health, life and welfare of employees involved. Zachry, supra, at 343. In order to provide for an expeditious hearing on the merits of the case, the Chairman denies the motion for review and remands the case back to the Hearing Examiner for a full hearing on the merits. If after a full hearing on the merits, an appeal of the final order of the hearing examiner is made by either party, the Respondent may then bring up the contentions that it raised in this interlocutory appeal. See, Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980) (order setting aside default judgment and entry of default is not an appealable interlocutory order in that if after a trial on the merits an adverse judgment is reached, the plaintiff may appeal the order setting aside the default judgment by assigning as error the order setting aside the default judgment).

The parties are reminded of the language of H. B. Zachry, Company, supra:

. . . it is noteworthy that this matter was heard before Hearing Examiner Alphin on November 21, 1980 and that orders for discovery were issued on June 22, 1981 and the appeal from those orders were not heard by the Review Board until on March 26, 1982.

As a result of the discovery dispute in this case, the case has been protracted for over a year. This is exactly the sort of delay which G.S. §90-95(c) [sic - §95-135(c)] is designed to prevent.

Zachry, supra, at 343.

The North Carolina Supreme Court addressed the reasons for disallowing the appeal of interlocutory orders which reinforces the language of the Review Board in Zachry, supra.

These rules are designed to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case

before an appeal can be heard. (Citations omitted). "There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." (Citations omitted).

Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980).

Complainant made a conditional cross-petition for review conditioned on the Board allowing the Respondent's Petition for Review. In light of my decision denying the Petition for Review, the Complainant's conditional cross-petition for review is moot.

ORDER

THEREFORE, it is **ORDERED** that Respondent's Petition for Review is denied and the case is remanded back to the Hearing Examiner for a hearing on the merits. It is further **ORDERED** that the Respondent be allowed to appeal the Hearing Examiner's denial of the Motion to Dismiss that is the subject of this appeal in the event of an appeal of an adverse decision by either party.

This the 16th day of January, 2003.

OSCAR A. KELLER, JR., CHAIRMAN