BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

STRUCTURAL STEEL PRODUCTS, INC.

RESPONDENT.

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

ORDER

APPEARANCES:

Complainant:
Ralf F. Haskell
Special Deputy Attorney General
North Carolina Department of Justice

Respondent:

Michael C. Lord
MAUPIN TAYLOR & ELLIS PA
Attorneys for Respondent

BEFORE:

Hearing Examiner: Monique M. Peebles

THIS CAUSE came on for hearing and respondent's motion to dismiss was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on July 25, 2002, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Mr. Ralf Haskell, Special Deputy Attorney General. The Respondent was represented by attorney Michael C. Lord of Maupin

Taylor & Ellis, PA. Present for the hearing for the Department of Labor, OSHA Division, were Nicole Brown, Health Compliance Officer and Kimberly Brightwell, who was a Health Compliance Officer in training at the time of the inspection. Present at the motion hearing for the respondent were Louise Kutsch-Barnes, Chief Financial Officer for Structural Steel and Steve Brogden, vice president of sales for Structural Steel.

Respondent moved the court to dismiss all citations on the basis that the commissioner exceeded her scope of consent in conducting a comprehensive or wall-to-wall inspection during a Site Specific Targeting ("SST") inspection on April 30 at the respondent's facility. The court allowed respondent to be heard on its motion and present evidence over complainant's objection.

DISCUSSION

The issue is whether the comprehensive inspection conducted after the records review inspection by the Health Compliance Officers was without administrative probable cause.

Administrative probable cause is a determination that there is a reasonable, objective basis for the decision to inspect a particular worksite. Mark A. Rothstein, *Occupational Safety & Health Law* § 232 (4th ed. 1998). In keeping with the Fourth Amendment's reasonable expectation of privacy requirement, the Commission has the authority to exclude evidence on the basis that the warrantless search was unreasonable. *Id*. at § 237.

There is no dispute that the SST inspection conducted at the respondent's facility was a warrantless inspection. The question then becomes how the respondent can actually challenge the reasonableness of the warrantless inspection. Complainant argues that when a warrantless search is attempted, the employer may either (1) refuse the inspection and require a warrant or (2) consent to the inspection. The respondent argues that the employer can either (1) refuse the inspection (2) protest the inspection or (3) consent to the inspection. One of respondent's witnesses, Ms. Kutsch-Barnes testified that she told the HCO she could do the inspection, under protest. She testified that under protest to her, meant that "if there were any issue at a later date, they could bring it up." Mr. Brogden also testified that he allowed the HCO to do the inspection under protest and he understood that to mean that they were reserving their right to object at a later date. The respondent argues that proceeding with an inspection "under protest" is a middle ground recognized in law which allows the employer to reserve its right to later contest an inspection.

The Court finds no legal basis to support respondent's contention. Rothstein, § 236, clearly contemplated cases where an actual warrant was at issue. "There are three main ways in which an employer can ***challenge the validity of a warrant*** in district court: (1) permit the inspection (***under protest***) and then move to quash the warrant and enjoin further enforcement based on the challenged inspection; (2) refuse the inspection and then seek to quash the warrant; and (3) refuse the inspection and then defend an action for contempt." HCO Brown testified that both Kutsch-Barnes and Brogden told her that she could proceed with the inspection under protest and that a warrant would not be necessary. At no time did Kutsch-Barnes or Brogden require HCO Brown to obtain a warrant before proceeding with the comprehensive inspection.

Assuming arguendo that "under protest" also serves to challenge the reasonableness of a warrantless search, the next issue is whether it was reasonable to proceed with the comprehensive inspection after HCO Brown recalculated the Lost Workday Injury and Illness Case Rate ("LWDII") during the records review inspection.

There is no dispute that HCO Brown had probable cause to conduct the records review inspection. In order to proceed with a comprehensive inspection, Respondent argues that the state plan's threshold LWDII was 14.0 and not 8.0. Respondent further argues that two of the nine lost workday cases were incorrectly recorded by respondent on the respondent's log for 1999 and therefore respondent was not an appropriate candidate for a comprehensive inspection if those two cases are backed out and the LWDII was recalculated.

HCO Brown testified that she has been a HCO since August 1999 and in recalculating the LWDII on the OSHA 200 log, she was trained that if the LWDII rate was between 14.0 and 8.0, she should proceed with a full comprehensive inspection. Kevin Beauregard, Assistant Deputy Commissioner with the Department of Labor, testified that the State of North Carolina adopted this federal directive. Mr. Beauregard testified that if you backed out one case, the LWDII rate would be above 14.0 and if you backed out two of the cases, the LWDII rate would still be above 8.0 wherein the HCO would proceed with a comprehensive inspection. The Court finds by a preponderance of the evidence that the North Carolina SST plan inspection authorizes the compliance officer to proceed with the inspection if the recalculated rate is below 14.0 but above 8.0 and therefore the comprehensive inspection of the respondent's facility was reasonable.

After reviewing the record file, hearing the evidence presented at the motion hearing, with due consideration of the arguments and contentions of all parties, and reviewing relevant legal authority, the undersigned makes the following additional Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of N.C. Gen. Stat. §§ 95-126 et. seq., the Occupational and Safety and Health Act of North Carolina (the "Act").

2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about July 2, 2001, contesting a citation issued on June 20, 2001, to Respondent, Structural Steel Products, Inc. (hereinafter "Respondent" or "Structural Steel").

3. Respondent, a North Carolina Corporation, duly organized and existing under the laws of the State of North Carolina with its principal office located at 8027 Highway 70 West, Clayton, NC and is subject to the provision of the Act (N.C. Gen. Stat. § 95-128) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10).

4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).

5. 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.

6. The North Carolina Site Specific Targeting (SST) plan inspection authorizes the compliance officer to proceed with the inspection if the recalculated the Lost Workday Injury and Illness Case Rate (“LWDII”) is below 14.0 but above 8.0.

7. In recalculating the Lost Workday Injury and Illness Case Rate (“LWDII”) if you disregarded one case, the LWDII rate would be above 14.0 and if you disregarded two of the cases, the LWDII rate would still be above 8.0 and therefore there was probable cause for the comprehensive inspection of the respondent’s facility.

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. There was probable cause for the Health Compliance Officers to conduct the comprehensive inspection after they performed the records review inspection.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, Respondent's Motion to Dismiss is HEREBY Denied.

This the 23rd day of September, 2002.

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Monique M. Peebles
Administrative Law Judge