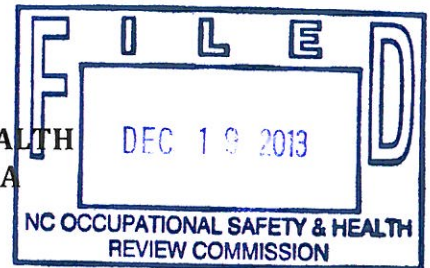


**BEFORE THE OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION OF NORTH CAROLINA**



COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

KEEN PLUMBING CO.  
and its successors

RESPONDENT.

DOCKET NO. OSHANC 2011-5244  
OSHA INSPECTION NO. 314879065  
CSHO ID NO. N8928

**ORDER OF THE COMMISSIONERS**

**DECISION OF THE REVIEW COMMISSION**

This appeal was heard at or about 10:00 A.M. on the 12<sup>th</sup> day of November 2013, Lee House, 422 North Blount Street, Raleigh, North Carolina, by Oscar A. Keller, Jr., Chairman, Dr. Richard G. Pearson, and Arlene K. Edwards, Members of the North Carolina Occupational Safety and Health Review Commission.

**APPEARANCES**

Complainant: Jill Cramer, Assistant Attorney General; North Carolina Department of Justice, Raleigh, North Carolina.

Respondent: Stephen Safron, Raleigh, North Carolina; J. Anthony Penry; Penry Reimann, PLLC, Raleigh, North Carolina.

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission affirms the Order of Hearing Examiner Peebles.

## ISSUES PRESENTED

**I. WHETHER THE DISMISSAL OF THE FIRST CITATION, ISSUED JULY 29, 2011, WAS WITHOUT PREJUDICE?**

**II. WHETHER THE SEPTEMBER 20, 2012, HEARING WAS AN ORIGINAL PROCEEDING?**

### SAFETY STANDARDS AND/OR STATUTES AT ISSUE

#### **24 N.C. Admin. Code 03.0102**

- (1) The Rules of Procedure of the Safety and Health Review Board of North Carolina shall govern all proceedings before the Safety and Health Review Board of North Carolina and its hearing examiners, except where contests are initiated by agricultural employers or employees the Administrative Procedures Act shall apply.
- (2) In the absence of a specific provision, procedure shall be in accordance with the North Carolina Rules of Civil Procedure.

#### **24 N.C. Admin, Code 03.0401**

At any stage of a proceeding a party may enter a notice to withdraw its notice of contest, petition for modification of abatement date, or citation. A notice to withdraw a notice of contest may only be entered when the citation contested has been fully complied with, and the proposed penalty is paid in full. Any additions, amendments, or deletions from the contested citation, proposed by the Director, must be stated in a notice of settlement. Any notice of dismissal shall be served upon employees and parties in accordance with Rule .0107 of this Chapter.

#### **North Carolina Rules of Civil Procedure, Rule 41(a)(1)**

(a) Voluntary dismissal; effect thereof.-

- (1) By Plaintiff; by Stipulation.- Subject to the provisions of Rule 23c and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. *Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without*

*prejudice*, except that a notice of dismissal operates as an adjudication upon the merits when filed by the plaintiff who has once dismissed in any court of this or any other state of the United States, an action based on the same claim. If an action commenced within the time prescribed therefore, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

**§ 95-135. North Carolina Occupational Safety and Health Review Commission.**

(a) The North Carolina Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members from among persons who, by reason of training, education or experience, are qualified to carry out the functions of the Commission under this Article. The Governor shall appoint the members of the Commission and name one of the members as chairman of the Commission. The terms of the members of the Commission shall be six years except that the members of the Commission first taking office shall serve, as designated by the Governor at the time of appointment, one for a term of two years, one for a term of four years, and the member of the Commission designated as chairman shall serve for a term of six years. Any vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled by the Governor for the remainder of the unexpired term. The Governor shall fill all vacancies occurring by reason of the expiration of the term of any members of the Commission.

(b) The Commission shall hear and issue decisions on appeals entered from citations and abatement periods and from all types of penalties. Appeals from orders of the Director dealing with conditions or practices that constitute imminent danger shall not be stayed by the Commission until after full and adequate hearing. The Commission in the discharge of its duties under this Article is authorized and empowered to administer oaths and affirmations and institute motions, cause the taking of depositions, interrogatories, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with any appeal or proceeding for review before the Commission

**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 and is subject to the Act N.C. Gen. Stat § 95-128.
4. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
5. On June 29, 2011, Compliance Safety and Health Officer Gene Powell (CSHO Powell) inspected Respondent's worksite at 1601 Central Heights Road, Goldsboro, North Carolina (site) pursuant to a Special Emphasis.
6. As a result of the recommendations of the compliance officer, on July 29, 2011, the Complainant issued citations to the Respondent.
7. On October 6, 2011, the Attorney General, on behalf of the Commissioner of Labor, filed a Notice of Withdrawal of Citation and Notification of Penalty Without Prejudice.
8. A new citation was issued on October 26, 2011. The matter was docketed in the Safety and Health Review Commission November 18, 2011. Keen Plumbing contested the citation, filed a Statement of Position on November 28, 2011, and requested formal pleadings. The Commissioner of Labor filed the formal Complaint on December 22, 2011. Keen Plumbing filed an Answer of January 17, 2012. The matter came before Hearing Examiner Monique Peebles for hearing on September 20, 2012.
9. At hearing, counsel for Keen Plumbing made a motion to dismiss arguing that the Attorney General's Withdrawal on October 6, 2011, was actually a dismissal with prejudice, therefore, barring the current proceeding. Hearing Examiner Peebles denied that motion.
10. In paragraph 45 of Hearing Examiner Peebles' Order she noted an adjusted penalty of \$1,000 and in paragraph 68 noted an adjusted penalty of \$1,000, for a total penalty of \$2,000.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the Commission 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 Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The dismissal of the first citation issued July 29, 2011, was without prejudice.

5. The September 20, 2012, hearing before Hearing Examiner Monique Peebles was an original proceeding.

## **DISCUSSION**

### **I. WHETHER THE DISMISSAL OF THE FIRST CITATION ISSUED JULY 29, 2011, WAS WITHOUT PREJUDICE?**

Rule .0401 of the Review Commission states that a party can withdraw a citation at any time. (24 N.C. Admin. Code 03.0401). That rule does not state whether such a withdrawal is with or without prejudice. Rule .0102(2) states that if an issue is not directly covered in those rules, procedure shall be in accordance with the North Carolina Rules of Civil Procedure. (24 N.C. Admin. Code 03.0102) The Rules of Civil Procedure say a party may withdraw without prejudice. (Rule 41a). Therefore the Commissioner of Labor properly withdrew the citation without prejudice. Hearing Examiner Monique Peebles correctly denied the motion to dismiss.

### **II. WHETHER THE SEPTEMBER 20, 2012, HEARING WAS AN ORIGINAL PROCEEDING?**

Although federal OSHA cases are not binding on this court, we will look at the federal case, *Stripe-A- Zone* as reference. *Strip – A – Zone, Inc.*, OSHRC No. 79-2380, 1980 OSHARC LEXIS 116, 9 OSH (BNA) 1040 (1980). In that case, a citation was issued citing the Respondent with four serious violations. The Secretary of Labor filed a motion to withdraw the citation without prejudice which was granted. The Secretary later issued 3 citations to the Respondent based on the same inspection. The Commission stated that “the dismissal by the judge neither purported to be nor operated as an adjudication of the merits of the citation. [The] order merely permitted a procedural action which voided the citation underlying...and restored the parties to their pre-citation position.” *Id.*

In this case, as in the *Strip – A – Zone* case, the filing of the Notice of Withdrawal without Prejudice did not equate to an adjudication on the merits; it was a procedural action by a party that returned the parties to their original state. The September 20, 2011, hearing was the evidentiary hearing. The September 20, 2011, hearing was an adjudication on the merits of the case and was an original proceeding which resulted in the December 11, 2012, final order.

Keen Plumbing argued that the language in N.C.G.S. 135(b) makes a hearing in front of a Hearing Examiner an appeal. N.C.G.S 135(b) does use the term “appeal,” and the Review Commission does in fact hear appeals. The Review Commission has two tiers: first a Hearing Examiner has a hearing which is the adjudication on the merits; then, if either party is not satisfied with the decision of the Hearing Examiner, it may appeal to the Review Commission which is a three-member commission which reviews decisions from hearings and accepts briefs and generally requires oral arguments. All contested cases must first have a hearing, which is an adjudication on the merits, before the matter can be taken to the next level of review. A hearing before a hearing examiner is not an appeal, it is an original proceeding.

**ORDER**

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's December 11, 2012, Order in this case be, and hereby is, **AFFIRMED**, to the extent that it is not inconsistent with this opinion. Respondent is further **ORDERED** to abate the violations and to pay the assessed penalty of \$2,000 within 30 days of the filing date of this Order.

This the 19<sup>th</sup> day of December 2013.

  
OSCAR A. KELLER, JR., CHAIRMAN

  
RICHARD G. PEARSON, Ph.D., MEMBER

  
ARLENE K. EDWARDS, MEMBER

**CERTIFICATE OF SERVICE**

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

J ANTHONY PENRY  
PENRY REIMANN PLLC  
1330 ST MARY'S STREET  
SUITE 260  
RALEIGH NC 27605

JILL CRAMER  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
P O BOX 629  
RALEIGH NC 27602-0629

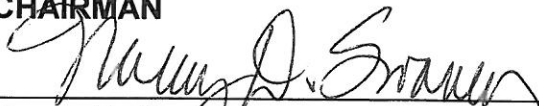
by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

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

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 19<sup>th</sup> DAY OF December 2013.

OSCAR A. KELLER, JR.  
CHAIRMAN

  
\_\_\_\_\_  
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Docket and Office Administrator  
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