

NORTH CAROLINA  
GUILFORD COUNTY

FILED IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
2019 JAN 29 P 2:29 18 CVS 571

GUY M. TURNER, INCORPORATED, )  
)  
PETITIONER, )  
)  
v. )  
)  
CHERIE K. BERRY, COMMISSIONER )  
OF LABOR OF THE STATE OF NORTH )  
CAROLINA, )  
)  
RESPONDENT. )

ORDER AND JUDGMENT FOLLOWING  
JUDICIAL REVIEW  
(OSHANC Docket No. 2016-5788)

This cause came before the Court during the January 7, 2019, term of the Guilford County Superior Court, High Point Division, pursuant to a Petition for Judicial Review by Petitioner Guy M. Turner, Incorporated, for judicial review of the final decision of the Occupational Safety and Health Review Commission of North Carolina in accordance with N.C. Gen. Stat. §95-141 and Article 4 of Chapter 150B of the North Carolina General Statutes, N.C. Gen. Stat. §150B-43, et. seq. Andrew S. Lasine appeared on behalf of Petitioner and Melissa H. Taylor, Special Deputy Attorney General, appeared on behalf of Respondent.

After considering the Record submitted by the Review Commission, the applicable OSHA standards, and the arguments of Counsel, and applying the standards for judicial review set forth in N.C. Gen. Stat. §150B-51, the Court finds and concludes as follows:

1. All parties are properly before the Court and the Court has jurisdiction over the parties and the subject matter of this proceeding.

2. On February 3, 2016, the Occupational Safety and Health Division of the North Carolina Department of Labor issued citations to Petitioner following a job-site inspection designated as OSHA Inspection No. 318028727 (the "Citations").

3. Petitioner timely contested the Citations, including associated penalties. Petitioner's Notice of Contest was designated as OSHANC Docket No. 2016-5788.

4. Thereafter, an evidentiary hearing was conducted before an Administrative Law Judge (the "Hearing Examiner") who issued a Hearing Order and an Amended Hearing Order (together, the "Hearing Order") affirming Citation 1, including its subparts, and dismissing Citation 2.

5. Petitioner thereafter timely petitioned the Occupational Safety and Health Review Commission of North Carolina (the "Review Commission") for review of the Hearing Order.

6. Following a hearing before the Review Commission, the Review Commission issued the Order of the Commissioners overturning, in part, and affirming, in part, the Hearing Order.

7. Petitioner exhausted its administrative remedies and timely filed and served its Petition for Judicial Review of the final Order of the Commissioners of the Review Commission.

8. In its Petition for Judicial Review, Petitioner excepted to the Review Commission's Conclusion of Law that Respondent proved that Petitioner committed a violation of 29 CFR §1926.55(a) based on an alleged exposure to carbon black in excess of the personal exposure limit ("PEL").

9. Petitioner further excepted to the Review Commission's conclusion that the alleged over-exposure to carbon black resulting from a sudden an accidental exposure to carbon

black should have been anticipated, rejecting Petitioner's defense based on a sudden, unanticipated exposure to carbon black.

10. The Review Commission adopted certain findings in the Hearing Order, as amended, but did not adopt Findings Nos. 27, 36, 39, 44, and 53. Each of these findings, rejected by the Review Commission, related to Petitioner's alleged failure to recognize the hazard of carbon black at the job-site at which Respondent's inspection was conducted.

11. As a result, the Review Commission rejected Respondent's contention that Petitioner should have required personal protective equipment ("PPE"), "triggering the provisions for medical evaluation and fit testing." [Review Comm. Order, Pg. 3, ¶I].

12. The Review Commission therefore concluded that because PPE was not required, the Citations and the Hearing Examiner's Order related to Petitioner's alleged failure to conduct medical evaluation and fit testing of Petitioner's employees was erroneous. Based on this conclusion, the Review Commission overturned Citation 1, Item 1.a. and Item 1.b.

13. The Review Commission noted in reaching this conclusion that "[t]he evidence clearly established that the employees were wearing the respirators because they chose to" and that Petitioner "did not require the use of protective equipment." [Review Comm. Order, Pgs. 3-4, ¶I].

14. Nevertheless, both the Hearing Examiner and the Review Commission concluded that Petitioner's employees who were voluntarily wearing respirators during Respondent's inspection were exposed to carbon black in excess of the Permissible Exposure Limit (PEL).

15. The undisputed evidence before the Hearing Examiner and the Review Commission showed that the voluntary respirators were appropriate for carbon black.

16. Compliance with 29 CFR §1926.55(a) [Construction Industry] and 29 CFR §1910.1000(a)(2) [General Industry] is to be achieved by the use of administrative or engineering controls or protective equipment as provided in 29 CFR §1926.55(b) [Construction Industry] and 29 CFR §1910.1000(e) [General Industry].

17. Petitioner was not cited for a violation of 29 CFR § 1926.55(b) or 29 CFR §1910.1000(e) or for failing to monitor air quality.<sup>1</sup>

18. Instead, Respondent cited Petitioner for being exposed to carbon black in excess of the Permissible Exposure Limit (PEL) in violation of 29 CFR §1926.55(a) Respondent also did not cite Petitioner for not implementing administrative or engineering controls or mandating the use of respirators.

19. Additionally, the Review Commission rejected the findings by the Hearing Officer that Petitioner failed to recognize the hazard of carbon black and therefore should have required the use of respirators.

20. The citation for violating 29 CFR 1955(a), as found by the Hearing Officer and affirmed by the Review Commission, is therefore erroneous as a matter of law.

21. Alternatively, the citation for 29 CFR §1926.55(a) standing alone became arbitrary, capricious, and an abuse of discretion when citation 1, items 1a and 1b were dismissed by the Review Commission and where Petitioner was not cited for failing to monitor air quality or failing to implement administrative or engineering controls or to mandate the use of respirators.

22. Additionally, Petitioner presented undisputed evidence at the hearing of the contested case that the lone employee exposed to carbon black in excess of the PEL, who was

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<sup>1</sup> Nevertheless, in Finding of Fact ¶37 and ¶63 [adopted as a Conclusion of Law], the Hearing Officer's Order, as amended, appeared to find a violation of these standards.

voluntarily wearing a respirator that protected him from the hazard, was suddenly and unexpectedly exposed to the hazard.

23. The Review Commission concluded “that type of event should be anticipated” [Review Comm. Order, Pg. 5, ¶II] despite the fact that the Review Commission rejected the Hearing Officer’s Findings Nos. 27, 36, 39, 44, and 53 related to Petitioner’s alleged failure to recognize the hazard of carbon black at the job-site at which Respondent’s inspection was conducted.

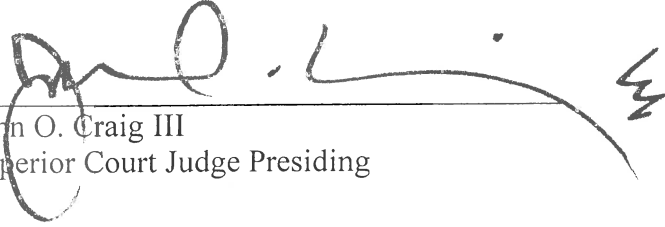
24. As a result, the Review Commission’s conclusion rejecting Petitioner’s defense based on the sudden and accidental exposure to carbon black is not supported by competent evidence in view of the entire record and is arbitrary, capricious, and an abuse of discretion.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED THAT the Review Commission’s conclusion that Respondent proved a violation of 29 CFR §1926.55(a) and the Review Commission’s Order affirming the Hearing Officer’s Order, as amended, as to Citation 1, Item 2, shall be and hereby is reversed.

IT IS FURTHER ORDERED THAT the Citations, including but not limited to Citation 1, Item 2, are vacated, in their entirety.

IT IS FURTHER ORDERED THAT Respondent promptly undertake any and all action required to reflect in the public record, including the OSHA website, that the Citations are vacated.

This the 28 day of January, 2019.

  
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John O. Craig III  
Superior Court Judge Presiding

NORTH CAROLINA  
GUILFORD COUNTY

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18 CvS 571

2019 JAN 30 P 3:06

GUILFORD COUNTY, C.S. CLERK

GUY M. TURNER, INCORPORATED, 

Petitioner,

vs.

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

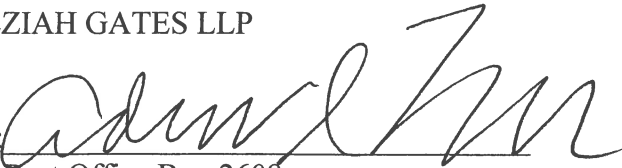
Respondent.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned has this date served the foregoing pleading in the above-entitled action upon all other parties to this cause by depositing a copy thereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department, properly addressed to said parties, or the attorneys for said parties, as the case may be.

This the 30<sup>th</sup> day of January, 2019.

KEZIAH GATES LLP

By: 

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Telephone: (336) 889-6900

DOCUMENT: ORDER AND JUDGMENT FOLLOWING JUDICIAL REVIEW

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