

BEFORE THE N.C. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE )  
STATE OF NORTH CAROLINA, ) DOCKET NO: OSHANC 2021-6369  
)  
COMPLAINANT, ) INSPECTION NO: 318204252  
)  
) CSHO ID.: D370  
)  
v. )  
)  
)  
INDUSTRIAL SERVICES GROUP, INC )  
d/b/a UNIVERSAL BLASTCO )  
and its successors, )  
)  
RESPONDENT. )

**FILED**  
**AUG 12 2024**  
NC OSH Review Commission

**ORDER ON RESPONDENT'S MOTION FOR A TRIAL BY JURY**

Respondent has moved the Court to "order a jury impaneled for the trial of this matter on the basis of its [U.S. Constitutional] Seventh Amendment rights" and cites as grounds for its motion the U.S. Supreme Court's decision in *SEC v. Jarkesy*, 219 L. Ed. 2d 650, 144 S. Ct. 2117, 2024 LEXIS 2847 (Jun 27 2024). Because *Jarkesy* does not establish grounds for a jury trial in this case, and, because there is no basis in North Carolina law for this matter to be tried by a jury Respondent's motion is DENIED.

**The U.S. Supreme Court's Decision in *Jarkesy* Does Not Support Respondent's Argument for a Jury Trial**

The *Jarkesy* case addressed a U.S. Constitutional issue that that arose when Congress passed the 2010 Dodd-Frank Act, 124 Stat. 1376, extending the Securities and Exchange Commission's ("SEC") discretionary authority to pursue penalties for fraudulent acts against individuals either in administrative tribunals or in Article III courts. *Jarkesy*, 219 L.Ed. at 662-663. In deciding whether the rights contained in the Seventh Amendment to the U.S. Constitution attach "when the SEC seeks civil penalties . . . for security fraud[.]" the Court concluded that the anti-fraud provisions of the statutes enforced by the SEC replicate common law claims and that *Jarkesy* was, therefore, entitled to a jury trial.

The instant case is not analogous to *Jarkesy* and that fact is made clear by the Court's opinion which specifically distinguished the agency authority delegated in the SEC's statutory provisions from the delegated authority contained within the Occupational Safety and Health Act of 1970. *Id.*, at 674-676. The Court explained:

Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that 'each employer . . . shall comply with occupational safety and health standards promulgated under this chapter.' . . . These standards bring no common law terms of art, they instead resembled a detailed building code. . . . The purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law. Rather, Congress stated that it intended the agency to 'develop [ ] innovative methods, techniques, and approaches for dealing with occupational safety and health problems.'

*Id.* at 676, citing 84 Stat. 1593, 29 U.S.C. §654(a)(2) and explaining its decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977).

Contrary to Respondent's suggestion that the Court "essentially opined that [*Atlas Roofing*] was no longer good law" (Resp. Mot., p 3), the analysis for determining whether a jury trial is implicated by penalties for violations of the OSH Act is, in fact, controlled by the *Atlas Roofing* decision. The *Jarkesy* Court found *Atlas Roofing* was inapposite to "civil penalty suits for fraud" but went no further in analyzing *Atlas Roofing's* applicability to other administrative agency actions. *Jarkesy*, at 675. The Court certainly did not even suggest that the interpretation of the OSH Act by the *Atlas Roofing* Court was in any way erroneous. The *Jarkesy* Court simply distinguished the OSH Act from the laws at issue in *Jarkesy*. The distinction is precisely why no jury trial is implicated by the administrative enforcement of OSHA penalties. The Court stated, for instance, that *Atlas* "involved 'a new cause of action, and remedies therefor, **unknown to common law**'" and that *Atlas* relied upon precedent not implicated by "suits at common law or in the nature of such" suits. Furthermore, "[t]he novel claims in *Atlas Roofing* had never been brought in an Article III court." *Jarkesy* at 676-678. *Internal citations omitted. Emphasis supplied.* The U.S. Supreme Court's reasoning in *Jarkesy*, therefore, does not establish a right to a jury trial for the citations issued in the instant case.

Furthermore, the proceedings in the instant case arise under state law, not under federal law. N.C. Gen. Stat. §95-126 et seq. The right to a jury trial under the U.S. Constitution is not applicable to disputes heard in state forums. *Better Home Furniture Co. v. Baron*, 243 N.C. 502, 507, 91 S.E.2d 236, 239 (1956).

### **The North Carolina Constitution Does Not Provide for a Jury Trial for Claims Arising Under the NC OSH Act**

In the interest of judicial economy it is worth considering whether there is a jury trial right arising under state law. Following clearly established North Carolina precedent, the undersigned finds that there is no right to jury trial under state law.

The Occupational Safety and Health Act of North Carolina ("Act") provides that federal occupational safety and health standards are adopted by North Carolina, unless the Commissioner of Labor adopts an alternative rule which is at least as effective as the federal counterpart. N.C. Gen. Stat. §95-131(a). The power to enforce and administer the occupational safety and health rules adopted by the State rests with the Director of the Occupational Safety

and Health Division of the North Carolina Department of Labor. N.C. Gen. Stat §95-133. The Director has the authority to enforce and administer the occupational safety and health laws, rules and regulations, including those procedural rules related to the issuance of citations, proposed penalties, and any adjudicative hearings conducted pursuant to the Director's authority. *Id.* The Act further provides that the "Commission shall hear and issue decisions on appeals from citations and abatement periods and from all types of penalties." N.C. Gen. Stat. §95-135(b). A hearing examiner that is appointed by the Commission Chair "shall hear **and make a determination** upon, any proceeding instituted before the Commission . . . ." N.C. Gen. Stat. §95-135(i). *Emphasis supplied.*


Where, as here, a statute directs that a case be heard without a jury, the state constitutional right to a jury trial is determined by legislative history. Article I, Sec. 25 of the North Carolina Constitution provides for a right to jury trial "[i]n all controversies at law respecting property . . . ." However, having abolished the procedural distinction between causes of action at law and at equity, the North Carolina Supreme Court has held that

[t]he right to trial by jury under article I has long been interpreted by this Court to be found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted. . . . Conversely, where the prerogative did not exist by statute or at common law upon the adoption of the Constitution of 1868, the right to trial by jury is not constitutionally protected today.

*Kiser v. Kiser*, 325 N.C. 502, 507-508, 385 S.E.2d 487, 490 (1989). Article IV, Sec. 3 of the state constitution empowers the General Assembly to "vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const., art IV, §3. The Occupational Health and Safety Act of North Carolina was adopted in 1973. Thus, no right to jury trial for disputes that arise over the enforcement of standards under the Act existed at the time that the 1868 North Carolina Constitution was adopted, and, the General Assembly had the authority to delegate judicial functions to the N.C. Department of Labor.

For the reasons cited herein, Respondent's Motion is DENIED.

SO ORDERED, this the   12th   day of August 2024.

  
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Mary-Ann Leon  
Hearing Examiner  
maleon@leonlaw.org

CERTIFICATE OF SERVICE

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

TRAVIS W. VANCE  
FISHER & PHILLIPS  
227 WEST TRADE ST STE 2020  
CHARLOTTE, NC 28202

By depositing a copy of the same in the United States Mail, by certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

STACEY PHIPPS  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH NC 27602

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

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

via email.

THIS THE 12 DAY OF August 2024.

PAUL E. SMITH  
CHAIRMAN



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