

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
93CVS02530

ASSOCIATED MECHANICAL
CONTRACTORS, INC.,

OSHANC NO. 90-1794

Petitioner,

ORDER

v.

HARRY S. PAYNE, JR., COMMISSIONER
OF LABOR OF NORTH CAROLINA

Respondent.

THIS MATTER came before the court for Judicial Review under G.S.150B-51, et. seq. of a final Agency Decision entered January 25, 1993, by the North Carolina Safety and Health Review Board.

This case was initiated by citations issued July 12, 1990, by the Commissioner of Labor under G.S. α 95-133. The citations were issued after a trench cave-in which resulted in a fatal injury at Petitioner's worksite. Petitioner timely exercised its right to contest the violations and penalties.

On October 31, 1991, and January 10, 1992, a hearing was held before Hearing Examiner Richard M. Koch who heard evidence, made findings and entered an Order filed with the Respondent Board on June 17, 1992, which affirmed the citation for 29 CFR 1916.21(b)(2) (deficient training program regarding excavating and trenching) as a serious violation and an assessed penalty of \$560. The Hearing Examiner also affirmed the citation for 29 CFR 1926.652(b) as a wilful-serious serious violation (failure to protect the trench against cave- in) and the assessed penalty of \$8,000.

The Review Board on January 29, 1993, affirmed the findings and penalties assessed below and Petitioner has sought review in this court. This court has conducted a whole record test and from the matters of record concludes:

(1) There is substantial and ample evidence, upon review of the entire record, to support the finding and conclusion that Respondent violated 29 CFR 1926.21(b)(2) and that such violation was serious and that Respondent committed a willful and serious violation of 29 CFR 1926.652(b).

(2) Review by the Board from the recommendation of the Hearing Examiner is de novo and the Board is at liberty to accept or reject the findings of fact and conclusions of the Hearing Examiner; therefore, it is irrelevant whether the Hearing Examiner applied an appropriate legal test in a finding of willfulness so long as the Board makes a correct finding and conclusion of willfulness-regarding a violation of 29 CFR 1926.652(b).

(3) There is sufficient competent evidence of record to support the Board's finding of facts including those facts found by the Hearing Examiner which the Board adopted;

(4) Based upon such findings of fact the Board made correct and proper conclusions of law with regard to these violations;

(5) There was no violation of any statutory or constitutional right of the Petitioner and the Board did not act in excess of its statutory authority or jurisdiction;

(6) This Agency decision was not made upon any unlawful procedure and was not affected by any error of law;

(7) This Agency decision is supported by substantial competent evidence in view of the entire record as a whole, and, as such,

(8) This Agency decision is not arbitrary or capricious.

This decision is rendered in Chambers and out of session by the consent of the parties given in open court through their counsel.

WHEREFORE, this Final Agency Decision is affirmed and the Petition is dismissed with prejudice.

This the 3 day of November, 1993.

DONALD W. STEPHENS
SUPERIOR COURT JUDGE PRESIDING