BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

LLOYD T. WILSON,

Employee, Third Party

v.

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

GEORGIA-PACIFIC CORPORATION,

RESPONDENT.

DOCKET NO. OSHANC 94-3159
OSHA INSPECTION NO. 111100798
CSHO ID NO. B5975

ORDER

DECISION OF THE REVIEW BOARD

This case was scheduled for hearing before the full board on two of Complainant's motions, one of Respondent's motions and eleven letters and documents of Lloyd T. Wilson, third party employee which the Board is treating as motions. The first motion of Complainant's is a Motion to Dismiss filed May 24, 1995 and the second is a Motion for an Expedited Hearing on reopening the case filed December 1, 1995. The Respondent's motion is a Motion to Dismiss filed August 30, 1995.

Mr. Lloyd Wilson filed eleven letters and documents with the Board which the Board is treating as motions. They are as follows:

1. Letter from Lloyd Wilson dated April 29, 1995 and filed May 2, 1995. Mr. Wilson makes a request that DOL send the Board three OSH files, file # 26964, file # 27004 and file # 111100798. He also makes a request that Georgia-Pacific bring his medical records to the hearing.

2. Motion that Complainant be Considered Hostile toward Petitioner dated 7-17-94 (95) and filed July 18, 1995.

3. Motion designated Part B dated 7-17-94(95) and filed July 18, 1995. Mr. Wilson states that the Notice of Contest was untimely filed and that he did not receive a letter (notice) of employee rights.

4. Motion to Dismiss the Motion to Dismiss and Have a Formal Hearing designated Part A dated 7-17-94(95) and filed July 18, 1995. Mr. Wilson asks whether the Board approved the deletion of the citations by Kim Austin in the informal conference and states that it was a "settlement" that should have been approved by the Board.

5. Motion to Reinstate Citations in Original Form filed August 11, 1995 and a Motion for Default for Failure of Respondent to Obey Rules.

6. Motion that the $68.00 charged for copies was unfair filed August 14, 1995.

7. Motion for Respondent to correct responses of August 24 and 28, 1995 filed September 1, 1995.

8. Motion in letter that payment of the $68.00 for photocopying be delayed until the hearing filed November 14, 1995.

9. Letter requesting copies of all phone records of DOL and AG for a specified period and copy of Georgia-Pacific's tracking record for letters for a specified period filed November 14, 1995.

10. Letter requesting that Respondent file a corrected copy of its motion to reflect that asbestos monitoring should have been done in 1979 filed November 21, 1995.

11. Letter requesting the meaning of certain entries in the OSH Inspection Report and requesting copies of all phone records on toll free line to DOL and of all phone lines to AG for a specified period and asking the AG to explain their theories of the law for the regulations pertaining to Asbestos Monitoring, Medical Examination and Access to Medical Records filed November 28, 1995.

These motions and the arguments of all parties (Mr. Wilson was absent) were heard at or about 9:00 A.M. on the 22nd day of January, 1996 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, Member and L. McKay Whatley, sitting as designated Member of the North Carolina Safety and Health Review Board.

APPEARANCES

Linda Kimbell, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Charles H. Morgan of Alston and Bird, Atlanta, Georgia and William H. Weatherspoon, Jr. of Brown and Bunch, Raleigh, North Carolina for Respondent.

Lloyd T. Wilson made no appearance.

ISSUE PRESENTED

1. Does the Board have jurisdiction to reopen a case that was closed by a Notice of Withdrawal of Citation and to grant party status to the only affected employee when that employee was never given notice of his employee rights to participate as a party or to object to the reasonableness of the abatement time?

2. Is Rule 60(b) of the North Carolina Rules of Procedure the appropriate authority for reopening a case when the case was closed by a Notice of Withdrawal of Citation filed by the Commissioner of Labor?

3. Is Mr. Lloyd Wilson prevented from electing party status or from objecting to the reasonableness of the abatement time because he allegedly missed the deadlines?

STATUTES AND REGULATIONS AT ISSUE

1. N.C.G.S. § 95-137(b)(4) which provides in pertinent part:

> . . . The rules of procedure prescribed by the chairman of the Board shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section. (emphasis added).

2. N.C.G.S. § 95-135(e) which states:

> The rules of procedure prescribed or adopted by the Board shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section. (emphasis added).

3. Rule of Procedure of the Safety and Health Review Board of North Carolina .0201 which provides:

> Affected employees or their authorized employee representative may elect to participate as parties in an action concerning their employer. Such election must ordinarily be made within 30 days prior to

the time the case is set for initial hearing on the merits. However, in cases where settlement is proposed or modification of abatement is proposed, such employees or their authorized employee representative shall have 15 days after notice, as required by these rules, of the proposed settlement or proposed modification of abatement in which to seek or participate as parties in the case and to be heard on any questions, including the proposed settlement or modification of abatement.

4. Rule of Procedure of the Safety and Health Review Board of North Carolina .0107(f) which provides:

> The notice of contest, notice of hearing, notice of withdrawal, notice of settlement and any order or decision of a hearing examiner or of the Board other than a procedural order, as well as the notice informing affected employees of their right to elect party status in any proceeding pursuant to Rule .0201 of this Chapter and of their right to contest the provisions of the abatement period must be posted.

5. Rule of Procedure of the Safety and Health Review Board of North Carolina .0107(e) which provides:

> Service to employees shall be accomplished by posting in at least one location where all affected employees have an opportunity to read the notice or pleading. Proof of posting shall be filed not later than the first working day following the posting. (emphasis added).

6. Rule of Procedure of the Safety and Health Review Board of North Carolina .0401 which provides:

> At any stage of a proceeding a party may enter a notice to withdraw its . . . citation. . . . Any notice of dismissal shall be served upon employees and parties in accordance with Rule .0107 of this Chapter.

7. 29 CFR 1910.20(e)(1)(i) which provides:

> Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place and manner. If the employer cannot reasonably provide access to the record within fifteen (15) working days, the employer shall within the (15) working days apprise the employee or designated representative requesting the record of the reason for the delay and the earliest date when the record can be made available.

8. 29 CFR 1910.20(e)(1)(iii) which provides:

> Whenever an employee or designated representative requests a copy of a record, the employer shall assure that either:
>
> (A) A copy of the record is provided without cost to the employee or representative,
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> (B) The necessary mechanical copying facilities (e.g., photocopying) are made available without cost to the employee or representative for copying the record, or
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> (C) The record is loaned to the employee or representative for a reasonable time to enable a copy to be made.

9. 29 CFR 1910.20(e)(1)(iv) which provides:

> In the case of an original X-ray, the employer may restrict access to on-site examination or make other suitable arrangements for the temporary loan of the X-ray.

10. 29 CFR 1910.20(e)(2)(ii)(A) which provides:

> Each employer shall, upon request, assure the access of each employee to employee medical records of which the employee is the subject, except as provided in (e)(2)(ii)(D) of this section.

11. 29 CFR 1910.20(e)(2)(ii)(D) which provides:

> Whenever an employee requests access to his or her employee medical records, and a physician representing the employer believes that direct employee access to information contained in the records regarding a specific diagnosis of a terminal illness or a psychiatric condition could be detrimental to the employee's health, the employer may inform the employee that access will only be provided to a designated representative of the employee having specific written consent, and deny the employee's request for direct access to this information only. Where a designated representative with specific written consent requests access to information so withheld , the employer shall assure the access of the designated representative to this information, even when it is known that the designated representative will give the information to the employee.

12. 29 CFR 1910.20(c)(1) which provides:

> "Access" means the right and opportunity to examine and copy. (emphasis added).

13. 29 CFR 1910.20(c)(4) which provides:

> "Employee" means a current employee, a former employee, or an employee being assigned or transferred to work where there will be exposure to toxic substances or harmful physical agents. In the case of a deceased or legally incapacitated employee, the employee's legal representative may directly exercise all the employee's rights under this section. (emphasis added).

14. Rule of Procedure of the Safety and Health Review Board of North Carolina .0101(2) which provides:

> "Affected employee" means an employee of a cited employer who is exposed to or has access to the alleged hazard described in the citation, as a result of his assigned duties.

15. North Carolina Rule of Civil Procedure 60(b) which provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) Mistake, inadvertence, surprise, or excusable neglect;
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> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
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> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
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> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.
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> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

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(9).

4. The employer (Respondent) Georgia-Pacific Corporation is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. The Respondent was inspected by a compliance safety and health officer from the Department of Labor from July 22, 1994 through August 9, 1994 pursuant to a complaint from Mr. Lloyd T. Wilson, a former employee of Respondent, that he had been denied access to his medical records.

6. As a result of that inspection two nonserious violations were grouped and alleged in one nonserious citation which was issued on August 31, 1994 with total proposed penalties of $650.00.

7. The nonserious citation was for an alleged violation of 29 CFR 1910.20(e)(1)(i) for not providing access to medical records within a reasonable time (not longer than 15 working days) and for an alleged violation of 29 CFR 1910.20(d)(1)(i) for not maintaining each employee record for at least the duration of employment plus thirty years.

8. An informal conference was held and Citation 1, Item 1b dealing with maintaining the medical records was withdrawn but Citation 1, Item 1a for failure to provide access to medical records was left intact. The results of the informal conference were mailed to Respondent in a letter which was received by Respondent on November 22, 1994.

9. The Respondent's Notice of Contest acknowledging the withdrawal of Citation 1, Item 1b but contesting Citation 1, Item 1a was received by the Department of Labor on December 1, 1994 and filed with the Review Board on December 5, 1994.

10. Conferences were held between counsel for Respondent and Sherra Smith, Assistant Attorney General, counsel for Complainant and Kim Austin, compliance health officer supervisor who conducted the inspection. Based on representations made by counsel for Georgia-Pacific at these conferences that Georgia-Pacific had provided Mr. Wilson with access to his medical records, on February 7, 1995, the Complainant filed its Notice of Withdrawal of Citation withdrawing the remaining Citation 1, Item 1a. Mr. Wilson was not consulted to ascertain whether he had been given access to his medical records.

11. It appears from the submissions of the parties as follows:

a. that prior to this hearing, Georgia-Pacific offered access to Mr. Wilson's x-rays only to Mr. Wilson's physician;

b. that the only records that Georgia-Pacific has found for Mr. Wilson are copies of a pre-employment physical and a chest X-ray;

c. that Georgia-Pacific has sent Mr. Wilson illegible copies of his pre-employment physical and have stated that they and the doctor have lost Mr. Wilson's medical file;

d. that Georgia-Pacific continues to deny Mr. Wilson personal access to his original chest x-ray and to their carbon copy of his pre-employment physical which Georgia-Pacific has located and

e. that Lloyd T. Wilson has indicated that the "lost" records are the ones that he is interested in.

12. Lloyd T. Wilson was and is an affected employee in that the medical records for which the Respondent was cited for failing to give access to and to keep records of were Lloyd T. Wilson's medical files.

13. The Notice to Employees of Informal Conference that was sent to the employer as part of the Citation stated that "Employees and/or representatives of employees have a right to attend an informal conference".

14. Lloyd T. Wilson is an affected employee and the only affected employee in this case and he was never given timely notice by either the Complainant or Respondent of the informal conference or of his right to participate in the informal conference or of the dismissal of Citation 1, Item 1b as a result of the informal conference.

15. Lloyd T. Wilson is an affected employee and the only affected employee in this case and he was never given timely notice by either the Complainant or Respondent of the withdrawal of Citation 1, Item 1a.

16. Lloyd T. Wilson is an affected employee in this case and he was never given timely notice by either the Complainant or Respondent of his right to participate as a party in this action or of his right to object to the reasonableness of any abatement period.

17. Lloyd T. Wilson has been ordered by the plant manager at Georgia-Pacific's Dudley, North Carolina plant not to set foot on Georgia-Pacific's property.

18. By letter dated February 24, 1995, Lloyd T. Wilson wrote to Ken Kiser asking what happened to his employee rights and stating that he had received no Notice of Employee Rights in this case and he was the only affected employee. Said letter was filed with the Board on March 9, 1995.

19. On April 25, 1995 the Chair treated the letter from Lloyd T. Wilson as a petition to reopen the case under Rule 60(b) of the Rules of Civil Procedure and a petition to elect party status under Board Rule .0201 and issued an order reopening the case and granting Mr. Lloyd T. Wilson party status and ordering that he receive copies of all document filed in this case.

20. On May 24, 1995 Complainant filed a Motion to Dismiss.

21. On December 1, 1995 Complainant filed a Motion for an Expedited Hearing on the order reopening the case.

22. On August 30, 1995 The Respondent filed a Motion to Dismiss.

23. From May 2, 1995 through November 28, 1995 Mr. Lloyd T. Wilson filed eleven letters and documents with the Board which the Board is treating as motions.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board 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 Board has jurisdiction of this cause and the parties are properly before this Board.

3. Rule 60(b) is the appropriate authority for reopening this case.

4. The Notice of Withdrawal of Citation in this case is a final judgment, order or proceeding within the meaning of Rule 60(b) of the North Carolina Rules of Civil Procedure.

5. Lloyd T. Wilson is an affected employee within the meaning of the OSHANC Act and the Rules of Procedure of the Safety and Health Review Board.

6. The Board denies Mr. Wilson's request that the Department of Labor send the Board copies of OSH files numbered 26964 and 27004 in that these files are not relevant to the issue of whether Mr. Wilson has access to his medical records. The Board also denies Mr. Wilson's requests to have the DOL send copies of OSH file numbered 111100798 to the Board in that Mr. Wilson has been given copies of this file and he may present any relevant evidence from this file to the Hearing Examiner at the hearing. Since Mr. Wilson may subpoena to the hearing such evidence as he deems relevant, it is not necessary for the Board to address his request that Georgia-Pacific bring his medical records.

7. The Board denies Mr. Wilson's request that the Department of Labor be declared hostile to him because that is not a legal designation that can be applied to a party.

8. The Board denies Mr. Wilson's motion to dismiss which is based on the allegations that the Notice of Contest was untimely filed and that he did not receive a notice of employee rights in that it is moot in light of the remand of this matter.

9. As stated below in the decision the Board declines for policy reasons to overturn the results of the informal conference and therefore denies Mr. Wilson's request to regard the results of the informal conference as a settlement which should have been approved by the Board. See the discussion in Conclusion of Law numbered 11 for the $68.00 charge for photocopying.

10. See the Discussion section below on the motion to reinstate citations in the original form. The motion for Default for Failure of Respondent to obey rules is denied.

11. The Board is granting Mr. Wilson's motion with respect to the fairness of the $68.00 charge for photocopying and Mr. Wilson is relieved from paying the $68.00 charge for photocopying his file on the basis of financial hardship and on the basis that this file was provided to him pursuant to an order of the Board.

12. The Board denies Mr. Wilson's request to require Respondent to correct responses of August 24 and 28, 1995 since Mr. Wilson may present relevant evidence on this issue at his hearing.

13. Mr. Wilson's motion that payment of $68.00 for photocopying be delayed is moot in that the Board has relieved him of the requirement to pay for the photocopying.

14. Mr. Wilson's motions requesting copies of phone records is denied in that no good cause was shown and that the requests are outside the scope of the matters before the Board.

15. The Board denies Mr. Wilson's Motion that Respondent file a corrected copy of its motions to reflect that asbestos monitoring should have been done in 1979. Mr. Wilson is free to offer any relevant evidence at the hearing to rebut any allegations made by the Respondent.

16. The Board denies Mr. Wilson's motions requesting the meaning of certain entries in the OSH Inspection report and requesting copies of all phone records and requesting that the Attorney General explain its theories of the law as this is a discovery request and no good cause is shown.

DISCUSSION

This is a case of first impression before the Board. The issue is a narrow one, whether a former employee who seeks and is denied access to his medical records may reopen a case in which the Commissioner has withdrawn the citation where the employee was never given notice of his right to participate as a party or of his right to object to the reasonableness of the abatement time. The Board answers this question in the affirmative.

The regulation at issue is 29 CFR 1910.20(e)(1)(i) which provides:

> Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place and manner. If the employer cannot reasonably provide access to the record within fifteen (15) working days, the employer shall within

the (15) working days apprise the employee or designated representative requesting the record of the reason for the delay and the earliest date when the record can be made available.

Both the Respondent and Complainant have asserted jurisdictional bars to the Board hearing any issues with respect to Citation 1, Item 1b (failure to maintain medical records) which was dismissed by an amendment that was issued after an informal conference attended by the Complainant and the Respondent but which was not attended by Lloyd T. Wilson. The Notice to Employees of Informal Conference that was sent to the employer as part of the Citation stated that "Employees and/or representatives of employees have a right to attend an informal conference" but Mr. Wilson was never sent a copy of the Citation and Notice of Informal Conference by the Respondent. The Respondent further asserts that jurisdiction never vested with the Review Board with respect to Citation 1, Item 1a (failure to provide access to medical records) because the Notice of Withdrawal of Citation was filed before formal pleadings were made. The Complainant asserts that jurisdiction to hear all issues with respect to Citation 1, Item 1a vested in the Review Board upon the filing of the Notice of Contest but that the Review Board was divested of jurisdiction upon the filing of the Notice of Withdrawal of Contest.

It is true that jurisdiction vests with the Review Board at the latest upon the filing of the Notice of Contest. N.C.G.S. § 95-137(b)(4) and Board Rule .0303(d). There may be situations where jurisdiction vests at an earlier time. See, Louisiana-Pacific Corp., 1989 OSHD 37,534 (RC 1989) (holding that the Review Commission may hear an employer's challenge to a citation even where a timely notice of contest has not been filed when the Secretary of Labor has employed deceptive practices or has failed to comply with required procedures). Since Mr. Wilson was not given notice of his right to attend the informal conference, the Review Board could assert jurisdiction over the dismissal of Citation 1, Item 1b on the basis that proper procedures were not followed but for policy reasons the Board declines to do so in this case. The NCOSH Act encourages the settlement of cases and informal conferences are one of the means of accomplishing settlement so that abatement of hazardous conditions may be attained at an early stage of the proceedings and the Board is reluctant to disturb the findings of informal conferences. See, Donovan v. Occupational Safety and Health Review Commission (Mobil Oil), 713 F.2d 918, 927 (CA2 1983). The Board grants the motions of the Respondent and Complainant to dismiss the reopening of the case with respect to Citation 1, Item 1b and denies Third Party, Lloyd T. Wilson's Motion to Reinstate Citations in Original Form with respect to Citation 1, Item 1b.

However, access to Mr. Wilson's medical records is a different matter and the Board denies the Complainant's and Respondent's motions to dismiss the reopening of the case with respect to Citation 1, Item 1a. Mr. Wilson's motion to reinstate the citations with respect to Citation 1, Item 1a is moot in that the Chair has by a previous order reinstated the citations with respect to Citation 1, Item 1a.

Mr. Wilson is an affected employee within the meaning of Board Rule .0201 and has the right to reopen the case pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure in order to gain personal access to his medical records. The regulations are clear that the term "employee" includes a former employee for purposes of access to the medical records kept by an employer. 29 CFR 1910.20(c)(4) states: "Employee" means . . . a former employee. . ." . When this definition of employee for access to medical records is read into Board Rule .0201 then it would read: "Affected (former) employees . . . may elect to participate as parties in an action (involving access to the employee's medical records) concerning their employer." See, Brooks v. Cone Mills v. Pearlie C. Hamlett, 2 NCOSHD 506 (RB 1984). The cases cited by the Respondent for the proposition that a former employee is not an employee for purposes of the OSH Act are not applicable when the specific regulations at issue define an employee as a former employee.

The regulations are also clear that an employee and this includes a former employee is entitled to prompt, personal access to examine and copy his or her medical records that an employer has. 29 CFR 1910.20(e)(2)(ii)(A), 29 CFR 1910.20(c)(1) and 29 CFR 1910.20(c)(4). Only when the employer's doctor has determined that information in the medical record could be detrimental to the employee's health may personal access to only the detrimental information be denied to the employee. In this situation the detrimental information must be supplied to a designated representative and there is no requirement that the designated representative be a doctor. 29 CFR 1910.20(e)(2)(ii)(D). The rest of the medical records that are not detrimental to the employee must be provided at no cost so that the employee may examine and copy if the employee wishes. 29 CFR 1910.20(e)(2)(ii)(A), 29 CFR 1910.20(e)(2)(ii)(D), 29 CFR 1910.20(e)(1)(iii). The regulations are also clear that the first set of copies are

to be provided at no cost to the employee. 29 CFR 1910.20(e)(1)(iii), 29 CFR 1910.20(e)(1)(v). The regulations are also clear that if the records consists of an original X-ray, then the employer may restrict access (which means the right of the employee to examine and copy) to on-site examination or make other suitable arrangements for the temporary loan of the X-ray. 29 CFR 1910.20(e)(1)(iv).

The reason that the regulations require prompt personal access for examination and copying of employee medical records is that an employee needs that information to determine if he or she has been exposed to work conditions which may have caused or contributed to a disease or other health problem. This information is important in both the diagnosis and treatment of medical conditions which the employee has or may have. 29 CFR 1910.20(a) states that the purpose of the section is that "Access by employees . . . is necessary to yield both direct and indirect improvements in the detection, treatment, and prevention of occupational disease." Mr. Wilson first requested personal access to his medical records on or about May 27, 1994 and two years later it appears that he still has not been allowed to personally examine the medical records and the original X-rays which the company has. When he went to the Georgia-Pacific plant in Dudley, North Carolina and requested access to his medical records on or about May 27, 1994 he was ordered by the plant manager not to set foot on Georgia-Pacific property. Georgia-Pacific has the right to order Mr. Wilson off of their property but they must make prompt arrangements at no cost to Mr. Wilson for him to personally review his medical records off of their property. At the time of the writing of this order, it appears that Mr. Wilson has received a copy of his X-ray and illegible copies of his pre-employment physical but he has not been allowed to personally examine the original X-ray and the original carbon copy of his pre-employment physical which the company has. He has been told that both the doctor and the company have lost the remainder of his original medical records. A hearing on this issue is necessary to determine the actual facts.

Both the Complainant and Respondent assert that since the Department of Labor has filed a Notice of Withdrawal of Citation in this case, the Board is without jurisdiction to reopen the case. The Complainant cites Brooks v. Southern Bell Telephone and Telegraph Company, 2 NCOSHD 283 (RB 1979) and Cuyahoga Valley Railroad Company v. United Transportation Union, 473 US 3, 106 S.Ct. 286, 88 L.Ed.2d 2 (1985), on remand, 783 F.2d 58 (6th Cir. 1986) for the proposition that the Department of Labor is free to withdraw a citation at any stage of the proceedings. This proposition is based on the entrusting of the prosecutorial function of the OSH Act to the Department of Labor and the entrusting of the adjudicatory function of the OSH Act to the Review Board. The reasoning that the Courts give is that settlement of cases is the lifeblood of the OSH Act in that settlement is necessary to free up the limited resources of the Department of Labor so that abatement of the hazards can be achieved as part of the settlement process without having to wait several years for a contestment to be resolved. In this manner abatement of hazards can be achieved in a timely manner and the purpose of the OSH Act, that workers be provided with a safe and healthy workplace, can thus be achieved. See, Donovan v. Occupational Safety and Health Review Commission (Mobil Oil), 713 F.2d 918, 927 (CA2 1983).

That reasoning is inapposite in this case and this case can be distinguished on its facts from Southern Bell, supra, and Cuyahoga, supra. This case does not involve a Union's attempt to prosecute a case that the Department of Labor has decided not to prosecute but is a case that involves a former employee's attempt to gain access to his medical records. Allowing the Department of Labor to withdraw a citation for failure to provide medical records to a former employee without any input from the former employee who requests the medical records does not speed abatement but prevents abatement. The regulation, 29 CFR 1910.20(e)(1)(i), supposes that a "reasonable" time for providing access to records is 15 working days but it has been over two years and it appears that Mr. Wilson still has not been allowed to personally examine and copy at no cost to him the medical records which Georgia-Pacific has admitted that it has in its possession. The only way that abatement may be achieved in this case so that Mr. Wilson can examine his medical records and determine whether to hold Georgia-Pacific accountable for his "lost" records is to hold that Mr. Wilson may proceed as a party and to have all of the rights of a party.

The NCOSH Act in two places requires the Board to proscribe rules of procedure affording affected employees party status. N.C.G.S. § 95-137(b)(4) states:

. . . The rules of procedure prescribed by the chairman of the Board shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section.

(emphasis added).

N.C.G.S. § 95-135(e) states:

The rules of procedure prescribed or adopted by the Board shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section. (emphasis added).

Pursuant to that mandate to provide employees with the opportunity to participate as parties the Board promulgated Rule .0201 of the Rules of Procedure of the Safety and Health Review Board of North Carolina which provides:

Affected employees or their authorized employee representative may elect to participate as parties in an action concerning their employer. Such election must ordinarily be made within 30 days prior to the time the case is set for initial hearing on the merits. However, in cases where settlement is proposed or modification of abatement is proposed, such employees or their authorized employee representative shall have 15 days after notice, as required by these rules, of the proposed settlement or proposed modification of abatement in which to seek to participate as parties in the case and to be heard on any questions, including the proposed settlement or modification of abatement.

An argument can be made that Mr. Wilson may not be granted party status because he missed the 30 day deadline of Rule .0201. By its own language Rule .0201 is not a strict statute of limitations because it states that election of party status must ordinarily be made within 30 days prior to the time the case is set for initial hearing and thus allows for exceptions to the 30 day rule. In the situation such as Mr. Wilson's where the former employee was not given notice of his rights to elect party status as is required by Board Rules, then the Board in its discretion will allow an exception to the 30 day rule so that Mr. Wilson may elect party status after expiration of the 30 days.

The Complainant argues that the Respondent followed the Board Rules and posted the appropriate notices at the employer's workplace. Board Rule .0107(f) requires that the notice informing affected employees of their right to elect party status must be posted and Board Rule .0107(e) tells how that notice to employees is accomplished. Board Rule .0107(e) states in pertinent part:

Service to employees shall be accomplished by posting in at least one location where all affected employees have an opportunity to read the notice or pleading. (emphasis added).

A reading of Board Rules .0107(e) and (f) together would require and a conscientious attempt to comply with the Board Rules to give notice to all of the affected employees would have involved the company sending Mr. Wilson, the only affected employee, a copy of the notice informing him of his right to elect party status and copies of the other notices that Board Rule .0107(f) requires to be posted. This is especially true when the only affected employee is ordered not to set foot on the Respondent's property and would not have access to any notice posted there. Mr. Wilson was not given notice of any of the proceedings and has had no meaningful opportunity to participate as a party in hearings under the NCOSH Act.

Both the Complainant and Respondent argue that Rule 60(b) is inapplicable to a case in which the Commissioner of Labor has filed a notice of withdrawal of citation. The argument is that there is no case to reopen because it was disposed of by a notice of withdrawal of citation and there has been no final judgment or order. The Respondent further asserts that Mr. Wilson may not reopen a case pursuant to Rule 60(b) because he was not a party to the original action. The Review Board has held on many occasions that Rule 60(b) is applicable to proceedings before the Review Board. E. g., Commissioner of Labor v. Starr Electric Company, Inc., 5 NCOSHD 271, 273 (RB 1993)

The North Carolina Court of Appeals has held that a notice of dismissal is a "proceeding" within the meaning of Rule 60(b). In Carter v. Clowers, 102 NC App. 247 (1991) the issue was whether a notice of dismissal with prejudice pursuant to North Carolina Rules of Civil Procedure Rule 41(a)(1) was a "judgment, order or proceeding" within the meaning of Rule 60 (b) so that it could be reopened to correct a mistake made by the

plaintiff's counsel. The North Carolina Court of Appeals cited a federal case, Noland v. Flohr Metal Fabricators, Inc., 104 F.R.D. 83, with approval as follows:

> In Noland, a federal district court concluded that a voluntary "dismissal can be considered a 'proceeding' thus allowing relief via Rule 60(b)." Noland, 104 F.R.D. at 86.

Carter v. Clowers, supra, at 252. Rule 41(a)(1) of the Rules of Civil Procedure was the rule that was followed for voluntary dismissal for actions before the Review Board prior to the Board's promulgation of Board Rule .0401. Therefore, case law with respect to the reopening of a case that has been voluntarily dismissed pursuant to Rule 41(a)(1) is applicable to the reopening of a case that has been voluntarily dismissed pursuant to Board Rule .0401. See, Brooks v. Southern Bell, 2 NCOSHD 283. We hold that a Notice of Withdrawal of a Citation pursuant to Board Rule .0401 is a "proceeding" within the meaning of North Carolina Rules of Civil Procedure Rule 60(b). If a case has been closed by a withdrawal of citation and there exists any of the grounds for which Rule 60(b) allows a reopening, a case may be reopened before the Board pursuant to Rule 60(b).

In the instant case there exists sufficient evidence in the record to allow Mr. Wilson to reopen the case pursuant to Rule 60(b)(1) in that Mr. Wilson was never notified of his right to participate and he was therefore "surprised" within the meaning of Rule 60(b)(1) when he learned that the case had been withdrawn. There is also sufficient evidence in the record to allow the reopening of the case pursuant to Rule 60(b)(6)'s "Any other reason justifying relief from the judgment" in that equity as well as the OSH Act and the Board rules dictate that Mr. Wilson have input into the decision as to whether or not he has had access to his medical records. For the reasons given herein we hold that this case is properly reopened pursuant to Rule 60(b)(1) and (b)(6).

Mr. Wilson's letter which was treated as a motion to reopen the case was filed with the Board a little over a month after the Notice of Withdrawal of Citation was filed with the Board and falls within Rule 60(b)'s requirement that the "motion be made within a reasonable time and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken".

An argument has been made by Respondent that only a party may reopen a case pursuant to Rule 60(b) and that since Mr. Wilson was not a party to the original action he may not reopen the case. Neither the Complainant nor the Respondent gave Mr. Wilson notice of his right to participate as a party and they are therefore both estopped from asserting that Mr. Wilson may not reopen the case because he was not a party to the original action. The North Carolina Court of Appeals has stated:

> The general rule is that only a party or his legal representative has standing to have an order set aside, and that a stranger to the action may not obtain such relief. Shaver v. Shaver, 244 N.C. 309, 93 S.E. 2d 614 (1956). This rule does permit exception, however. In Bowling v. Combs, 60 N.C. App. 234, 298 S.E. 2d 754, disc. rev. denied, 307 N. C. 696, 301 S.E. 2d 389 (1983), this Court found no error where the trial court granted an administratrix's motion, made three months before she became a party to the action, to set aside a voluntary dismissal taken by her predecessor in office. The "technicality" that she was not a party was insufficient reason to vacate the order. Like the administratrix in Bowling, Daniels was no "stranger to the case" In his capacity as court-appointed surveyor, he was available to serve the court as its witness.

Ward v. Taylor, 68 N. C. App. 74, 80-81 (1984). As in Ward, Mr. Wilson is no "stranger to the case" in that it is his medical records that are the subject of this case. Mr. Wilson's lack of formal party status does not render his motion to reopen the case pursuant to Rule 60(b) improper.

In the eleven letters and documents that Mr. Wilson filed with the Board before the Board's January 22, 1996 hearing, he makes many requests and charges which the Board is treating as motions. These motions are numbered and set out above and the Board will refer to them in the order below according to the numbers assigned to them above.

ORDER

For the reason stated herein, the Review Board hereby grants the motions of the Complainant and Respondent in part and grants and denies the motions of Lloyd Wilson in part and **ORDERS** that the reopening of the case with respect to Citation 1, Item 1b is reversed and Citation 1, Item 1b is **HEREBY DISMISSED**. Furthermore, the Review Board denies the Complainant's and Respondent's motions to dismiss the reopening of the case with respect to Citation 1, Item 1a and **HEREBY ORDERS** that this case be set expeditiously for a hearing before a hearing examiner on the issues set forth in Citation 1, Item 1a and specifically on the issue of whether Mr. Wilson has been given access to his medical records in a reasonable time, place and manner as is required by 29 CFR 1910.20(e)(1)(i).

For the reasons stated herein, the Review Board **ORDERS** that Mr. Wilson's motions numbered 1 through 5 and 7 through 11 be denied and that Mr. Wilson's motion numbered 6 be granted and the Department of Labor is **ORDERED** not to charge Mr. Wilson the $68.00 for the photocopy of the OSH file that is the subject of this action and to refund him any money that he may have already paid for the file in this case.

This the 1st day of July, 1996

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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L MCKAY WHATLEY