

BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

GEORGIA-PACIFIC CORPORATION

RESPONDENT.

DOCKET NO. OSHANC 95-3199
OSHA INSPECTION NO. 125286435
CSHO ID NO. F4516

ORDER

DECISION OF THE REVIEW BOARD

This interlocutory appeal was heard at or about 11:00 A.M. on the 15th day of December, 1995 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. A rehearing of the interlocutory appeal was heard on January 22, 1996 before the same Board members at or about 9:00 a.m. at the Wake County Courthouse, Room 700 on the seventh floor, 316 Fayetteville Street Mall, Raleigh, North Carolina.

APPEARANCES

Jane Gilchrist, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant at both hearings.

No appearance for Respondent at first hearing and Charles H. Morgan of Alston and Bird, Atlanta, Georgia and William H. Weatherspoon, Jr. of Brown and Bunch, Raleigh, North Carolina for Respondent at rehearing.

ISSUES PRESENTED

1. Does Rule .0602 determine the time period for a party to appeal a denial of a motion for discovery?
2. Did the Respondent show good cause for allowing the motion for discovery including the taking of depositions and the propounding of interrogatories and requests for production of documents over and above what the Hearing Examiner ordered the Complainant to produce?

STATUTES, RULES OR REGULATIONS AT ISSUE

1. Rule .0404 of the Rules of Procedure of the Board which is titled "Discovery Depositions and Interrogatories" and provides:

(a) Except by order of the Board or the hearing examiner, discovery deposition of parties, intervenors, or witnesses, discovery inspections by parties or intervenors, and interrogatories, and requests for documents and things, directed to parties or intervenors shall not be allowed.

(b) In the event the Board or the hearing examiner grants an application for the conduct of such discovery proceedings, the order granting the same shall set forth appropriate time limits governing the discovery.

(c) The hearing examiner or Board may limit the extent of discovery, taking into account such considerations as: burdensome expense, prior opportunity of a party to acquire the information, the

complexity of issues in the case, and other relevant factors.

2. Rule .0602 of the Rules of Procedure of the Board which is titled "Review: Briefs for Review" and provides:

(a) Petitioning for review. Any member of the Board may direct that a decision of a hearing examiner be reviewed by the entire Board as a whole. Any party adversely affected or aggrieved by the decision of the hearing examiner (pursuant to Rule .0309 or .0601 of this Chapter) or by the decision of the Chairman of the Review Board (pursuant to Rule .0309 of this Chapter) may file a petition for review. The petitioner or cross-petitioner must comply with applicable Rules .0505 and .0506 of this Chapter. If no direction for review or petition for review is effected within 30 days from the date on which the hearing examiner's or Chairman's decision is filed with the Board, such decision shall become the final order of the Review Board. A petition for review or cross-petition for review may be conditional: either may state that review is sought only upon the existence of an opposing party's petition for review. A cross-petition for review may be filed within seven days of notice from the opposing party of its petition for review.

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. Georgia-Pacific Corporation is a wood products company with national and international subsidiaries with a location in Dudley, North Carolina.
6. An inspection was made of Respondent's business located in Dudley, North Carolina from October 24, 1994 through November 14, 1994 by Compliance Safety Officer Chris Fisher who was accompanied by trainee inspector Ed Lewis.
7. Tim Childers is the district supervisor who supervises these two inspectors and is responsible for approving the citations.
8. As a result of that inspection three violations were alleged in one serious citation which were issued on January 9, 1995. Complainant cited Georgia-Pacific for an alleged violation of 29 CFR 1910.176(a) in that permanent aisles or passageways were not appropriately marked in the roadway between the OSB building and boiler building and for two alleged violation of 29 CFR 1910.178(n)(4) which were grouped together with one assessed penalty. The alleged violations of 1910.178(n)(4) were that industrial truck drivers were not required to slow down and sound the horn at cross aisles and wherever vision was obstructed and the drivers were not required to travel with the load trailing whenever the load obstructed forward view. A penalty of \$2,275.00 was proposed for the alleged violation of 1910.176(a) and a penalty of \$2,275.00 for the grouped alleged violations of 1910.178(n)(4) for a total penalty of \$4,550.00.
9. The Respondent's Notice of Contest was filed with the Review Board on January 30, 1995.

10. On February 21, 1995, the Respondent filed its Statement of Position form with the Review Board requesting formal pleadings.
11. The parties exchanged a formal complaint and answer and a hearing was set for May 12, 1995 before the Honorable administrative law judge Margaret Morgan.
12. Respondent's counsel requested a continuance on the grounds that he had a previous OSHA matter scheduled for the week of the hearing and he needed additional time to conduct discovery.
13. A Petition for Discovery was filed concurrently with the Motion for a Continuance and requested that the Respondent be allowed to depose CSO Chris Fisher, CSO trainee Ed Lewis and supervisor Tim Childers. The Petition for Discovery also requested that the Respondent be allowed to propound interrogatories and requests for production of documents.
14. The Honorable Margaret Morgan granted the Motion for a Continuance by Order dated May 1, 1995 and continued the hearing to a date to be set by the Review Board in the future.
15. By Order dated August 8, 1995 and filed with the Review Board on August 10, 1995 Judge Morgan denied the Motion for Discovery in general for failure to show good cause but granted it in part by allowing the production of documents contained in the investigative files after the documents had been redacted to protect the identities of witnesses and complainants.
16. Respondent submitted a Motion for Reconsideration of Order Denying Discovery which Motion was dated September 12, 1995 and which was filed with the Board on September 13, 1995.
17. On September 21, 1995 Complainant filed a Response to the Motion for Reconsideration opposing it on procedural and legal grounds.
18. On September 29, 1995, Respondent filed a Reply to Complainant's Response with the Board.
19. By Order dated and filed November 9, 1995, the Honorable Robin E. Hudson, Chair of the Safety and Health Review Board, in her discretion referred the Motion for Reconsideration to the full Board.
20. A hearing was held before the full Board at its regularly scheduled meeting on December 15, 1995.
21. Complainant filed a Memorandum of Authority on January 5, 1996.
22. On January 9, 1996 Respondent filed a Motion to Allow Oral Argument Regarding Reconsideration of Order Denying Discovery.
23. On January 16, 1996 Complainant filed an Objection to Motion to Allow Oral Argument.
24. On January 19, 1996 the Honorable Robin E. Hudson issued an Order Granting Motion for Oral Argument.
25. On January 22, 1996 Respondent filed a Notice of Appearance of North Carolina Counsel, William H. Weatherspoon, Jr., as counsel for Georgia-Pacific Corporation.
26. On January 22, 1996 brief oral arguments on the merits of allowing discovery by Respondent were heard by the full Board.

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. Complainant has failed to show good cause to allow additional discovery over and above the redacted copy of the Complainant's investigative file which was provided to Respondent pursuant to the discovery order of the Hearing Examiner below.

4. The copy of the redacted file provided to Respondent pursuant to the order of the Hearing Examiner below allows the Respondent to prepare an adequate defense to the charges and meets the requirements of the due process clause of the 14th Amendment to the U. S. Constitution and the law of the land clause in Article I, § 19 of the North Carolina Constitution.

DISCUSSION

The main issue in this case is whether the Respondent has met its burden of showing good cause for the granting of discovery over and above the redacted file that the Hearing Examiner ordered the Complainant to produce. As part of its attempt to show good cause, the Respondent asserts state and federal constitutional due process arguments that the requested discovery is necessary for Respondent to prepare an adequate defense. These issues present a mixed question of fact and law. The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981)

In general, formal discovery is not allowed as a matter of course in contested cases heard before the Hearing Examiner or Review Board pursuant to the Occupational Safety and Health Act of North Carolina (OSHANC). Brooks v. United Parcel Service, Inc., 5 NCOSHD 169 (RB 1992). Formal discovery is generally denied to provide for an expedited resolution of the matter so that the alleged violations may be abated. See, Brooks v. Weeks Construction Company, 3 NCOSHD 976 (RB Chairman 1990), appeal held invalid, Brooks v. Weeks Construction Company, 3 NCOSHD 977 (RB Chairman 1990); Brooks v. Central Transport, Inc., 3 NCOSHD 230 (Review Board Chairman, dissenting opinion, 1988; majority opinion withdrawn on May 10, 1989). ". . . it is the policy of the Review Board to move expeditiously to hearing To do otherwise would be contrary to the policy of the North Carolina OSHA law that employees in our state be provided with safe and healthful workplaces." Brooks v. Yates Construction Co. Inc., 2 NCOSHD 983, 990 (RB 1986). An employer or his attorney must usually take advantage of the Department of Labor's "open file" policy as an informal discovery device. United Parcel Service, supra, at 170.

Although formal discovery, except requests for admissions, requires leave of the court and is generally denied, the Rules of Procedure of the Review Board recognizes that there are cases whose complexity may require discovery that is more extensive than that provided by the Department of Labor's "open file" policy or more extensive than the information that the OSH Division gathers from employers pursuant to its normal inspection of an employer. Brooks v. Scandura, Inc., 2 NCOSHD 296 (RB 1980); Brooks v. United Parcel Service, Inc., 5 NCOSHD 169 (RB 1992). Rule .0404 governs formal discovery and provides as follows:

.0404 DISCOVERY DEPOSITIONS AND INTERROGATORIES

(a) Except by order of the Board or the hearing examiner, discovery depositions of parties, intervenors, or witnesses, discovery inspections by parties or intervenors, and interrogatories, and requests for documents and things, directed to parties or intervenors shall not be allowed. (b) In the event the Board or the hearing examiner grants an application for the conduct of such discovery proceedings, the order granting the same shall set forth appropriate time limits governing the discovery. (c) The hearing examiner or Board may limit the extent of discovery, taking into account such considerations as: Burdensome expense, prior opportunity of a party to acquire the information, the complexity of issues in the case, and other relevant factors.

Pursuant to Rule .0404, an employer or his attorney desiring discovery, in this case the deposition of the compliance officers and supervisor, interrogatories and the production of documents, over and above what the

Department of Labor provides voluntarily, must apply to the Review Board or Hearing Examiner for an order compelling discovery upon making a showing of good cause for the production of the requested documents. Brooks v. H. B. Zachry Company, 2 NCOSHD 341, at 348 (RB 1982). "[A]s a general rule discovery will be granted in those rare instances where the party seeking discovery shows that such discovery is required in the interest of justice." United Parcel Service, *supra*, at 171.

The Board has allowed discovery in complex cases involving new ergonomics issues (Brooks v. United Parcel Service, Inc., 5 NCOSHD 169 (RB 1992)) and excessive noise levels (Brooks v. Scandura, Inc., 2 NCOSH 296 (RB 1980)) upon a showing of good cause by the party seeking discovery. Georgia-Pacific has not shown any of the reasons for which discovery has been granted in previous cases. The Board has reviewed the whole record in this case and the facts are that this case is a simple case involving only three alleged serious violations concerning the unsafe driving of industrial trucks. There are no novel or complicated issues such as ergonomics or excessive noise levels involved. Respondent asserts that due process requires that discovery be allowed so that it can ascertain the factual basis behind the citations. The discovery order of the Hearing Examiner below allowed the Respondent to have a copy of the investigative file of the Complainant after it had been redacted to protect witnesses names. This copy of the redacted file meets the requirements of the due process clause of the 14th Amendment to the U. S. Constitution and the law of the land clause in Article I, § 19 of the North Carolina Constitution by giving the Respondent the factual basis behind the citations to allow the Respondent to prepare an adequate defense. To allow the Respondent to take the depositions of the compliance officers and supervisor and to require the Complainant to answer interrogatories and produce documents over and above what has already been provided unduly burdens the limited resources of the Department of Labor and prevents an expeditious resolution of the controversy.

The complainant has asserted a procedure bar and alleges that the motion for reconsideration was filed after 30 days had expired from its issuance and/or filing and that it has become final pursuant to N.C.G.S. § 95-135(i) and Board Rule .0602. The Board has held that N.C.G.S. § 95-135(i) applies "only in cases of final orders by Hearing Examiners" to give parties an automatic right to an appeal to the Board and that "Orders of an interlocutory nature such as discovery orders are subject to review only if the Board determines a review is appropriate." Brooks v. H. B. Zachry Company, 2 NCOSHD 341, at 349 (RB 1982). Since this discovery order issued by the Hearing Examiner is not considered a final order subject to N.C.G.S. § 95-135(i), the appeal of this discovery order is not subject to the 30 day time limit of N.C.G.S. § 95-135(i) and Board Rule .0602. It is within the discretion of the Chair and the Board to hear the appeal of the discovery order and the Board as part of that discretion determines that this appeal is timely.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's August 8, 1995 Order denying Respondent's discovery request in general but allowing the discovery request for a copy of the investigative file redacted to protect the names of witnesses, in this cause be, and hereby is, **AFFIRMED** in all parts.

This the 15th day of August, 1996.

ROBIN E. HUDSON, CHAIR

KENNETH K. KISER, MEMBER

L. MCKAY WHATLEY, DESIGNATED MEMBER