

STATE OF NORTH CAROLINA
COUNTY OF WAKE

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA

Respondent,

v.

WEEKLEY HOMES, L.P. d/b/a
DAVID WEEKLEY HOMES,

Petitioner.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 02CVS16661

DOCKET NO. OSHANC 99-3806
OSHA INSPECTION NO. 302649405
CSHO ID NO. P2687

ORDER

*Affirmed by Court of Appeals
Petition for Certiorari denied and appeal dismissed*

This matter comes before this Court upon the petition of Weekley Homes, L.P. d/b/a .David Weekley- Homes ("Petitioner") for Judicial Review of this Order of the Safety and Health Review Board of North Carolina ("Review Board"). On December 5, 2000, Administrative Law Judge Ellen R. Gelbin upheld the North Carolina Department of Labor's issuance of a citation to Petitioner pursuant to occupational safety and health standards for Petitioner's failure to "provide for frequent and regular inspections of this job sites, materials, and equipment to be made by competent persons designated by this employer[.]" *see* 29 C.F.R. § 1926.20(b)(2). On November 21, 2002, this Review Board affirmed Judge Gelbin's decision (OSHANC 99-3806). Petitioner then timely filed for judicial review of the Review Board's decision on December 17, 2002.

This Court held a hearing in this matter on September 17, 2003. Present at this hearing were Michael Lord and Robert E. Rader, Jr ., counsel for Petitioners, and Jane Ammons Gilchrist, Assistant Attorney General, counsel for Respondent Commissioner of Labor of the State of North Carolina ("Respondent"). At the hearing, Respondent objected to Petitioner's filing of a Reply Brief in this this matter, and this Court took the objection under advisement. Based on all matters before this Court, Respondent's objection is **OVERRULED**, and the Court notes that the Court has considered Petitioner's Reply Brief as part of the record in this case.

The Court heard argument on the petition for judicial review and has considered the full record in this case, including all briefs filed as to the issues presented and the entire record of proceedings before this Review Board.

Based on the consideration of these matters, this Court makes the following FINDINGS and CONCLUSIONS pursuant to N.C. Gen. Stat. §§ 95-141 and 150B-51:

(1) The proper standard for review of an agency decision is determined by the nature of the error asserted in judicial review. For an asserted error of law or procedure, the review of the Court is *de novo*. *See* N.C. Gen. Stat. § 150B-51(b)(1)-(4), (c). For an asserted error of fact, the review of the Court is the "whole record" test, which requires the Court to examine the entirety of the administrative record to determine whether the agency's decision is supported by substantial evidence (and therefore affirmed) or whether it is arbitrary and capricious (and therefore reversed). *See* N.C. Gen. Stat. § 150B-51(b)(5), (6).

(2) The Review Board's Findings of Fact, Conclusions of law, and Order with respect to its ruling that Petitioner committed a "serious violation" of this standard contained in 29 C.F.R. § 1926.20(b)(2) are supported by competent, material, and substantial evidence, and are not otherwise erroneous.

(3) The Review Board's Findings of Fact, Conclusions of law, and Order with respect to its ruling that Petitioner committed a "serious violation" of the standard contained in 29 C.F.R. § 1926.20(b)(2) are not in excess of the statutory authority or jurisdiction of the Board.

(4) The Review Board's Findings of Fact, Conclusions of law, and Order with respect to its ruling that Petitioner committed a "serious violation" of the standard contained in 29 C.F.R. § 1926.20(b)(2) are not arbitrary or capricious.

(5) The Review Board's Findings of Fact, Conclusions of law, and Order with respect to its ruling that Petitioner committed a "serious violation" of the standard contained in 29 C.F.R. § 1926.20(b)(2) are not in violation of any constitutional provisions, and were not a product of unlawful procedure.

(6) The Review Board's Findings of Fact, Conclusions of law, and Order with respect to its ruling that Petitioner committed a "serious violation" of the standard contained in 29 C.F.R. § 1926.20(b)(2) are not affected by any other error of law. More particularly, our Court of Appeals has approved the doctrine of "multi-employer worksite responsibility" on at least two occasions. *See Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 30-34 (1993) ("If an employer is allowed to 'contract' away his responsibility in providing a safe workplace, the effectiveness of the safety standards employed by the legislative Act would be drastically diminished."); *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 468-69 (1988). The Review Board's exercise of the multi-employer worksite responsibility doctrine in this case based on Petitioner's failure to "provide for frequent and regular inspections of the job sites" (as opposed to the subcontractor's failure to provide fall protection for its employees) was an appropriate legal conclusion based on the undisputed facts presented here.

(7) Because there is no error of law or fact as to the Review Board's Findings of Fact, Conclusions of law, and Order with respect to its ruling that Petitioner committed a "serious violation" of the standard contained in 29 C.F.R. § 1926.20(b)(2), the Order of the Board in this case is upheld.

Based on the foregoing, Petitioners' exceptions as set forth in the petition for judicial review are without merit and are accordingly overruled. IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Order of North Carolina's Safety and Health Review Board in this case is AFFIRMED.

This ORDER was entered out of session with the prior consent of both sides.

This, the 26th of September, 2003.

Ripley E. Rand
Superior Court Judge