

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 05 CVS 16429

2006 JUN 22 A 10:17

WAKE COUNTY, CSC

IN THE MATTER OF AN APPEAL BY)	
REGIONAL CONSTRUCTION AND)	ORDER ON
DESIGN, INC. REGARDING THE)	JUDICIAL REVIEW
NORTH CAROLINA ELECTRICAL)	
CODE)	
)	
)	

THIS CAUSE was duly calendared for hearing on the 22nd day of June, 2006 before the undersigned Judge presiding over Wake County Superior Court upon the Petition for Judicial Review filed herein by Petitioner James E. Long, Commissioner of Insurance of the State of North Carolina; and Petitioner being represented by attorney Daniel S. Johnson of the North Carolina Department of Justice, and Respondents having failed to appear before the Court: and the Court having reviewed the court file and record herein; the Court makes the Findings, Conclusions, and Order as set out herein.

PARTIES

1. Petitioner James E. Long, Commissioner of Insurance of the State of North Carolina, (hereinafter "Petitioner") is the duly elected Commissioner of Insurance of the State of North Carolina, and Petitioner maintains his office in Raleigh, Wake County, North Carolina.
2. Respondent Regional Construction and Design Inc. ("Regional") is a North Carolina Corporation with an office in Mecklenburg County, North Carolina.
3. Respondent Mecklenburg County is a political subdivision of the State of North Carolina with its offices in Mecklenburg County, North Carolina.
4. Under N.C. Gen. Stat. § 143-139, Petitioner has the duty of administration and enforcement of all sections of the North Carolina Building Code including, inter alia, the Electrical Code. Petitioner exercises his enforcement duties in cooperation with local code enforcement officials.
5. Respondent Mecklenburg County operates a local code enforcement department or division known as "Mecklenburg County Code Enforcement."

PROCEDURAL HISTORY

6. On August 15, 2005, Mecklenburg County Code Enforcement denied approval for four items of equipment located in a factory building being built by Respondent Regional in Mecklenburg County, North Carolina.

7. On August 15, 2005, Regional served a written Notice of Appeal of the August 15, 2005 Mecklenburg County Code Enforcement denial decision to the North Carolina Building Code Council (“Building Code Council”) in its judicial or appellate capacity under N.C. Gen. Stat. §143-141(a).

8. On August 25, 2005, Petitioner James E. Long, Commissioner of Insurance, moved to intervene in the Building Code Council appeal proceeding brought by Regional.

9. On September 12, 2005, Regional's appeal of the decision of Mecklenburg County Code enforcement was called for hearing before the Building Code Council.

10. On September 12, 2005, Petitioner's motion to intervene in Regional's appeal before the Building Code Council was granted by the Building Code Council.

11. Testimony was heard and exhibits were introduced by Petitioner and by Respondent Regional before the Building Code Council at the appeal hearing on September 12 and September 13, 2005. The Council made no announcement of the taking any official or judicial notice of any fact under N.C. Gen. Stat. § 150B-41 (d).

12. On October 28, 2005, the North Carolina Building Code Council entered an order in its judicial capacity under N.C. Gen. Stat. §150B-38, et seq. and N.C. Gen. Stat. § 143-141 in the appeal proceeding entitled: “In The Matter Of An Appeal By Regional Construction And Design, Inc. Regarding The North Carolina Electrical Code.” A copy of said Order and agency decision is attached to the Petition for Judicial Review as “Exhibit A.”

13. Said Order and agency decision was served by U.S. Postal Service on October 31, 2005.

14. Petitioner, Commissioner Long, filed this Petition for Judicial Review on November 23, 2005. The Petition seeks judicial review and reversal of the October 28, 2005 Order of the North Carolina Building Code Council.

15. Respondent Mecklenburg County was served on November 25, 2005 and Respondent Regional Construction and Design, Inc. was served on November 28, 2005.

STATUTORY BACKGROUND

16. Under N.C. Gen. Stat. § 143-138(a) the Building Code Council may adopt a North Carolina State Building Code.

17. Pursuant to N.C. Gen. Stat. § 143-138(b): “The North Carolina State Building Code as adopted by the Building Code Council, may include rules governing ... electrical systems ...“

18. Pursuant to N.C. Gen. Stat. § 143-138(c), the Building Code Council is authorized, but not required, to adopt the National Electric Code.

19. The 2005 version of the National Electric Code (“NEC”) was adopted by the Building Code Council, and was in effect at all times pertinent to this proceeding.

20. The Building Code Council has also adopted the “North Carolina Administration and Enforcement Requirements Code.”

21. Under N.C. Gen. Stat. § 143-141, a person may appeal a decision of a building code enforcement official to the Building Code Council.

22. Proceedings on appeal by the Building Code Council are governed by N.C. Gen. Stat. §150B-38 through §150B-42.

23. The Council's decision must be based on the evidence in the record. See N.C. Gen. Stat. §150B-41 and §150B-42.

24. Venue for this judicial review proceeding in Wake County is proper pursuant to N.C. Gen. Stat. § 150B-45 and N.C. Gen. Stat. § 143-141(d).

THE 2005 NEC and THE COUNCIL'S ADMINISTRATION CODE

25. The 2005 version of the National Electric Code was adopted by the Council, and was in effect at all times pertinent to this proceeding.

26. The scope of the applicability of the National Electric Code (NEC) is found in Section 90.2. Section 90.2(A)(1) provides that the code covers the installation of equipment for public and private premises. Section 90.2(A)(3) provides that the code covers the installation of conductors and equipment that connect to the supply of electricity .

27. Section 90.2(A) of the NEC provides, in part:

(A) Covered. **This Code covers the installation of electrical conductors, equipment, and raceways; signaling and communications conductors, equipment, and raceways; and optical fiber cables and raceways for the following:**

- (1) **Public and private premises**, including buildings, structures, mobile homes, recreational vehicles, and floating buildings ...
- (3) **Installations of conductors and equipment that connect to the supply of electricity**

28. Electrical equipment in buildings or connected to the electrical supply is governed by the NEC.

29. The North Carolina Court of Appeals case of Jenkins v. Starrett Corp., 13 N.C. App. 437 (1972) clarifies that NEC coverage of electric equipment does not depend on the equipment being a fixture.

30. Sections 110.2 of The NEC provides: “110.2 Approval. The conductors and equipment required or permitted by this *Code* shall be acceptable only if approved.”

31. Equipment is defined in Section 100 of the NEC as a “general term including material fittings, devices, appliances, luminaries (fixtures), apparatus, and the like used as a part of, or in connection with, an electrical installation.”

32. Utilization equipment is defined by Section 100 of the code as “equipment that utilizes electric energy for electronic, electromechanical, chemical, heating, lighting, or similar purposes.”

33. Section 90.4 of the NEC makes it clear that the Agency Having Jurisdiction (Mecklenburg County Code Enforcement in this case) has the responsibility for approving the equipment. Approved means acceptable to the Authority Having Jurisdiction. See definition of “approved” in NEC Section 100.

34. Section 90.7 of the NEC authorizes examinations for safety made by organizations properly equipped and qualified for experimental testing, inspections of the run of goods at factories, and service-value determination through field inspections. This language is an authorization and endorsement of the “listing” process and of the “labeling” process by expert Nationally Recognized Testing Laboratories.

35. Labeling or labeled is defined in section 100 of the NEC. That definition follows:

Labeled, Equipment or materials to which has been attached a label, symbol or other identifying mark of an organization that is acceptable to the authority having jurisdiction and concerned with product evaluation, that maintains periodic inspection of production of labeled equipment or materials, and by whose labeling the manufacturer indicates compliance with appropriate standards or performance in a specified manner.

36. Listing or listed is likewise defined in section 100 of the NEC. That definition follows:

Listed, Equipment, material, or services included in a list published by an organization that is acceptable to the authority having jurisdiction and concerned with evaluation of products or services. that maintains periodic inspection of production of listed equipment or materials or periodic evaluation of services, and whose listing states that the equipment, material, or services either meets appropriate designated standards or has been tested and found suitable for a specified purpose.

37. Section 110.3 of the NEC provides for the examination, identification, installation, and use of equipment. Section 110.3 of the code applies to equipment as defined in Section 100 of the code. This section of the NEC, together with the language of section 90.7 of the NEC, and the language of section 205.2 of the Administration Code permit the authority having jurisdiction to approve equipment based on either listing or labeling.

38. Under Section 205.2 of the Administration Code, the Code Enforcement Official may require tests, test reports or specific analysis as proof of compliance. Tests or analyzes shall be performed at the expense of the owner or his agent, and by an approved testing laboratory or other approved agency or registered design professional. This code section authorizes code officials to use labeling or listing as approval mechanisms.

39. In North Carolina there are four methods of approval available to the local code enforcement agency. The equipment could be listed, or labeled, or approved by a qualified design professional, such as a licensed engineer. or it can be inspected by the local code authority itself. See NEC Sections 90.4, 90.7, 110.3 and Section 205.2 of the Administration Code.

FINDINGS OF FACT

40. Chief Electrical Inspector Harvell of Mecklenburg wrote to Respondent Regional on August 15, 2005 and informed Regional that the “weaving machine” and three “additional Machines” that had been installed and connected to the electrical system failed and were not approved because they were not “labeled.” This decision should have more properly been phrased as a denial based on failure of the equipment to be approved by the authority having jurisdiction.

41. The four items of equipment that failed were two items of Liba equipment and two items of Mallimo equipment. Each item is electrical equipment that weaves fiberglass thread into fiberglass matting.

42. The uncontradicted evidence at the hearing showed that the equipment at issue uses electricity for an electromechanical purpose and is utilization equipment.

43. The equipment at issue has not been approved. The equipment was not approved because Regional did not produce proof of listing, did not produce proof of labeling; and did not produce proof of Engineer approval.

44. The phrase “listing and labeling” has become a “buzz word” or shorthand phrase among code inspectors that means approval by the local agency having jurisdiction under the four available approval options.

45. Code officials don't often do their own evaluation because they don't have the required expertise and time to do such field testing.

CONCLUSIONS OF LAW

46. Section 110.2 of the NEC as adopted by the Council is a comprehensive requirement that all equipment permitted by the NEC shall be acceptable only if approved.

47. Section 100 of the NEC as adopted by the Council provides that “approved” means accepted by the authority having jurisdiction. Mecklenburg County Code Enforcement is the pertinent authority having jurisdiction with respect to this appeal.

48. Equipment is defined in Section 100 of the NEC as a “general term including material fittings, devices, appliances, luminaries (fixtures), apparatus, and the like used as a part of, or in connection with, an electrical installation.”

49. The language of the above NEC definition of equipment which uses the words “including” and the phrase “and the like” shows that the sample items listed in that definition are not meant to be an all-inclusive list of items that constitute equipment.

50. Utilization equipment is equipment within the broad, non-exclusive general definition of equipment found in the NEC. Both the name “utilization equipment” and the definition of utilization equipment in which “equipment” is the first word show that utilization equipment is equipment. The general and inclusive definition of equipment in the NEC does not logically exclude the category of equipment known as utilization equipment.

51. Utilization equipment is not excluded from the NEC definition of equipment and the definition of “utilization equipment” in Section 100 starts of with the word “equipment.”

52. The mandatory approval requirement of Section 110.2 of the NEC applies to the equipment at issue in this appeal since it is equipment as defined in Section 100 of the NEC.

53. Section 110.3 of the code applies to the equipment at issue since it is equipment as defined in Section 100 of the code. This section of the NEC, together with the language of section 90.7 of the NEC, and the language of section 205.2 of the Administration Code permit the authority having jurisdiction to approve equipment based on either listing or labeling.

54. In North Carolina there are four methods of approval available to the local code enforcement agency. The equipment could be listed, or labeled, or approved by a qualified design professional, such as a licensed engineer, or it can be inspected by the local code authority itself. See NEC Sections 90.4, 90.7, 110.3 and Section 205.2 of the Administration Code.

55. Since the equipment at issue has not been approved by any of the four permissible methods available in North Carolina, Mecklenburg County Code enforcement properly denied approval for the weaving equipment at issue in this appeal. and the Building Code Council should have affirmed the decision of Mecklenburg County Code Enforcement.

56. The Council's October 28, 2005 Order found that the equipment at issue was not “equipment” as defined in. Section 100 of the Electrical Code,

57. The Council's October 28, 2005 Order also found that Section 110.2 of the Electrical Code requiring approval of equipment did not apply to the equipment at issue.

58. The Council erred by failing to accept the uncontradicted evidence presented at the hearing and failing to follow its own rules (the NEC and the Administration Code) when it erroneously found that the utilization equipment at issue is not equipment and is not required by the NEC to be approved by the Authority Having Jurisdiction using one of the four available approval options.

59. The Council's October 28, 2005 Order is affected by error of law and is not supported by substantial, admissible evidence in view of the entire record.

60. Pursuant to N.C. Gen. Stat. §150B-51(b)(4) and §150B-51(b)(5), this Court should reverse the October 28, 2005 Order of the Building Code Council and should reinstate the decision of Mecklenburg County to deny approval for the equipment at issue.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. Section 110.2 of the NEC as adopted by the Council is a comprehensive requirement that all equipment permitted by the NEC shall be acceptable only if approved.

2. Section 100 of the NEC as adopted by the Council provides that “approved” means accepted by the authority having jurisdiction. Mecklenburg County Code Enforcement is the pertinent authority having jurisdiction with respect to this appeal.

3. The equipment at issue in this appeal is utilization equipment and is equipment as that term is defined in Section 100 of the NEC.

4. Since the equipment at issue has not been approved by any of the four permissible methods available in North Carolina, Mecklenburg County Code enforcement properly denied approval for the weaving equipment at issue in this appeal.

5. Finding 5 on page 3 of the Order states: “The Council also takes notice of similar testimony by James Bartl, Mecklenburg County Director of Code Enforcement, prior to the June 10, 2005 Order.” This finding shows that the Building Code Council made use of evidence outside the record of the hearing. The Council’s use of evidence outside the Record violates the statutory requirement that the Order be based on the Record before the Council. See N.C. Gen. Stat. §150B-41 and §150B-42.

Said finding is HEREBY VACATED because it is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat. 150B-51(b)(5).

6. Finding 12 on page 5 of the Order states: “The knitting machines that are the subject of this Order are not a material fitting, a device, an appliance, a luminaire, or an apparatus, and therefore does not fall under the definition of equipment as defined by Section 100 of the Code.”

Said finding is HEREBY VACATED because it is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat. 150B-51(b)(5).

7. Finding 13 on page 5 of the Order states: “Section 110.2 of the Code provides that the conductors and equipment required or permitted by the Code shall be acceptable only if approved. *This section of the Code does not apply to the knitting machines that are the subject of this Order as they are not equipment as defined in Section 100 of the Code.*”

The italicized portion of said finding is HEREBY VACATED because it is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat. 150B-51 (b)(5).

8, Finding 14 on page 5 of the Order states: “Section 110.3 of the Code provides for the examination, identification, installation, and use of equipment. *This section of the Code does not apply to the knitting machines that are the subject of this Order as they are not equipment as defined in Section 100 of the Code*”

The italicized portion of said finding is HEREBY VACATED because it is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat. 150B-51 (b)(5).

9. Conclusion of law 2 on page 5 of the Order states: “There is no comprehensive listing and labeling [sic] requirement that applies to all machinery that is connected to the electrical system within a building.” Said conclusion of law uses the shorthand phrase “listing and labeling” as a substitute for the more accurate terminology of “approved” or the equivalent phrase “acceptable to the authority having jurisdiction” found in NEC Sections 110.2 and 100.

Said conclusion of law is HEREBY VACATED because it is affected by error of law and is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat. 150B-51(b)(4) and N.C. Gen. Stat. 150B-51(b)(5).

10. Conclusion of law 4 on page 6 of the Order states: “The knitting machines [sic] that are the subject of this Order are not equipment as that term is defined in the Code.”

Said conclusion of law is HEREBY VACATED because it is affected by error of law and is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat. 150B-51(b)(4) and N.C. Gen. Stat. 150B-51(b)(5).

11. Conclusion of law 5 on page 6 of the Order states: “The Mecklenburg County Inspection Department's determination that the knitting machines must be listed and labeled [sic] as set out in the August 15 Inspection Report is not supported by the language of the Code.” Said conclusion of law uses the shorthand phrase “listing and labeling” as a substitute for the more accurate terminology of “approved” or the equivalent phrase “acceptable to the authority having jurisdiction” found in NEC Sections 110.2 and 100.

Said conclusion of law is HEREBY VACATED because it is affected by error of law and is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat. 150B-51(b)(4) and N.C. Gen. Stat. 150B-51(b)(5).

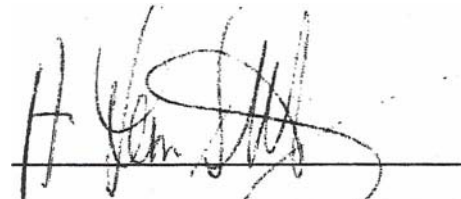
12. The Decree found on page 6 of the Order states: "The determinations of the Mecklenburg County Inspection Department and the North Carolina Department of Insurance that the knitting machines described in paragraph 3 of the findings of fact must be listed and labeled [sic] by a third party certification agency that has been approved by the Council is reversed." Said decree uses the shorthand phrase "listing and labeling" as a substitute for the more accurate terminology of "approved" or the equivalent phrase "acceptable to the authority having jurisdiction" found in NEC Sections 110.2 and 100.

Said decree is HEREBY VACATED because it is affected by error of law and is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat. 150B-51(b)(4) and N.C. Gen. Stat. 150B-51 (b)(5).

13. The Building Code Council erred by failing to accept the uncontradicted evidence presented at the hearing and failing to follow its own enactments and by failing to find that the utilization equipment at issue is required by the NEC to be approved by the Authority Having Jurisdiction using one of the four available approval options.

14. The Building Code Council's October 28, 2005 Order is HEREBY REVERSED because it is affected by error of law and is not supported by substantial, admissible evidence in view of the entire record in violation of N.C. Gen. Stat 150B-51(b)(4) and N.C. Gen. Stat. 150B-51 (b)(5). Accordingly, the decision of Mecklenburg County to deny approval for the equipment at issue is HEREBY REINSTATED as completely as if it had never been reversed by the Building Code Council.

This 22nd day of June, 2006.



JUDGE OF SUPERIOR COURT

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a copy of the foregoing pleading or paper was served on:

Regional Construction and Design, Inc.
c/o Lawrence J. Shaheen, Registered Agent
601 Eagleton Downs Drive, Suite A
Pineville, N.C. 28134

Mecklenburg County
c/o County Manager's Office
Charlotte-Mecklenburg Government Center
600 East Fourth Street, 11 th Floor
Charlotte, N.C. 28202

by depositing a copy thereof in the United States mail, first class postage prepaid, as provided by

Rule 5 of the North Carolina Rules of Civil Procedure.

This 22nd day of June, 2006.

**ROY COOPER
ATTORNEY GENERAL**

By: 

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Special Deputy Attorney General
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