

Tarrant v Department of Bldgs. of the City of N.Y.

2020 NY Slip Op 33820(U)

November 17, 2020

Supreme Court, New York County

Docket Number: 158609/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

PATRICK TARRANT,

Petitioner,

- v -

DEPARTMENT OF BUILDINGS OF THE CITY OF NEW
YORK, ENVIRONMENTAL CONTROL BOARD OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

Respondents.

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INDEX NO. 158609/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Petitioner Patrick Tarrant, a crane operator, brings this Article 78 proceeding to reverse a May 2, 2019 determination of Respondents New York City Department of Buildings (“DOB”), Environmental Control Board/Office of Administrative Trials and Hearings (“OATH”; collectively “Respondents”) which upheld a decision by a hearing officer finding Mr. Tarrant in violation of certain construction site safety codes. The motion has been fully submitted.

Background

On August 27, 2018, DOB Inspector Burbank issued summons #35305915N (the “summons”) to Petitioner for “inadequate safety measures operation of crane/derrick hoisting equipment in an unsafe manner,” stating that while Petitioner was operating the crane, a “guide rope which was tied to the slings of the crane snagged a shore post which [was] caused to fall 11 stories” and crashed through the roof of a car. (NYSCEF Doc No. 1 at ¶¶ 6, 7; see NYSCEF Doc No. 10 [summons].) Inspector Burbank based the summons on information he received from

Inspector Scott, who arrived on scene prior to Inspector Burbank. (NYSCEF Doc No. 19 at 3.) Inspector Scott gleaned information from interviews with witnesses performed onsite.

A hearing took place before hearing officer Albert Ghunney, who imposed a \$10,000.00 penalty on Petitioner for violating Building Code (“BC”) § 3316.2, which states that all hoisting equipment must be operated to eliminate hazard to the public. (NYSCEF Doc No. 15.) Hearing officer Ghunney rejected Petitioner’s arguments that Frank Loppolo was actually operating the crane at the time of the accident, that the ultimate fault lay with the signalman who erroneously gave Petitioner an “all clear” signal while Petitioner was performing a blind lift, and that the shore post’s additional 50 pounds of weight was not sufficiently heavy enough for the load moment indicator (“LMI”) to alert Petitioner to stop the lift.

Petitioner filed an appeal with the OATH Appeals Unit. In affirming hearing officer Ghunney’s decision, the Appeals Unit found that the decision was “not against the weight of the evidence” and that the crane operator, not the signalman, has “overall responsibility for the safe operation of a crane.” (NYSCEF Doc No. 17.)

Petitioner now brings this Article 78 action, arguing that “OATH’s failure to interpret the hearing officer’s decision as finding that [Petitioner] was not operating in the blind is an error, not reasonable and rational and is arbitrary and capricious.” (NYSCEF Doc No. 28 at ¶ 3.) Additionally, Petitioner argues that his own testimony regarding the LMI sensitivity should have been found credible because he is an expert in the field of crane operation, and that the signal person should have been held responsible for his own error.

DISCUSSION

In article 78 proceedings, “the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; ‘the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is ‘substantial

evidence.” “The approach is the same when the issue concerns the exercise of discretion by the administrative tribunal: The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is ‘arbitrary and capricious.’” The arbitrary or capricious test chiefly “relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact.”

(*Pell v Bd. Of Educ.*, 34 NY2d 222, 230-31 [1974] [internal citations omitted].)

The court finds that the Appeals Unit decision upholding the determination of hearing officer Ghunney was based on substantial evidence, rational, and not arbitrary or capricious. Hearing officer Ghunney took the testimony of both Inspectors Burbank and Scott, who inspected the scene of the accident and compiled information based on their personal observations, interviews with multiple witnesses, and photographs. He found their testimony to be more credible than Petitioner’s, who unsuccessfully tried to argue for the first time that he was not operating the crane at the time of the accident, despite having given contradictory testimony beforehand. Further, hearing officer Ghunney stated that Petitioner should have either seen or felt the additional load via the LMI, or seen it occur in real time at or near the 11th floor of the project.

The Appeals Unit found no reason to disturb hearing officer Ghunney’s decision, stating that he was in the best position to determine witness credibility and agreeing that Petitioner, as the crane operator, bore overall responsibility for the crane’s safe operation, not the signalman. (NYSCEF Doc No. 17 at 4.)

The court finds that these decisions were not arbitrary or capricious and were based on substantial evidence. Accordingly, it is hereby

ADJUDGED that the application is denied and the Petition is dismissed, with costs and disbursements to Respondents, as taxed by the Clerk, and that Respondents have execution therefor.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

11/17/20
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE