United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1236 **September Term, 2001**

Filed On: March 15, 2002 [665162]

Cody-Zeigler, Inc.,

Petitioner

v.

Secretary of Labor,

Respondent

On Petition for Review of an Order of the
Occupational Safety and Health Review Commission

Before: GINSBURG, *Chief Judge*, ROGERS and GARLAND, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the Occupational Safety and Health Review Commission and on the briefs filed by the parties. For the reasons given in the attached memorandum, it is

ORDERED AND ADJUDGED that the petition for review should be DENIED.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

MEMORANDUM

Between February, 1998 and January, 2000 the Occupational Safety and Health Administration (OSHA) inspected Cody-Zeigler, Inc., an Ohio construction company, 12 times. According to Cody-Zeigler, there is "not a statistical possibility" that it was randomly selected for inspections this many times. After unsuccessfully challenging before the agency citations it received in five of the inspections, Cody-Zeigler now petitions for review of the following portion of the Occupational Safety and Health Review Commission's decision against it:

> Cody-Zeigler argues that a challenge to OSHA's selection of a particular worksite for inspection is cognizable under section 8(a), but its consent to the inspections in each of these cases makes it unnecessary to address that issue here .... Cody-Zeigler's consent extinguishes any challenge it might otherwise have been able to make here.

Sec'y of Labor v. Cody-Zeigler, Inc., 2001 O.S.H.R.C. No. 9 at 6. Cody-Zeigler also challenges the Commission's decision to affirm denials of its requests for discovery. *Id.*

Cody-Zeigler argues that the Commission: (1) improperly interpreted § 8(a) of the Occupational Health and Safety Act, 29 U.S.C. § 657(a), which mandates that inspections be conducted "within a reasonable manner"; (2) departed from its precedent without providing an adequate explanation; and (3) arbitrarily affirmed the denials of discovery.

Although consent would not have precluded Cody-Zeigler from objecting under § 8(a) to the manner in which the inspections were conducted, *see L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1239 (4th Cir. 1998), we find no fault in the Commission's conclusion that consent precluded Cody-Zeigler from challenging under § 8(a) the manner in which it was selected for inspections. If §

8(a) mirrors the Fourth Amendment to the Constitution of the United States and requires the OSHA to have administrative probable cause to conduct an inspection -- as Cody-Zeigler argues and the Commission assumed -- then the provision should also embody the consent exception well-established in fourth amendment jurisprudence. *See Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991) ("we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so"). Cody-Zeigler presents no reason to think the Congress meant to codify the probable cause requirement of the Fourth Amendment in § 8(a) but not the consent exception.

Cody-Zeigler contends that it could consent only to reasonable searches. *See, e.g., United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 100 (5th Cir. 1992). As the Commission properly concluded, however, the cases Cody-Zeigler cited, including *Harris*, are inapposite because they involved determinations of the scope of consent given in advance of the particular searches being challenged. *See Comm. Dec.* at 4 n.4.

Cody-Zeigler's argument that the Commission deviated from its precedent without adequate explanation also fails. It can point to no case in which the Commission recognized a § 8(a) defense based upon the OSHA's selection of a site to be inspected and the employer had consented to the inspection. Cody-Zeigler principally relies upon *Sec'y of Labor v. L.R. Willson & Sons, Inc.*, 17 O.S.H. Cas. (BNA) 2059 (Rev. Comm'n 1997), but that case is not inconsistent with the decision under review. The Commission in *L.R. Willson* simply stated that although consenting to an inspection does not waive an employer's right to challenge the manner of inspection, the employer could not make out a defense under § 8(a) because the conduct in question -- offsite observation -- was not covered

by that provision. *Id*. at 2061. Nor did the Commission, in *Sec'y of Labor v. Hamilton Fixture*, 16 O.S.H. Cas. 1073 (Rev. Comm'n 1993), consider whether § 8(a) requires the OSHA to have probable cause to inspect a site and if so whether an employer can raise a defense upon that ground even though it consented to the inspection. Finally, the Commission's decision in *Sec'y of Labor v. Adams Steel Erection, Inc.*, 13 O.S.H. Cas. (BNA) 1073 (Rev. Comm'n 1987), supports its conclusion in the order under review that even if § 8(a) constrains the manner in which the OSHA selects a site for inspection, an employer forfeits a § 8(a) defense if it consents to the inspection. The Commission in *Adams Steel* appears to have assumed that the decision to inspect the employer could not have been challenged under § 8(a) because consent had been given; the Commission skipped right to the question whether § 8(a) requires the OSHA "to obtain evidence of any particular sort to support [its] decision to seek a consensual inspection" and concluded that it does not. *Id.* at 1079.

Finally, because the Commission correctly determined that Cody-Zeigler's § 8(a) defense failed as matter of law, there was no reason to allow discovery on this issue.