

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,
Complainant,
vs.

**ORDER GRANTING THE MINNESOTA
DEPARTMENT OF LABOR AND
INDUSTRY'S MOTION FOR
SUMMARY DISPOSITION**

United Parcel Service, Inc.,
Respondent.

This matter came before Administrative Law Judge James E. LaFave upon the motion for summary disposition filed on December 31, 2013, by the Commissioner of the Department of Labor and Industry. The Respondent United Parcel Service filed its opposition on January 15, 2014. The Complainant filed a response brief on January 21, 2014. Oral arguments were heard on March 6, 2014, and the motion record closed on that date.

Jackson Evans, Assistant Attorney General, appeared for the Occupational Safety and Health Division of the Minnesota Department of Labor and Industry (Department). Carla J. Gunnin, Baker Donelson, Bearman, Caldwell & Berkowitz, PC, appeared for the Respondent United Parcel Service (UPS).

STATEMENT OF THE ISSUES

An employer is required to correct a violation for which a citation has been issued. In addition, an employer is required to submit a progress report within 30 days of the citation's abatement date. In January of 2010, UPS was issued citations for failing to maintain an indoor temperature of at least 60 degrees at its distribution centers in Minneapolis and Maple Grove, Minnesota. Those citations became final. In March of 2013, the Department re-inspected the Minneapolis facility and found the indoor temperature was below 60 degrees. The issues presented are:

1. Whether UPS failed to abate its violation of Minn. R. 5205.0110, subp. 3(A) at its Minneapolis distribution center; and
2. Whether UPS failed to submit progress reports regarding the abatement of the violation of Minn. R. 5205.0110, subp. 3(A), at its Minneapolis distribution center?

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that there are no material facts in dispute and that the Department's motion for summary disposition is granted. The citations are affirmed.

Based upon the record and the submissions and arguments of counsel the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Commissioner is responsible for enforcement of Occupational Safety and Health Administration (OSHA) regulations in Minnesota, including Minn. R. 5205.0110, subp. 3. That rule requires employers to keep "indoor workrooms" at a minimum temperature of 60 degrees.¹

2. UPS is an employer engaged in the business of shipping packages.²

3. In January 2010, the Commissioner issued citations to UPS for failure to maintain a 60 degree temperature in the indoor workrooms at its distribution centers at 3312 Broadway Avenue, NE, Minneapolis, MN, and 8601 Valley Forge Lane, Maple Grove, MN.³

4. The UPS timely challenged the citations and a hearing was held before Administrative Law Judge Kathleen Sheehy on March 26, 2012. Judge Sheehy issued an order on June 20, 2012, reversing the citations. The basis for the decision was a determination that Minn. R. 5205.0200, concerning garage ventilation applied to the work areas in question, not Minn. R. 5205.0110, concerning indoor workrooms.⁴

5. The Department appealed Judge Sheehy's order to the Occupational Safety and Health Review Board (Board). The Board determined that, since the two standards considered by Judge Sheehy were not mutually exclusive, both standards applied. The Board reversed Judge Sheehy's order and upheld the original citations on December 20, 2012.⁵ The citations became a final order of the Commissioner on that date.⁶

¹ Minn. R. 5205.0110, subp. 3.

² *Order, Peterson v. UPS, Inc.*, No. 62-CV-13-5652 (D. Minn. Feb. 28, 2014) (order denying Defendant leave to amend answer, granting Plaintiff summary judgment, and enjoining Defendant to maintain minimum temperature of 60 degrees).

³ *Id.*, Aff. Waweru, Exhibit B.

⁴ Aff. Evans, Exhibit B, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, Docket Nos. 3-1901-21382-2 and 3-1901-21383-2 (June 20, 2012).

⁵ Aff. Evans, Exhibit D, Decision, MN OSH Docket No. 10137 and 10138 (Dec. 20, 2012) (Sheehy specifically found that the distribution centers were not "indoor workrooms." The Board implicitly found that they were).

⁶ Respondent's Opposition to Complainant's Summary Disposition Motion, p. 4. (Jan. 15, 2014).

6. UPS sought a stay of enforcement of the citation pending the appeal. The motion for a stay of enforcement was denied on March 4, 2013.⁷

7. UPS attempted but did not perfect an appeal of the Board's order. UPS then filed a writ of certiorari appeal with the Minnesota Court of Appeals on January 18, 2013. The Court of Appeals denied the writ on February 26, 2013 for lack of jurisdiction.⁸ UPS proceeded to file a petition for writ of certiorari with the Minnesota Supreme Court which likewise denied the petition on April 30, 2013.⁹

8. OSHA attempted to re-inspect UPS's Minneapolis distribution center on January 28, 2013. UPS refused to permit the inspection. OSHA obtained a warrant from the Hennepin County District Court and on March 7, 2013, was able to re-inspect UPS's Minneapolis facility with the aid of the Hennepin County Sheriff's Department. OSHA found that temperatures within the facility continued to be below the 60 degree minimum temperature required for an indoor workspace.

9. Based on the results of the March 7, 2013, inspection, OSHA issued a citation to UPS on June 12, 2013, for failure to abate the original citation. A second citation was also issued because UPS never filed progress reports on the abatement as required by Minn. R. 5210.0532.¹⁰

10. UPS timely filed notice of contest of the new citations.¹¹

Based upon the foregoing Findings of Fact, arguments of the parties, and legal research, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 182.661, subd. 3.

2. The Department gave proper notice and has fulfilled all relevant procedural requirements of law or rule.

3. UPS is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. The Department has the burden of establishing the cited violations by a preponderance of the evidence. UPS has the burden of proving the existence of an affirmative defense, if any, by a preponderance of the evidence.¹²

⁷ Aff. Evans, Exhibits D, E, and F.

⁸ Complainant's Exhibit L, *Peterson v UPS, Inc.*, A13-0099 (Minn. Ct. App. 2013) (order dismissing appeal of Board's order).

⁹ Complainant's Exhibit N, *Peterson v UPS, Inc.*, A13-0099 (Minn. 2013) (order denying further review).

¹⁰ Aff. Waweru.

¹¹ *Peterson v. UPS, Inc.*, Answer (Aug. 13, 2013).

¹² Minn. R. 1400.7300, subp. 5.

5. The Commissioner may issue a Failure to Abate (FTA) citation if an employer fails to correct a violation for which a citation has been issued.¹³

6. An FTA citation is established when the Department demonstrates “(1) the original citation has become the final order of the Commission, and (2) the condition or hazard found upon re-inspection is the identical one for which the respondent was originally cited.”¹⁴

7. The citations for failing to keep the temperature of an indoor workspace at a minimum of 60 degrees became final on December 20, 2012. On March 7, 2013, the temperature of UPS’s Minneapolis distribution center was found to be below 60 degrees.

8. The Department established UPS failed to timely abate its violation of Minn. R. 5205.0110 by failing to maintain a temperature of at least 60 degrees in the indoor workspace at its distribution center in Minneapolis.

9. UPS is required to certify to the Commissioner that a cited violation has been abated, including providing progress reports for violations not immediately abated.¹⁵

10. UPS has not submitted any progress reports on abatement. Further, upon re-inspection following the finality of the original citation, the condition for which UPS was cited (not maintaining a workspace temperature of at least 60 degrees) was still present.

11. The Department established UPS failed to submit timely progress reports of its abatement efforts in violation of Minn. R. 5210.0532.

¹³ Minn. Stat. § 182.661, subd. 2.

¹⁴ *Secretary of Labor v. Hercules, Inc.* 20 O.S.H. Case (BNA) 2097 (O.S.H.R.C. Jan. 21, 2005) 2005 WL 224866 ay *2 (examining the similar federal counterpart).

¹⁵ Minn. R. 5210.0532, subp. 2.

ORDER

Because there are no genuine material facts in dispute regarding the failure to abate the citation or the failure to submit progress reports on abatement **IT IS HEREBY ORDERED THAT:**

1. The Department's Motion for Summary Disposition is **GRANTED**.
2. The citations issued to UPS are hereby affirmed.

Dated: May 7, 2014

s/James E. LaFave
JAMES E. LAFAVE
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

This matter is part of an ongoing series of litigation between the Department and UPS. As part of the current case, a motion for summary disposition was filed by the Department and arguments were heard.

Legal Standards

A motion for summary disposition is not specifically addressed in Minn. R. 1400.5100 through 1400.8400. Thus, the Rules of Civil Procedure for the district court for Minnesota are to be applied.¹⁶ The Minnesota Rules of Civil Procedure provide that where there is a showing of no genuine issues as to any material fact and that either party is entitled to judgment as a matter of law a summary judgment motion may be granted.¹⁷ "A genuine issue of material fact exists 'when reasonable persons might draw different conclusions from the evidence presented.'"¹⁸ "[T]o defeat summary

¹⁶ Minn. R. 1400.6600.

¹⁷ Minn. R. Civ. P. 56.03.

¹⁸ *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffen*, 778 N.W.2d 380, 387 (Minn. Ct. App. 2010), citing *DLH Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn.1997).

judgment, there must be evidence sufficient to establish a genuine issue for trial as to the existence of an essential element.”¹⁹

Minnesota law is silent as to the standard to apply regarding a challenge to a failure to abate citation. The Federal Occupational Safety and Health Review Commission used an analysis that will be adopted here. A complainant’s prima facie case of failure to abate is established upon a showing that: “(1) the original citation has become a final order of the Commission, and (2) the condition or hazard found upon re-inspection is the identical one for which respondent was originally cited.”²⁰

“An employer may rebut this prima facie case by showing that the condition was corrected or, if not corrected, that the employer has prevented the exposure of his employees to the violative condition.”²¹ “The prima facie case may also be rebutted by a showing that the condition for which the employer was cited was in fact not violative of the Act either at the time of the original inspection or at the time of re-inspection.”²² The latter “defense is cognizable where the original citation has become a final order of the Commission by operation of law.”²³

Analysis

a. Background

At the heart of the dispute between UPS and the Department is whether certain work spaces at UPS are “indoor workrooms” and therefore must be heated to a minimum temperature of 60 degrees. Following the original citations for failing to maintaining the indoor work temperature at a minimum of 60 degrees in two of its facilities, UPS requested a hearing and successfully challenged the citations. An Administrative Law Judge, following a hearing and inspection of the facilities, determined that the standard for which UPS was cited did not apply to the work spaces in question, and so reversed the citations.

The Department appealed that determination to the Occupational Safety and Health Review Board. The Board reversed the decision of the Administrative Law Judge and determined that the cited standard did apply. UPS then sought a stay of the order pending its appeal. The stay was denied.

UPS’s appeal of the order to the Minnesota Court of Appeals was not perfected due to UPS’s failure to properly serve the petition for the writ on the Board. The Court of Appeals dismissed the matter for lack of jurisdiction. A petition was then filed with the Supreme Court of Minnesota which was also denied.

¹⁹ *Beecroft v. Deutsche Bank Nat. Trust Co.*, 798 N.W.2d 78, 82 (Minn. Ct. App. 2011).

²⁰ *Secretary v. Braswell Motor Freight Lines, Inc.*, 5 OSHC (BNA) ¶ 1469 (O.S.H.R.C. May 19, 1977).

²¹ *Id.*, citing *Secretary v. York Metal Finishing Company*, 7 OSAHRC 845 (1974).

²² *Braswell*, 5 OSHC. (BNA) ¶ 1469 (O.S.H.R.C. May 19, 1977), citing *Secretary v. Franklin Lumber Co., Inc.*, 9 OSAHRC 922 (1974).

²³ *Franklin Lumber Co., Inc.*, 9 OSAHRC 922 (O.S.H.R.C. 1974).

During the time appeals were attempted, the Department conducted a follow-up inspection on UPS's Minneapolis facility. Judicial intervention was required to complete the re-inspection. When the re-inspection was completed, the Department found the facilities were still below the minimum required temperature of 60 degrees and two new citations were issued for the Minneapolis facility. One was for a failure to abate the original citation. The other was for a failure to submit required progress reports on the abatement process. It is these two citations that are being challenged.

Additionally, it must be noted, that the Department initiated a separate action on the underlying citations in the Ramsey County District Court. In that proceeding the Department sought an injunction requiring UPS to maintain a minimum temperature of 60 degrees in its facilities. The Court granted this injunction on February 28, 2014.

b. UPS's position

UPS makes two arguments in opposition to the Department's Motion for Summary Disposition. First, the violation of Minn. R. 5205.0110, subp. 3, was not continual in nature and therefore cannot be the subject of an FTA citation. And second, that there are genuine issues of material fact which preclude granting the motion. As discussed below, neither argument is persuasive.

To establish a FTA citation the Department must demonstrate "(1) the original citation has become the final order of the Commission, and (2) the condition or hazard found upon re-inspection is the identical one for which the respondent was originally cited."²⁴

UPS concedes the original citations are final. The fact that upon re-inspection the Commissioner found the temperature still too low is also not in dispute. Rather, UPS argues that the Commissioner has not shown the originally cited violation was continuous. However, the burden of proof is on UPS to present, by a preponderance of evidence, this affirmative defense. In *Braswell* the employer had shown efforts to abate the violation for which it had been cited. UPS has not made such a showing in the present case and has not successfully rebutted the the Department's prima facie case.

Next UPS argues that there are at least six material facts in dispute that preclude summary disposition in this case. They are:

- (1) What constitutes an "indoor workroom";
- (2) Whether there were any health affects to employees related to the temperatures at the Respondent's facilities;
- (3) Whether the Respondent can feasibly comply with the standard (Minn. R. 5201.0110, subp. 3);

²⁴ *Secretary of Labor v. Hercules, Inc.* 20 O.S.H. Case (BNA) 2097 (O.S.H.R.C. Jan. 21, 2005) 2005 WL 224866 ay *2 (examining the similar federal counterpart).

- (4) Whether there exists an alternative means to comply with the standard;
- (5) Whether the cited rule is sufficiently clear to provide the Respondent with clear notice of the requirements for compliance; and
- (6) Whether the Respondent's operations are exempted from compliance with the standard?

All six of these purported issues of material fact concern the original citation, not the citations at issue in this proceeding. All six claims waived as a result of UPS's failure to timely appeal the final decision of the Board.²⁵ Further, none raise genuine issues of material fact concerning the failure to abate or failure to submit progress reports on abatement.

Conclusion

There are no disputed facts regarding the failure to abate and the related issue, of the failure to submit a progress report. The basis of UPS's defense is its vehement objection to the original citation which it was required to abate.

The original citation for failure to maintain the minimum temperature in UPS's facility, however, became a final order of the Commissioner following litigation. Borrowing an analysis used by the Federal Occupational Safety and Health Review Commission, the material facts of this case are clear and plain. The violation had not been corrected when the facility was re-inspected over two months following the final order. UPS has offered nothing to demonstrate that it corrected the violation. Given the lack of disputed material facts concerning the challenged abatement citations, the Department's motion must be granted and the citations affirmed.

J. E. L.

²⁵ *Spearman v. Salminen*, 379 N.W.2d 627 (Minn. Ct. App. 1986).