

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

Ken B. Peterson, Commissioner of the
Minnesota Department of Labor and Industry

v.

West Central Turkeys, LLC.

**ORDER ON MOTION
FOR SUMMARY DISPOSITION
(FIFTH PREHEARING ORDER)**

This matter came before Administrative Law Judge Eric L. Lipman on March 17, 2015, for an oral argument on the Respondent's Motion for Summary Disposition.

Lindsay K. Strauss, Assistant Attorney General, appeared on behalf of Minnesota Department of Labor and Industry. Dean F. Kelley and Colton D. Long, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., appeared on behalf of the Respondent, West Central Turkeys, LLC (WCT).

WCT asserts that it is entitled to judgment as a matter of law because it fully satisfied the workplace safety standards of Minn. R. 5207.0310 (2013). It maintains that that in this case there are no genuinely disputed issues of material fact that require an evidentiary hearing to resolve.

Based upon the submissions of the parties and the hearing record:

IT IS HEREBY ORDERED THAT:

1. The Respondent's Motion for Summary Disposition is **DENIED**.
2. Counsel shall confer with each other and the tribunal as to whether adjusting the current case milestones and the dates for the evidentiary hearing would be useful and convenient to the parties.

Dated: April 27, 2015

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Factual Background

WCT owns and operates a 305,000 square-foot processing facility in Pelican Rapids, Minnesota. The facility is engaged in large-scale operations in the processing, packaging and shipping of turkey products.¹

Within the facility is a series of refrigerated coolers that are used to take cooked turkey meat down to temperatures at which it can be safely stored and shipped in interstate commerce. The coolers are 9 feet wide and 24 feet long, and because of their particular use in WCT's operations they are colloquially referred to as the "take-down coolers." The work area outside of this suite of coolers, including the hallway connecting them, is approximately 800 to 1000 square feet.²

WCT contracted with Commercial Contractors Company of Melrose, Incorporated (CCC) to demolish, remove and re-pour the concrete floors in the take-down coolers. As part of its construction work, CCC planned to use gas-powered concrete saws to cut the concrete slabs of the cooler floors. When in use, these saws emit carbon monoxide.³

Both state and federal law oblige employers to monitor workplace levels of carbon monoxide whenever internal combustion engines discharge engine exhaust indoors. Minn. R. 5207.0310 provides:

The employer shall monitor environmental exposure of employees to carbon monoxide whenever internal combustion engines discharge engine exhaust gases indoors or unvented space heaters are operated indoors to ensure that carbon monoxide levels do not exceed those given in Code of Federal Regulations, title 29, section 1926.55, Appendix A. The air monitoring shall be done during initial operation and at least quarterly thereafter and during a period representing highest usage in areas where carbon monoxide exposure is most likely.⁴

According to the terms of 29 C.F.R. § 1926.55 (2014), Appendix A, the Permissible Exposure Limit (PEL) to carbon monoxide is 50 parts per million (ppm) over an 8-hour time weighted average (TWA).⁵

Prior to beginning CCC's work on February 23, 2013, Gerald Garvick, CCC's foreman, telephoned Mark Sikkink, WCT's Manager of Plant Engineering. Mr. Garvick told Mr. Sikkink that CCC did not have its four-gas meter available for the construction work at WCT's facility. CCC's meter was in use at another worksite. Four-gas meters

¹ AFFIDAVIT OF JAMIE TEBERG at ¶¶ 5 – 6 and 9.

² TEBERG AFF. at ¶¶ 12 - 14.

³ AFF. OF MIKE GALLMEIER at ¶ 3; TEBERG AFF. at ¶ 17.

⁴ Minn. R. 5207.0310 (2013); 29 C.F.R. § 1926.55, Appendix A (2014).

⁵ 29 C.F.R. § 1926.55, Appendix A.

are routinely used by construction companies to detect a series of harmful gases, including carbon monoxide.⁶

Mr. Sikkink informed Mr. Garvick that WCT had a four-gas meter that CCC could use to perform air monitoring during the construction work at the facility. WCT's four-gas meter had a pre-set alarm that would sound off any time that it detected the level of carbon monoxide reached or exceeded 25 ppm.⁷

On February 23, 2013, Jamie Teberg served as WCT's Maintenance Supervisor at the Pelican Rapids facility. Among his duties was ensuring that WCT's turkey meat processing, packaging and shipping equipment was operating properly.⁸

Immediately after CCC began work on that morning, Mr. Teberg entered the take-down cooler area. Using WCT's four-gas meter, he tested the carbon monoxide levels. At one point during CCC's initial operations, the alarm on the meter sounded off and registered a carbon monoxide concentration of 25 ppm.⁹

Mr. Teberg discussed the situation with Mr. Garvick. Mr. Teberg told him that WCT had a confined space fan with 10-inch tubes that could be used by CCC to blow fresh air into the take down cooler area so as to reduce carbon monoxide levels. Mr. Garvick accepted the offer and used the fan to blow fresh air into the work area.¹⁰

Before leaving the cooler area to perform work in another section of the WCT facility, Mr. Teberg provided Mr. Garvick with the meter to continue monitoring.¹¹

Later, Mr. Teberg returned to the cooler area. At this time, CCC employees were using two gas-powered concrete saws and a diesel powered mini-hoe to remove concrete. Mr. Teberg again used WCT's meter to test the levels of carbon monoxide in the area. As before, after completing the tests, Mr. Teberg gave the WCT meter to Mr. Garvick before exiting the work area.¹²

Approximately 30 minutes later, Mr. Teberg returned to the cooler area and took a series of carbon monoxide readings with the WCT meter. CCC was still using two gas powered saws and a diesel powered mini-hoe to break sections of concrete. The carbon monoxide levels during this set of tests were "well above 50 ppm."¹³

As a result, Mr. Teberg did not leave the area, but instead discussed the situation with Mr. Garvick. The two agreed that CCC should only use one gas-powered saw,

⁶ AFF. OF GERALD GARVICK, at ¶¶ 8 and 21.

⁷ TEBERG AFF. at ¶ 27; GARVICK AFF. at ¶ 46.

⁸ TEBERG AFF. at ¶¶ 2 and 4.

⁹ TEBERG AFF. at ¶¶ 24 and 28; GARVICK AFF. at ¶ 13.

¹⁰ TEBERG AFF. at ¶ 29; GARVICK AFF. at ¶ 13.

¹¹ TEBERG AFF. at ¶ 31; GARVICK AFF. at ¶¶ 14 and 42 - 43.

¹² TEBERG AFF. at ¶ 32; GARVICK AFF. at ¶¶ 42 - 43.

¹³ TEBERG AFF. at ¶ 34; GARVICK AFF. at ¶ 15.

instead of two, so as to reduce the carbon monoxide levels in the take-down cooler area. Additionally, they agreed that it would be best for the CCC employees to go on break, outside, until the carbon monoxide levels in the cooler areas were lower.¹⁴

Following the return of the CCC construction crew to the cooler area at the end of this break, the crew used a single gas-powered saw and the diesel mini-hoe to break up the concrete.¹⁵

The carbon monoxide levels that were recorded during this period are in dispute. The Department's investigator, Ronald Wallace, maintains that Mr. Teberg admitted to obtaining several carbon monoxide levels that were in excess of 190 ppm while CCC's work was underway. Additionally, Mr. Wallace maintains that Mr. Teberg shared readings that were in excess of 100 ppm with CCC employee Andy Hogland. Mr. Wallace alleges in his affidavit that, during an interview with Mr. Teberg, Teberg asserted that an employee could safely work in area with a concentration of 100 ppm of carbon dioxide for a period of 12 hours, without suffering adverse effects.¹⁶

Mr. Teberg again left the work area to attend to matters in another part of the facility. As before, he left the WCT four-gas meter with Mr. Garvick to continue monitoring carbon monoxide levels.¹⁷

The hearing record is not clear how attentive Mr. Garvick or others on the CCC crew were to carbon monoxide monitoring. Shortly after Mr. Teberg left on this particular occasion, Mr. Garvick began assisting the CCC crew by operating the diesel powered mini-hoe while other CCC workers used jack hammers to split the concrete floor.¹⁸

Within 15 minutes of Mr. Teberg's departure, Mr. Hoglund, who was disposing of rubble in the cooler behind where Mr. Garvick was operating the mini-hoe, became dizzy and started to hyperventilate. Mr. Hoglund was given oxygen and transported by ambulance from the WCT facility to Lakes Region Healthcare. While at Lakes Region Healthcare, Mr. Hoglund was treated for carbon monoxide poisoning.¹⁹

Mr. Teberg took a reading of the carbon monoxide levels in the take down cooler area after Mr. Hogland was overcome and received results of 1000 ppm – the maximum reading that was obtainable by the WCT meter.²⁰

Laboratory results from Lakes Region Healthcare showed that Mr. Hoglund's blood "exhibited a carboxyhemoglobin (COHb) level of 12.7%." Based upon these

¹⁴ TEBERG AFF. at ¶¶ 34 - 35; GARVICK AFF. at ¶ 15.

¹⁵ TEBERG AFF. at ¶ 36.

¹⁶ AFF. OF RON WALLACE, at ¶¶ 8 and 11.

¹⁷ TEBERG AFF. at ¶ 37; GARVICK AFF. at ¶¶ 42 - 43.

¹⁸ GARVICK AFF. at ¶¶ 43 - 44.

¹⁹ GARVICK AFF. at ¶¶ 17 – 19; WALLACE AFF., APPENDIX A, at 4 and 10.

²⁰ WALLACE AFF. at ¶¶ 8 and 11.

results, MN-OSHA officials estimate that Mr. Hoglund was exposed to a concentration of 400 ppm of carbon monoxide at the time that he became ill.²¹

The Department's Occupation Health and Safety Division issued citations to CCC and WCT for claimed violations of Minn. R. 5207.0310.²²

Legal Analysis

Summary disposition is the administrative equivalent of summary judgment.²³ Summary disposition is appropriate when there is no genuine dispute as to the material facts of a contested case and one party necessarily prevails when the law is applied to those undisputed facts.²⁴

The moving party – in this case, WCT – carries the burden of proof and persuasion to establish that there are no genuine issues of material fact which would preclude disposition of the case as a matter of law.²⁵ When considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the non-moving party – in this case, the Department.²⁶

WCT makes three key claims in support of its motion. WCT maintains that: (a) it was under no legal duty to abate carbon monoxide levels while CCC was undertaking work;²⁷ (b) by monitoring carbon monoxide levels, it fulfilled the legal duty it had under Minn. R. 5207.0310;²⁸ and (c) it did not have constructive knowledge that carbon monoxide levels were beyond the permissible exposure limits.²⁹

In the view of the Administrative Law Judge, none of these contentions is well-taken or obviates the need for a later evidentiary hearing.

With respect to first claim, namely that WCT had no legal duty to abate carbon monoxide levels that occurred at its facility while CCC was operating gas-emitting power tools, Minnesota's Occupational Safety and Health Act (Act) suggests otherwise. The Act includes very expansive definitions of both "employer" and "employee." Under the Act, an employer is "a person who employs one or more employees and includes any person who ... acts in the interest of, or as a representative of, an employer"³⁰

²¹ WALLACE AFF. APPENDIX A, at 4, 10.

²² AFF. OF DEAN KELLEY, EX. H.

²³ See *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

²⁴ See *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988).

²⁵ See *Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

²⁶ See *id.*; *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

²⁷ RESPONDENT'S MEMORANDUM OF LAW, at 12 - 18.

²⁸ *Id.*

²⁹ *Id.* at 18 – 20.

³⁰ Minn. Stat. § 182.651, subd. 7 (2014).

Similarly, an employee is “any person suffered or permitted to work by an employer, including any person acting directly or indirectly in the interest of or as a representative of, an employer”³¹ These expansive terms reflect the Minnesota Legislature’s broad remedial purpose “to assure so far as possible every worker in the state of Minnesota safe and healthful working conditions and to preserve our human resources”³²

Because Minn. R. 5207.0310 places duties upon “employers” to “monitor environmental exposure of employees to carbon monoxide whenever internal combustion engines discharge engine exhaust gases indoors,” WCT had a duty to complete these activities. WCT was an “employer” and Mr. Hoglund was “suffered or permitted to work by an employer” within the meaning of those terms. A direct employer-employee relationship between WCT and Hoglund was not required before WCT had a duty to prevent “worker exposure to dangerous air contamination”³³

Likewise true, WCT’s duty towards Hoglund, and others, was not discharged by operating a carbon monoxide meter while gas-emitting tools were being used. Instead, employers are obliged to “monitor environmental exposure of employees to carbon monoxide whenever internal combustion engines discharge engine exhaust gases indoors ... to ensure that carbon monoxide levels do not exceed those given in Code of Federal Regulations, title 29, section 1926.55, Appendix A.” Whether WCT deployed sufficient monitors, and in ways that were needed so as to ensure that the permissible exposure limits were not breached, is a disputed issue of material fact.

Lastly, viewing the facts in the hearing record in a way that is most favorable to the Department, it is genuinely disputed whether WCT had constructive knowledge of the exposure limit violation. Mr. Teberg acknowledges that he heard the gas-meter alarm sound on one occasion, and recorded carbon monoxide concentrations of 50 ppm on another, before Mr. Hoglund became ill. When these facts are combined with Mr. Wallace’s later averments, attributing to Mr. Teberg the view that much larger concentrations of carbon monoxide can be safely endured by workers, there are material factual issues to be resolved at trial. What Mr. Teberg said, did and believed about the concentrations of carbon monoxide on February 23, 2013 are all genuine issues of material fact.

On this record, WCT is not entitled to disposition as a matter of law.

E. L. L.

³¹ Minn. Stat. § 182.651, subd. 9 (2014).

³² Minn. Stat. § 182.65, subd. 2(b) (2014); *see also*, *Sec’y of Labor v. Telsi*, 23 O.S.H. 1644 at 3 (O.S.H.R.C. 2011) (Under the multi-employer work site doctrine “an employer who exercised sufficient control over the work site to prevent or detect hazards is liable for those conditions as a controlling employer”).

³³ Minn. Stat. § 182.651, subsd. 7, 9; Minn. R. 5207.0300, subp. 1; .0310 (2013).