

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

**ELEVENTH
PREHEARING ORDER**

v.

Rachel Contracting, Incorporated

This matter came before Administrative Law Judge Eric L. Lipman upon Respondent's Motion *in Limine* to exclude the testimony of Richard E. Markiewicz, Jr.

Lindsay K. Strauss, Assistant Attorney General, appeared on behalf of the Commissioner of the Minnesota Department of Labor and Industry (the Department). Mark A. Lies, II and Kerry M. Mohan, Seyfath Shaw, LLP, appeared on behalf of the Respondent, Rachel Contracting, Incorporated (Rachel Contracting).

Rachel Contracting maintained that permitting the testimony of Mr. Markiewicz, the Director of the Department's Safety Management Division, would be inappropriate and prejudicial because Mr. Markiewicz disposed of the handwritten notes of his site investigation.

On September 10, 18 and 19, 2013, Mr. Markiewicz visited the Rachel Contracting worksite in St. Paul, Minnesota, and during these visits examined the worksite, interviewed Rachel Contracting employees and made handwritten field notes of matters that he learned. Mr. Markiewicz maintains that he adhered to the instruction of the Department's policy manual – specifically, that “[t]he contents of field notes shall be entered into the [Minnesota OSHA Operations Systems Exchange] system as appropriate” and “shredded after final review of a case file.”¹ Mr. Marckiewicz's handwritten notes were destroyed and are not available for review.

Rachel Contracting asserts that because the handwritten notes are not available, it cannot effectively cross-examine witnesses at the evidentiary hearing or obtain information that is helpful to its defense.

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

¹ See, AFFIDAVIT OF RICK MARKIEWICZ at ¶¶ 6-7 and Exhibit 2 (April 15, 2015).

IT IS HEREBY ORDERED:

The Respondent's Motion *in Limine* is **DENIED**.

Dated: May 18, 2015

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

It is important to note that many of Rachel Contracting's concerns regarding an opportunity to prepare for trial have been addressed by the recent disclosure of investigative data. Rachel Contracting has received an unredacted version of Mr. Markiewicz's report, the audio recordings of the interviews that Mr. Markiewicz made at the worksite and copies of the "Tennessee warnings"² signed by each of the employees who were interviewed.³

Against this set of disclosures, the unavailability of Mr. Markiewicz's handwritten notes is far less important. Not having these items is not an occasion to bar Mr. Markiewicz from offering testimony at the hearing. Rachel Contracting can effectively and thoroughly explore any infirmities in the investigation report by comparing it to the audio recordings, the testimony of its own employees and what its management knows about the worksite.⁴ Significantly, Rachel Contracting is not a stranger to either those who participated in the interviews or the site where the demolition took place.

Because Rachel Contracting is not disadvantaged in its preparations for trial, excluding Mr. Markiewicz's testimony is not appropriate. The motion *in limine* must be denied.

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² The notice that an agency is required to provide an individual asked to supply private data concerning the individual is commonly referred to as a "Tennessee warning." *Manson v. State, Dep't of Employee Relations*, 613 N.W.2d 778, 780 n.1 (Minn. Ct. App. 2000).

³ See SEVENTH PREHEARING ORDER at ¶ 3 (May 1, 2015).

⁴ See generally, *United States v. Kuykendall*, 633 F.2d 118, 120 (8th Cir. 1980) (destruction of interview notes was not a basis for dismissal where a "formal report" and tape recording of the three-hour meeting was available for review); *United States v. Mechanic*, 454 F.2d 849, 856-57 (8th Cir. 1971) (striking witness testimony was not appropriate result where "it appears the notes were destroyed in good faith in the course of normal procedure and only after they had been substantially incorporated into the typed summaries which were produced").