

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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

Complainant,

v.

Minnesota's Builder, Inc.,

Respondent.

**ORDER ON MOTION FOR
PARTIAL SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Ann C. O'Reilly upon the Department's Motion for Partial Summary Disposition.

Jonathan D. Moler, Assistant Attorney General, appeared on behalf of Ken B. Peterson, Commissioner, Minnesota Department of Labor and Industry (Department). Kevin Kunnari, owner and sole shareholder of Minnesota's Builder, Inc., appeared on behalf of the Respondent Minnesota's Builder, Inc. (Respondent or Minnesota's Builder), and without legal counsel.

On August 21, 2015, the Department served and filed a Motion for Partial Summary Disposition. Respondent failed to respond to the Motion and the Motion record closed on September 8, 2015, at the closing of the responsive briefing period.¹

In its Motion, the Department asserts that it is entitled to partial summary disposition on its claim that the Minnesota's Occupational Safety and Health Act extends to unpaid family members who perform work on construction sites in the same way that it does to wage employees. On this question, the Department maintains that there are no disputed issues of material fact which require an evidentiary hearing to resolve.

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

IT IS HEREBY ORDERED THAT:

1. The Motion for Partial Summary Disposition is **GRANTED**.
2. Counsel shall confer with each other and the tribunal as to whether the current case milestones and the dates for the evidentiary hearing are still useful and convenient to the parties.

¹ See generally, Minn. R. 1400.6600 (2015).

3. The parties are encouraged to consider mediation in this case. The deadline to complete mediation is hereby extended to **November 16, 2015**.

Dated: October 16, 2015

s/Ann C. O'Reilly

ANN C. O'REILLY
Administrative Law Judge

MEMORANDUM

Factual Background

The Kunnari family (the Kunnaris) operates a farm market at which agricultural products are regularly sold to the public. The site of the market is 1303 - 8th Street South, Virginia, Minnesota.²

In addition to his role with the family's farm market operation, Kevin Kunnari, is also the owner and sole shareholder of Minnesota's Builder, Inc., a construction and remodeling business in Gilbert, Minnesota.³

On June 5, 2014, the Kunnaris obtained a building permit for construction of a 5,040 foot structure that would host a restaurant and retail outlet at the farm market site. The permit listed Minnesota's Builder as the construction contractor for the site.⁴

In July 2014, members of the Kunnari family began work building the structure at the market site.⁵ On July 21, 2014, while this work was underway, an inspector from the Department's Occupational Safety and Health Administration (MnOSHA) conducted a workplace safety review of the site.⁶

Following the review, the inspector concluded that conditions at the site violated several workplace safety laws and issued six citations.⁷ The citations asserted that:

Citation 1, Item 1: Minnesota's Builder did not have a Workplace Accident and Injury Reduction (AWAIR) Program in place, in violation of Minn. Stat. § 182.653, subd. 8 (2014);

² AFFIDAVIT OF JONATHAN D. MOLER, at Exhibit D (August 21, 2015) (Moler Aff).

³ *Id.* at Exs. D and F.

⁴ *Id.* at Ex. G and Ex. H at 3.

⁵ *Id.* at Ex. H at 3.

⁶ *Id.*

⁷ *Id.* at Ex. C.

Citation 1, Item 2: Minnesota Builder's workers did not wear protective helmets while overhead work was underway, in violation of 29 C.F.R. § 1926.100(a) (2015);

Citation 1, Item 3: Protective "fall arrest" or guardrail systems were not in place, in violation of 29 C.F.R. § 1926.501(b)(15) (2015);

Citation 1, Item 4: Minnesota's Builder did not have a training program to minimize hazards, in violation of 29 C.F.R. § 1926.503(a)(1)(2) (2015);

Citation 1, Item 5: A portable ladder on the site was not adequately secured during use, in violation of 29 C.F.R. § 1926.1053(b)(1) (2015); and

Citation 1, Item 6: Fall-arrest systems were not in use during work on an elevated platform, in violation of Minn. R. 5207.1100 (2015).⁸

On August 28, 2014, Mr. Kunnari filed a Notice of Contest in which he disclaimed MnOSHA's authority to issue citations in a circumstance such as this case. Mr. Kunnari asserted the following affirmative defense(s):

The authority and jurisdiction of the Minnesota Occupational Safety and Health Division is derived from Minnesota Statutes, Chapter 182 which gives it the ability to promulgate and enforce mandatory occupational safety and health standards applicable to employers and employees in the state of Minnesota. Consequently, it is my understanding that all proposed Minnesota OSHA citations and penalties only apply in instances where an employer/employee relationship exists. I, Kevin D. Kunnari am the owner of Minnesota's Builder and do not have any employees – I am also part owner of the inspection site (Kunnari's, Inc.) where the alleged violations allegedly occurred. The site is home to the Kunnari family farmer's market. The project is a family project. The work is being performed by Kunnari family members. Some of the family members are owners of the inspection site, and other family members have donated their time to the project. Therefore, none of these individuals are employees of Minnesota's Builder and Minnesota's Builder is not their employer. As such, no employer/employee relationship exists on this inspection site in regards to Minnesota's Builders. In conclusion, even if the alleged violations were proved; it is also my understanding that under these circumstances Minnesota OSHA does not have the authority to impose the proposed Citations and Penalties on Minnesota's Builder.⁹

⁸ *Id.*

⁹ *Id.* at Ex. D.

On August 24, 2015, the Department sought partial summary disposition on its claim that Minnesota's workplace safety laws apply to the construction work occurring at the family-owned market site; even if construction-related tasks were completed by unpaid members of the Kunnari family. Neither Mr. Kunnari, nor Minnesota's Builder, submitted a response to the Department's Motion.

Legal Analysis

Summary disposition is the administrative equivalent of summary judgment.¹⁰ 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.¹¹

The moving party – in this case, the Department – 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.¹² 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, Minnesota's Builder.¹³

With respect to Minnesota's Builder's key defense, namely that it had no legal duty to provide workplace protections for family members of Mr. Kunnari who performed work at the site for no pay, Minnesota's Occupational Safety and Health Act (Act) provides the contrary. 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"¹⁴ 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"¹⁵ The payment of wages is not a factor in determining whether a party is an employer or employee under these definitions. Consequently, Minnesota's Builder is an "employer" and members of the Kunnari family were "permitted to work" by it, within the meaning of those terms.

The expansive definitions of "employer" and "employee" 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

¹⁰ See *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

¹¹ 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).

¹² See *Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

¹³ See *id.*; *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

¹⁴ Minn. Stat. § 182.651, subd. 7 (2014).

¹⁵ Minn. Stat. § 182.651, subd. 9 (2014).

resources”¹⁶ An exchange of wages was not required before Minnesota’s Builder had a duty to prevent members of the Kunnari family from being exposed to workplace hazards at the construction site.¹⁷

Likewise important, while members of the Kunnari family were presumably performing construction work to improve their own property, the farm market site is not a private residence. It is a “place of employment” as those terms are used in the Act. The provisions of the Act cover construction activities at commercial sites within Minnesota, including a family-owned market.¹⁸

On this record, the Department is entitled to partial summary disposition.

A. C. O.

¹⁶ Minn. Stat. § 182.65, subd. 2(b) (2014); *accord*, *Ken B. Peterson, Commissioner of the Minnesota Department of Labor and Industry v. West Central Turkeys, LLC.*, 2015 WL 3372489, at *4 (April 27, 2015) (unpublished).

¹⁷ See Minn. Stat. § 182.651, subds. 7, 9; *see also*, Minn. R. 5205.0015 (2015) (providing that the provisions of Minn. R. Chapters 5206, 5207, 5208 and 5210 (2015) apply to “construction locations”).

¹⁸ Minn. Stat. § 182.652, subds. 1, 2 (2014) (“The provisions of this chapter or any standard or rule promulgated pursuant to this chapter *shall apply to all places of employment within this state* except ... any working conditions which are under the exclusive jurisdiction of the federal government”) (emphasis added); *see also*, *In Re Clauson*, 5 O.S.H. Cas. (BNA) ¶ 1760 (O.S.H.R.C.A.L.J. Mar. 17, 1977) (“The reason for excluding no employee, either by exemption or limitation on coverage, lies in the most fundamental of social purposes of this legislation which is to protect the lives and health of human beings in the context of their employment. Compliance with safety regulations is required by members of respondent’s family when engaged in construction activities on his behalf.”).