

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

**ORDER ON
MOTION TO DISMISS
(THIRD PREHEARING ORDER)**

v.

Bio Company, d/b/a/ Bio Corporation

This matter came before Administrative Law Judge Eric L. Lipman upon receipt of Bio Company's Motion to Dismiss. Following receipt of the Department's response, the record on the Motion to Dismiss closed on February 16, 2016.

Rachel E. Bell, Assistant Attorney General, appeared on behalf of the Complainant, the Commissioner of the Minnesota Department of Labor and Industry (the Department). Bennie D. Hedstrom and William Wadd, Owners, appeared on behalf of the Respondent, Bio Company (BC).

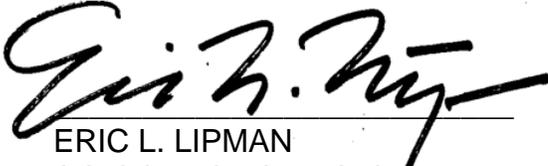
BC asserts that it is entitled to judgment as a matter of law because it fully complied with the applicable safety rules and the injury to its employee on June 2, 2015, was the result of the employee's workplace misconduct.

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

IT IS HEREBY ORDERED THAT:

1. BC's Motion to Dismiss is **DENIED**.
2. The schedule of proceedings set forth in the First Prehearing Order is unchanged.

Dated: March 10, 2016


ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Legal Standards

While BC stylizes its motion as a Motion to Dismiss the Complaint, it includes with its papers a declaration from the injured employee, David Dunlap. If matters outside of the Complaint are submitted, the tribunal may consider these materials by converting the motion to dismiss into one for summary disposition.¹

Summary disposition is the administrative equivalent of summary judgment.² 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.³

The moving party – in this case, BC – carries the burden of proof and persuasion to establish that there are no genuine issues of material fact which would prevent disposition of the case as a matter of law.⁴ 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.⁵

Factual Background

Respondent BC specializes in supplying schools with animal specimens, dissection equipment and anatomical models, among other educational materials.⁶

As part of its operations, BC uses small pieces of carp to feed turtles that are raised at its Alexandria, Minnesota, facility.⁷

BC employees operate a Hollymatic, Hi Yield 16 vertical band saw to cut carp. The fish are typically frozen solid when they are handled by BC employees.⁸

The process of cutting carp into small pieces is relatively regimented. First, a carp is held vertically and guided head-first into the vertical band saw, which cuts the carp down its center and along its spine. This first cut stops just before the carp's tail, so that the carp remains partially intact. Then, the carp is turned on its side and sliced horizontally several times along different parts of its body, starting at its head and

¹ See generally *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490-91 (Minn. 2004).

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

³ 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).

⁴ See *Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

⁵ See *id.*; *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁶ Affidavit of Royce Overland, Exhibit 1 (Ex.) at DLI 3.

⁷ Ex. 1 at DLI 2-4.

⁸ *Id.*; Ex. 2.

continuing towards its tail. Finally, the carp is turned and placed perpendicular to the saw blade. In this position, the last cuts are made, across and completely through the length of the fish's body. After this series of cuts, only cube-shaped pieces of the carp remain. The small, cube-shaped pieces are fed to BC's turtles.⁹

On the afternoon of June 2, 2015, three of BC's employees were cutting carp. One employee, David Dunlap, operated the vertical band saw to slice the fish. The other two employees assisted Mr. Dunlap by supplying containers of carp, using push sticks when cross-cuts were made, collecting the cube-shaped pieces of fish, and removing empty containers.

BC's employees use push sticks when making perpendicular cuts, but not when making the first vertical cut. Inspector Royce Overland, of the Minnesota Occupational Safety and Health Division (MNOSHA), avers that BC employees told him that on June 2, 2015 they did not have tools or jigs to guide the carp when making the first cuts.¹⁰

BC's vertical band saw is equipped with a blade guard. The blade guard is adjustable so that it can cover the portions of the saw's blade that are not being used to slice through the carp. The distance from the table of the saw to the guard when it is fully raised is 16 inches. Inspector Overland maintains that BC employees told him that the guard is never adjusted when the saw is operated. Instead the guard is kept fully-raised at the top of the blade and held in place with a zip tie.¹¹

Based upon employee reports, Inspector Overland maintains that on that June 2, 2015, the carp were not frozen or stiff, but slippery and slimy.¹² Moreover, based upon his interviews with BC employees, Inspector Overland avers that the blade guard on the saw was raised to the top of the blade and secured with a zip tie.¹³

At approximately 4:20 p.m., Mr. Dunlap was making the first vertical cut on a carp. As he glided the fish through the blade, Mr. Dunlap held the carp's tail with his right hand and pushed the fish through the blade with his left hand.¹⁴

⁹ Ex. 1 at DLI 2-4.

¹⁰ *Id.*, at DLI 12-13.

¹¹ *Id.*, at DLI 5 and 9.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, at DLI 5, 12-13.

The blade caught Mr. Dunlap's glove, pulling his left index finger into the saw. The blade cut his finger through the bone. Mr. Dunlap's finger was later amputated near the first knuckle.¹⁵

After completing the inspection, the Department cited BC for violating 29 C.F.R. § 1910.212(a)(1) and 29 C.F.R. § 1910.212(a)(3)(iii) (2015). It asserted that BC acted improperly when it operated the band saw without a guard over the unused portion of the blade, and failing to provide employees with special hand tools for use when cutting carp with a saw.¹⁶

Mr. Dunlap submitted a declaration in which he states that he did not do what his manager, Bennie Hedstrom, "told me to do when I cut my finger off on the band saw. I told this to the OSHA Inspector Royce Overland that it was my fault and the hand tools were on the table for me to use." Additionally, Mr. Dunlap maintains that "[t]he guard was down where it was supposed to be."¹⁷

Analysis

In this case there are a number of significant factual disputes. Specifically, there are competing versions as to whether BC's band saw was operated while the blade cover was secured in an open position and whether special hand tools were available to BC employees when cutting carp with a saw.

Because of the differing, and plausible disagreement on these questions, it would not be appropriate to resolve these disputes on the paper record alone. Resolution of those questions must await an evidentiary hearing.

E. L. L.

¹⁵ *Id.*

¹⁶ *Id.*, at DLI 22-28.

¹⁷ Declaration of David Dunlap, at 1 (January 26, 2016).