OAH 20-1901-37445

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Roslyn Robertson, Commissioner, Minnesota Department of Labor and Industry,

Complainant,

v.

Authentic Property Investments, LLC, d/b/a Eagles Nest Resort,

Respondent.

ORDER DENYING RESPONDENT'S MOTIONS TO COMPEL DISCOVERY AND FOR SUMMARY DISPOSITION

This matter came before Administrative Law Judge Steven M. Bialick on a Motion to Compel Discovery and a Motion for Summary Disposition, filed by Authentic Properties Investments, LLC, d/b/a Eagles Nest Resort (Respondent).

Bradley D. Simon, Assistant Attorney General, appeared on behalf of Roslyn Robertson, Commissioner, Minnesota Department of Labor and Industry (Complainant). Thomas W. Wexler, Attorney at Law, appeared on behalf of Respondent.

Oral arguments on Respondent's motions were heard on November 18, 2021, and the record relating to the motions was closed on that date.

Based upon all of the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum,

IT IS HEREBY ORDERED THAT:

1. Respondent's Motion to Compel Discovery is **DENIED**.

2. Respondent's Motion for Summary Disposition is **DENIED**.

3. This matter shall proceed to an evidentiary hearing on **February 15, 16, 17, 2022, at 9:30 a.m.,** as set forth in the First Prehearing Order, dated May 17, 2021 (First Prehearing Order).

Dated: December 6, 2021

STEVEN M. BIALICK
Administrative Law Judge

Reported: Digitally recorded
No transcript prepared

MEMORANDUM

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent operates a bar and restaurant in Duluth, Minnesota (Eagles Nest).[1]

On September 12, 2020, a Senior Safety investigator (C.B.) and a Safety Investigator (L.C.) with the Minnesota Department of Labor and Industry, Occupational Safety and Health Division (MNOSHA) conducted an on-site inspection of Eagles Nest.[2]

C.B. has declared, under penalty of perjury, that they initiated the inspection based on a referral received by MNOSHA. The referral alleged that Respondent was not complying with COVID-19 requirements to ensure employee safety.[3]

Under penalty of perjury, C.B. has also declared the following:

(1) Upon arrival at Eagles Nest, C.B. observed one employee (Contact 2) working behind the bar without wearing a mask. Seven unmasked customers were seated at the bar, and at various times Contact 2 was in close proximity to the unmasked customers. There were no barriers between Contact 2 and the customers.[4]

(2) L.C. and C.B. introduced themselves to Contact 2 and asked Contact 2 to reach the Eagles Nest owner to inform the owner of their presence. The owner

[1] Declaration of C.B. (C.B. Declaration).
[2] *Id.*; Declaration of L.C. (L.C. Declaration).
[3] C.B. Declaration.
[4] *Id.*

was not on site, so Contact 2 attempted to reach the owner by phone. Contact 2 was unable to reach the owner initially and, when Contact 2 returned to C.B. and L.C., Contact 2 was still not wearing a mask. C.B. and L.C. then asked Contact 2 to meet with them at a table located away from the customers. Contact 2 asked another employee (Contact 3) to take over the bar area for Contact 2 while Contact 2 met with C.B. and L.C. Contact 2 then put a mask on as Contact 2 walked over to C.B.'s and L.C.'s table. Contact 2 told C.B. and L.C. that Contact 2 had been working for several hours prior to the arrival of C.B. and L.C.[5]

(3) C.B. then observed Contact 3 working behind the bar, serving customers, without wearing a mask. C.B. took a photograph of Contact 3 working behind the bar without a mask on.[6]

(4) Contact 2 was eventually able to reach the Eagles Nest owner (Contact 1). Contact 1 then arrived on site and met with C.B. and L.C. During C.B.'s and L.C.'s initial conversations with Contact 1, Contact 1 was holding a bandana over her mouth and nose, but she was struggling to keep it from falling down. Contact 1 commented that it was too loose and did not stay up. C.B. and L.C. asked Contact 1 to instead use a disposable mask during their meeting and Contact 1 agreed.[7]

(5) While C.B. and L.C. were meeting with Contact 1, Contact 2 returned to working behind the bar. C.B. observed Contact 2 remove her mask several times while using the phone, and while standing directly in front of, and within six feet of, two customers who were at the bar. C.B. took a photograph of Contact 2 working behind the bar without a mask on. C.B. pointed out this observation to Contact 1, but Contact 1 did not appear concerned that her employee was working without wearing a mask. Contact 1 did not intervene or ask Contact 2 to wear her mask.[8]

(6) C.B. and L.C. conducted a walkaround inspection of the worksite, during which they interviewed two cooks who were working in a small kitchen area. The two cooks (Contacts 4 and 5) told C.B. and L.C. that it was typical for two cooks to work together in the kitchen. Contact 4 stated that the cooks did not always wear their masks while working. Contact 4 also stated that no alternative measures had been taken to protect the cooks in the kitchen when they were not wearing masks.[9]

(7) During the walkaround inspection, C.B. observed another employee (Contact 6) enter the building through the back kitchen to report to work as a bartender. Contact 6 was not wearing a mask when she walked into the building. Contact 1 was with C.B. and L.C. when they observed Contact 6 walk into the building without a mask. Contact 1 did not appear surprised or concerned that

[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

Contact 6 was not wearing a mask, and Contact 1 did not ask Contact 6 to put a mask on. C.B. asked Contact 6 where her mask was, and Contact 6 stepped outside the building, pulled her mask out of her pocket, and put it on.[10]

(8) Later, as C.B. and L.C. were concluding their walkaround inspection, C.B. observed Contact 6 working behind the bar without a mask on.[11]

(9) During their inspection, Contact 1 stated that she was hosting a three-hour karaoke event that evening and was expecting about 30 people. C.B. and L.C. asked Contact 1 if she was aware that the industry guidance applicable to her restaurant prohibited karaoke. Contact 1 was surprised by this and said that she was not aware. Contact 1 asked whether she should cancel the event, and C.B. and L.C. advised Contact 1 to cancel it.[12]

(10) The "Stay Safe Minnesota Industry Guidance for Safely Reopening: Restaurant and Bars," updated on August 3, 2020, stated that karaoke singing and open microphone events involving performances by patrons and visitors were not permitted.[13]

(11) At the time of the September 12, 2020, on-site inspection, industry guidance for bars and restaurants required use of masks by employees. The guidance also provided that customers were permitted to remove their face coverings temporarily when eating or drinking, provided that at least six feet of physical distance could be maintained between parties.[14]

(12) Minnesota Executive Order 20-81, which was in effect at the time of the inspection, required all individuals in an indoor business or public indoor space to wear a face covering. There were some exemptions to the face-covering requirement that were not applicable in this case.[15]

(13) C.B. determined that Respondent's employees were exposed to a recognized hazard of potential exposure to COVID-19 at Respondent's workplace. C.B. also determined that, based on data from CDC (Centers for Disease Control and Prevention) and MDH (Minnesota Department of Health), if an employee contracted COVID-19 there was a substantial likelihood that death or serious physical harm could result. C.B. also determined that the hazard could be corrected by feasible and effective means, namely masks and observing appropriate social distancing while working.[16]

(14) During the inspection, Respondent was unable to provide any documentation of a written Workplace Accident and Injury Reduction (AWAIR)

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

program. Contact 1 stated that she did not know that she was required to have an AWAIR program and admitted that she had not developed or implemented such a program.[17]

(15) Respondent's employees regularly used equipment, including a dishwasher, cooking grill, ovens, fryers, microwaves, and freezers.[18]

(16) During the inspection, C.B. observed that Respondent's employees' job duties required them to regularly use three materials classified as hazardous substances, namely First Mark Multi-Surface Degreaser, Keystone Sanitizer, and Pure Bright Germicidal Ultra Bleach. Contact 1 acknowledged that 11 employees used those substances on a routine basis for cleaning and disinfecting. Contact 1 also stated that she did not provide hazard communication training to Respondent's employees, and that she was unaware that she was required to do so.[19]

(17) The safety data sheets for the substances included language such as "Danger Causes severe skin burns and eye damage" and "Danger Causes skin irritation and causes serious eye damage."[20]

(18) During the inspection, Contact 1 also acknowledged that she had neither developed nor implemented a written hazard communications program for Respondent's employees who were exposed to hazardous substances. Contact 1 stated that she was not aware of the requirement that she do so.[21]

(19) Following the inspection, MNOSHA issued four citations to Respondent. **(a)** Citation 01, Item 001, was for violating Minn. Stat. § 182.653, subd. 2 (2020), for failure to meet the general duty standard. This citation was classified as "serious". **(b)** Citation 01, Item 002, was for violating Minn. Stat. § 182.653, subd. 8 (2020), for failing to develop and implement an AWAIR program. This citation was classified as "serious". **(c)** Citation 01, Item 003, was for violating 29 C.F.R. 1910.1200(h)(1), for failure to provide hazard communication training to employees. This violation was given a "C" rating, pursuant to MNOSHA's Citation Rating Guide, which is the least severe classification permitted by the Citation Rating Guide. This citation was classified as "serious," because MNOSHA's Field Compliance Manual includes a Penalty Chart which requires a "serious" classification for "C" level violations. **(d)** The fourth citation was for failure to develop and implement a written hazard communication program.[22]

The fourth citation was classified as "nonserious."

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

Complainant served a Summons and Notice, and a Complaint, dated January 6, 2021, on Respondent, relating to the citations that were issued.[23]

Respondent served an Answer to the Complaint, dated January 13, 2021, on Complainant.[24]

A prehearing conference was held on May 12, 2021, and the First Prehearing Order was issued on May 17, 2021.[25]

The First Prehearing Order set a deadline of August 31, 2021, to identify and serve expert witness statements for a party's case in chief. The First Prehearing Order stated that the disclosure of expert witnesses shall include a report as set forth in Minn. R. Civil. P. 26.01 (b)(2), which contains the following information:

(1) The name, business address, and telephone number of the expert witness;

(2) A complete statement of all opinions the witness will express and the basis and reasons for them;

(3) The facts or data considered by the witness in forming them;

(4) Any exhibits that will be used to summarize or support them;

(5) The witness's qualifications, including a list of all publications authored in the previous 10 years;

(6) A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and,

(7) A statement of the compensation to be paid for the study and testimony in the case.[26]

The First Prehearing Order stated that the period for general discovery would close on August 31, 2021. It also stated that, to obtain copies of the agency's file, a party should make a written demand pursuant to Minn. R. 1400.6700 (2021).[27]

On September 20, 2021, Respondent filed a motion for production of a copy of medical expert witness Dr. Frank Rhame's file relating to this case, including communications between counsel and Dr. Rhame. Respondent noted that, on August 31, 2021, the last day for expert witness disclosures to be made, Complainant disclosed

[23] Summons and Notice to Respondent; Complaint; (Jan. 6, 2021).
[24] Answer (Jan. 13, 2021).
[25] First Prehearing Order.
[26] *Id.*
[27] *Id.*

expert Dr. Frank Rhame. Regarding legal authority, Respondent's attorney stated, "In my experience, such expert witness files are commonly discoverable."[28]

On October 4, 2021, Complainant filed a response in opposition to Respondent's motion to compel a copy of Dr. Rhame's file. Complainant argued that:

(1) Respondent's request for discovery was untimely because Respondent failed to serve its request during the discovery period, which closed on August 31, 2021, pursuant to the First Prehearing Order; and

(2) Complainant fully disclosed all information about its expert, as required by the First Prehearing Order. In addition, Respondent cannot show any specific need for the additional information it requested.[29]

On October 5, 2021, and October 8, 2021, Respondent filed a Motion for Summary Disposition, requesting that the three serious citations issued by Complainant be vacated. Complainant filed a response to that motion on October 19, 2021. Respondent filed a reply to Complainant's response on October 25, 2021.

Respondent requested that oral arguments be heard regarding its motions, and oral arguments were heard on November 18, 2021.

II. MOTION STANDARDS

A. Discovery Standard

In an administrative law contested case proceeding, any means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed.[30] If the party from whom discovery is sought objects to the discovery, the party seeking the discovery may bring a motion before the judge to obtain an order compelling discovery.[31] In the motion proceeding, the party seeking discovery has the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant discovery.[32]

B. Summary Disposition Standard

Summary disposition is the administrative law equivalent to summary judgment.[33] Summary disposition is appropriate where there is no genuine issue of material fact and

[28] Respondent's Motions (Dated Sept. 18, 2021, filed Sept. 20, 2021).
[29] Complainant's Response in Opposition to Motion to Compel Discovery (Oct. 4, 2021).
[30] Minn. R. 1400.6700, subp. 2 (2021).
[31] *Id.*
[32] *Id.*
[33] *Pietsch v. Minnesota Bd. Of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2021).

the application of law will resolve the controversy.[34] The Office of Administrative Hearings has generally followed the summary judgment standards developed in the district courts in considering motions for summary disposition of contested case matters.[35]

The Administrative Law Judge's function on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but solely to determine whether genuine factual disputes exist with regard to material issues.[36] The judge does not weigh the evidence on a motion for summary disposition.[37]

In deciding a motion for summary disposition, the judge must view the evidence in the light most favorable to the nonmoving party.[38] All doubts and factual inferences must be resolved against the moving party.[39] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[40]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact.[41] If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts that are in dispute that can affect the outcome of the case.[42]

To successfully defeat a motion for summary disposition, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[43] It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.[44] A genuine issue is one that is not sham or frivolous.[45] A material fact is a fact whose resolution will affect the result or outcome of the case.[46]

While the purpose and useful function of summary disposition is to secure a just, speedy, and inexpensive determination of an action, summary disposition cannot be used

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[34] *See Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); *Gaspord v. Washington County Planning Commission*, 252 N.W.2d 590, 590-591 (Minn. 1977); Minn. R. 1400.5500(K); Minn. R. Civ. P. 56.03.
[35] *See* Minn. R. 1400.6600 (2021).
[36] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[37] *Id.*
[38] *Ostendorf v. Kenyon*, 247 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[39] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[40] *DLH*, 566 N.W.2d at 69.
[41] *Thiele*, 425 N.W.2d at 582.
[42] *Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 6, 1985).
[43] *Thiele*, 425 N.W.2d at 583; *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).
[44] Minn. R. Civ. P. 56.05.
[45] *Highland Chateau*, 356 N.W.2d at 808.
[46] *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976); *see also O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

as a substitute for a hearing where any genuine issue of material fact exists.[47] Summary disposition is only proper where there is no factual issue to be decided.[48]

III. LEGAL ANALYSIS

A. Motion to Compel Discovery

The First Prehearing Order set a deadline of August 31, 2021, to identify and serve expert witness statements for a party's case in chief. The First Prehearing Order stated what expert witness disclosures must be made, and those requirements were consistent with Minn. R. Civil P. 26.01 (b)(2).

The First Prehearing Order also stated that the period for general discovery would close on August 31, 2021, and that, to obtain copies of the agency's file, a party should make a written demand pursuant to Minn. R. 1400.6700.

Complainant complied with the First Prehearing Order and timely produced to Respondent a detailed report by its expert witness, Dr. Frank Rhame.[49]

Dr. Rhame's report provided all the information required by the First Prehearing Order, including a complete statement of his opinions, the facts and data he used to form his opinion, his qualifications, and the compensation he is receiving.[50] Complainant also supplemented its discovery responses with a copy of the articles and literature Dr. Rhame cited.[51] Respondent does not claim that Complainant's expert disclosure was insufficient or incomplete.[52]

In its one-paragraph motion to compel production of a copy Dr. Rhame's file relative to this case, including communications between counsel and Dr. Rhame, Respondent does not cite any legal authority. Respondent claims that granting its motion would "save time and focus" and that the documents sought "may also suggest appropriate cross examination." However, Respondent's claims are vague and do not adequately explain why production of Dr. Rhame's file is needed for the proper presentation of its case.

The information Complainant has already produced regarding Dr. Rhame and his opinions complies with the First Prehearing Order and applicable rules. Respondent has not met its burden of showing that the production of Dr. Rhame's file is needed for the proper presentation of its case, as required by Minn. R. 1400.6700, subp. 2. Therefore, Respondent's motion for the production of a copy of Dr. Rhame's file is **DENIED**.

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[47] *Sauter*, 70 N.W.2d at 353.
[48] *Id.*
[49] Complainant's Response in Opposition to Motion to Compel Discovery (Oct. 4, 2021) at 4.
[50] *Id.*
[51] *Id.*
[52] *Id.*

B. Summary Disposition Motion

In its summary disposition motion, Respondent asks that the three "serious violation" citations issued by Complainant be vacated.

Citation 01, Item 001, is a serious violation citation for allegedly violating Minn. Stat. § 182.653, subd. 2, by failing to meet the "general duty standard." That statute and standard requires the employer to furnish each of its employees with conditions of employment and a place of employment that is free from recognized hazards that cause, or are likely to cause, death or serious injury or harm to its employees. This citation alleges that Respondent failed to enforce COVID-19-related precautions to protect employees from potential exposure to the virus, specifically social distancing and the wearing of a mask by employees working at the bar.

Citation 01, Item 002, is a serious violation citation for allegedly violating Minn. Stat. § 182.653, subd. 8, which requires employers to establish a written workplace accident and injury reduction (AWAIR) program that promotes safe and healthful working conditions and is based on clearly stated goals and objectives for meeting those goals.

Pursuant to Minn. Stat. § 182.653, subd. 8(a), AWAIR programs must describe:

> (1) how managers, supervisors, and employees are responsible for implementing the program and how continued participation of management will be established, measured, and maintained;
>
> (2) the methods used to identify, analyze, and control new or existing hazards, conditions, and operations;
>
> (3) how the plan will be communicated to all affected employees so that they are informed of work-related hazards and controls;
>
> (4) how work place accidents will be investigated and corrective action implemented; and
>
> (5) how safe work practices and rules will be enforced.

Pursuant to Minn. Stat. § 182.653, subd. 8(b), an employer must conduct and document a review of the work place accident and injury reduction program at least annually and document how procedures set forth in the program are met.

Citation 01, Item 003, is a serious violation citation for allegedly violating 29 C.F.R. 1910.1200(h)(1) and (2) by failing to provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area. This citation alleges that Respondent had not provided initial hazard communication training to all employees who were routinely exposed to hazardous substances that included First Mark Multi-Surface Degreaser, Keystone Sanitizer, and Pure Bright Germicidal Ultra Bleach.

Minn. Stat. § 182.651, subd. 12 (2020), defines "serious violation" as follows:

> "Serious violation" means a violation of any standard, rule, or order other than a de minimis violation which is the proximate cause of the death of an employee. It also means a violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Respondent argues that the "serious violation" designation for the citations alleging violations of Minn. Stat. § 182.653, subd. 8 (Citation 01, Item 002; requirements for an AWAIR program) and 29 C.F.R. 1910.1200(h)(1) and (2) (Citation 01, Item 003; requirements for information and training on hazardous chemicals) should be vacated because those alleged violations do not create a substantial probability of death or serious physical harm.

Respondent also argues that Citation 01, Item 001, (alleged violation of Minn. Stat. § 182.653, subd. 2; the general duty standard) should be vacated for a number of reasons, including that **(a)** Respondent did not have actual or constructive knowledge of the masking and social distancing alleged violations; **(b)** the alleged violation was not properly classified as serious; **(c)** the general duty standard was not intended to make an employer a guarantor of a place perfectly safe from transmissible disease; **(d)** the alleged violations were only based on observations during one visit, which were possibly temporary; **(e)** there might have been unpreventable employee misconduct; **(f)** neither death nor serious physical harm is substantially probable or likely to occur from transmission of COVID-19; **(g)** there is insufficient evidence that a hazard existed in Respondent's workplace; **(h)** there is no showing that any employee was exposed to COVID-19; and **(i)** the general duty standard is not applicable if a more specific standard is available, and 29 C.F.R. 1910.132(a) contains a standard for personal protective equipment (PPE).

Complainant argues that Citation 01, Items 001, 002, and 003 were correctly classified as serious violations, as defined in applicable statutes and rules, and that there are genuine issues of material fact which preclude summary disposition. Complainant's arguments relating to the alleged violation of the general duty standard include **(a)** Respondent failed to furnish employees with conditions of employment and a place of employment that was free of recognized hazards that cause, or are likely to cause, death or serious injury, due to its failure to implement and enforce safety standards and requirements relating to COVID-19, including social distancing and mask wearing; **(b)** COVID-19 was a recognized hazard in September 2020; **(c)** COVID-19 causes, and is likely to cause, death and serious injury or harm; **(d)** even a one-time violation of health and safety rules can justify a citation; **(e)** Respondent knew or could have known of the violations; **(f)** Respondent cannot establish unpreventable employee misconduct; and

(g) standards regarding personal protective equipment (PPE) do not apply to COVID-19 standards and requirements.

Complainant has filed declarations and other information in support of its arguments that raise genuine issues of material fact that preclude summary disposition. Therefore, Respondent's motion for summary disposition is **DENIED**.

S. M. B.