

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

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

**ORDER ON COMPLAINANT'S MOTION
FOR
SUMMARY DISPOSITION**

Complainant,

vs.

Melrose Meat Shoppe, Inc.,

Respondent

This matter is before Administrative Law Barbara J. Case on a Motion for Summary Disposition (Motion), filed December 30, 2021. Respondent did not file a response to the Motion and the record closed on January 14, 2022, the deadline for the response.

Scott Grosskreutz, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department or Complainant). Melrose Meat Shoppe, Inc. (Respondent) appeared on its own behalf through owner, Kevin Bauer, and without legal counsel.

This proceeding arises out of one Citation issued to Respondent on October 15, 2020, by the Minnesota Occupational Safety and Health Administration (MNOSHA). The Citation consisted of two separate violations: Item 001 (violation of Minn. Stat. § 182.653, subd. 2 (2020)) and Item 002 (violation of Minn. Stat. § 182.653, subd. 8 (2020)).

Based on the proceedings and the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. Complainant's Motion for Summary Disposition is **GRANTED** in its entirety;
and
2. Citation 01, Items 001-002 in the Citation and Notification of Penalty issued to Respondent on October 15, 2020, are **AFFIRMED**.
3. The hearing scheduled for **March 3 and 4, 2022**, is **CANCELED**.

Dated: February 16, 2022

A handwritten signature in black ink, reading "Barbara Case", written over a horizontal line.

BARBARA J. CASE
Administrative Law Judge

MEMORANDUM

I. Undisputed Facts

SARS-CoV-2 is the virus that causes the disease known as COVID-19.¹ SARS-CoV-2 is primarily a respiratory tract virus that causes infection that can range in severity from no symptoms to severe pneumonia, and catastrophic fatal illness.² In severe cases, COVID-19 can cause respiratory failure, shock, multiorgan dysfunction, and death.³ Individuals with other diseases or conditions that are present simultaneously, known as comorbidities, and individuals with immunosuppression, are at higher risk of developing more severe symptoms.⁴

Transmission of respiratory viruses, including COVID-19, occurs through three modalities: touch, large droplets, and small airborne droplets.⁵ Airborne droplet spread accounts for most COVID-19 transmission. At least half of airborne transmission occurs before any symptoms arise in the infected patient and can be transmitted from an infected person who does not have any symptoms.⁶

On March 13, 2020, former president Donald Trump declared a national emergency related to the COVID-19 pandemic.⁷ On March 13, 2020, Minnesota Governor Tim Walz declared a peacetime emergency related to the COVID-19 pandemic.⁸ On June 5, 2020, Governor Walz issued Executive Order 20-74 requiring all businesses to develop and implement COVID-19 Preparedness Plans that address the hazards of COVID-19 transmission.⁹ COVID-19 Preparedness Plans were required to establish social distancing policies and procedures as well as cleaning, disinfecting, and ventilation protocols.¹⁰ In addition, businesses that had in-person customer interactions were required to include provisions in the plan to keep the public and workers safe as set forth in the applicable guidance available on the Stay Safe Minnesota website.¹¹

Respondent, Melrose Meat Shoppe, is a butcher shop owned by Kevin Bauer. The shop consists of a front retail area and a slaughtering and processing area in the back. Equipment in the processing area includes a vertical band saw, meat grinder, walk-in cooler, and stainless-steel cutting tables. On September 8, 2020, Michael Helms, an investigator with MNOSHA, attempted to inspect the shop.¹² Mr. Bauer refused to allow

¹ Declaration (Dec.) of Scott A. Grosskreutz (Dec. 30, 2021) at Exhibit (Ex.) 1 (Expert Report of Dr. Frank Rhame, M.D.).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Dec. of Michael Helms at ¶ 2 (Dec. 28, 2021).

¹⁰ *Id.* at Ex. 1 at 9-10.

¹¹ *Id.* at Ex. 1 at 10.

¹² *Id.* at ¶ 1, 3.

the inspection, and on September 17, 2020, a Stearns County district court judge issued an order authorizing the inspection.¹³ Investigator Helms then conducted the inspection on September 22, 2020, with a police officer present to enforce the court's inspection order.¹⁴

During the inspection, Investigator Helms observed an employee (Contact #2) working at the retail counter without wearing a mask or face shield. There were no physical barriers in place at the checkout register to separate employees from customers. Inspector Helms observed five customers enter the store, make a purchase at the checkout register, and then leave the store. None of these customers were wearing a mask or face shield. In addition, no one cleaned or disinfected the counter area where the customers had interacted with Contact #2. Contact #2 informed Inspector Helms that other employees clean the work areas at the end of the workday, but he does not clean the work area during his shift. Inspector Helms also observed Mr. Bauer and two of his employees (Contact #3 and Contact #4) working in the rear of the establishment processing large pieces of meat. None were wearing masks or face shields.¹⁵

During Inspector Helm's opening conference with Mr. Bauer, Mr. Bauer stated that he did not have any written safety programs, training records, or occupational injury and illness information. As the inspection progressed, Mr. Bauer became angry, gave the finger to Inspector Helm and the police, and stated that he would never wear a mask. Mr. Bauer further stated that he was aware of the mask mandate and was not going to follow it. Melrose Meat Shoppe did not have a written COVID-19 Preparedness Plan.¹⁶

Inspector Helm's inspection exposed two serious violations of the Minnesota Occupational Safety and Health Act of 1973, Minnesota Statutes chapter 182.¹⁷ First, he concluded, Respondent violated Minn. Stat. § 182.653, subd. 2, because Respondent did not furnish its employees with conditions and place of employment free from recognized hazards that are likely to cause death or serious injury to its employees.¹⁸ Specifically, Respondent failed to implement a COVID-19 Preparedness Plan and enforce COVID-19 precautions to protect its employees from exposure to the virus.¹⁹ Second, he concluded, Melrose Meat Shoppe violated Minn. Stat. § 182.653, subd. 8, because it had not developed and implemented a written Workplace Accident and Injury Reduction (AWAIR) Program.²⁰

An AWAIR program is a requirement separate from those arising in response to COVID-19, the purpose of which is to promote safe and healthful working conditions and to reduce risks to employees at the worksite.²¹ Although Respondent's employees

¹³ *Id.* at ¶ 4, Ex. 3 (Order for Inspection).

¹⁴ *Id.* at ¶ 5.

¹⁵ *Id.* at ¶ 7.

¹⁶ *Id.* at ¶ 8.

¹⁷ *Id.* at ¶ 11.

¹⁸ *Id.* at ¶ 11, Ex. 4 at OSHA 008-011.

¹⁹ *Id.*

²⁰ *Id.* at ¶ 11, Ex. 4 at OSHA 013.

²¹ *Id.* at ¶ 12.

regularly use equipment that could result in serious injury or death, Respondent informed Inspector Helms that he was not aware he needed a written AWAIR program and was unable to provide any documentation to show that he had developed or implemented one.²²

II. Procedural History

On October 15, 2020, MNOSHA issued a Citation and Notification of Penalty to Melrose Meat Shoppe.²³ On or about October 27, 2020, Respondent filed a Notice of Contest indicating he wished to contest both items of the citation.²⁴

On January 21, 2021, the Department served Respondent with a Summons and Notice and Complaint.²⁵ On or about February 5, 2021, the Respondent filed an answer to the Summons and Complaint. He stated that he supplied masks to his employees, but they chose not to wear them and would not work for him if he enforced mask wearing. He also stated that he was not aware that he was required to have a written AWAIR program in place for his business.²⁶

III. Legal Standard

Summary disposition is the administrative law equivalent to summary judgment. Summary disposition is appropriate where there is no genuine issue of material fact and where a determination of the applicable law will resolve the controversy.²⁷ 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.²⁸

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 issues exist.²⁹ The judge does not weigh the evidence on a motion for summary judgment.³⁰

In deciding a motion for summary disposition, the judge must view the evidence in the light most favorable to the non-moving party.³¹ All doubts and factual inferences must

²² *Id.*

²³ *Id.* at Ex. 9.

²⁴ Summons and Notice at Ex. 4.

²⁵ *Id.* at Ex. 1.

²⁶ *Id.* at Ex. 3.

²⁷ *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).

²⁸ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Ostendorf v. Kenyon*, 247 N.W.2d 834, 836 (Minn. Ct. App. 1984).

be resolved against the moving party.³² If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.³³

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact.³⁴ 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.³⁵

To successfully defeat a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.³⁶ 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.³⁷ A genuine issue is one that is not sham or frivolous.³⁸ A material fact is a fact whose resolution will affect the result or outcome of the case.³⁹

While the purpose and useful function of summary judgment is to secure a just, speedy, and inexpensive determination of an action, summary disposition cannot be used as a substitute for a hearing where any genuine issue of material fact exists.⁴⁰ Accordingly, summary disposition is only proper where there is no fact issue to be decided.⁴¹

IV. Legal Analysis

A. Issues

At issue in this matter is whether: (1) the cited standards applied to the conditions at the worksite; (2) Respondent violated the cited standards (3) Respondent knew or should have known of the existence of the hazards created by the violations (4) Respondent's employees had access to the hazards created by the violations; (5) the abatement periods were reasonable; (6) the citations were properly classified as serious; and (7) the penalties were appropriately calculated under Minn. Stat. § 186.666 (2020).

³² *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

³³ *DLH*, 566 N.W.2d at 69.

³⁴ *Thiele*, 425 N.W.2d at 582.

³⁵ *Highland Chateau, Inc. v. Minn. Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), review denied (Minn. Feb. 6, 1985).

³⁶ *Thiele*, 425 N.W.2d at 583; *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

³⁷ *DLH*, 566 N.W.2d at 71.

³⁸ *Highland Chateau*, 356 N.W.2d at 808.

³⁹ *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976); see also *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

⁴⁰ *Sauter*, 70 N.W.2d at 353.

⁴¹ *Id.*

B. The Cited Standards Apply and Were Violated

The undisputed facts establish that the cited standards apply to Respondent. Minn. Stat. § 182.653, subd. 2, requires an employer to furnish its employees with employment conditions free from recognized hazards that are likely to cause death or serious injury to its employees. Subdivision 8 of the statute requires an employer to “establish a written workplace accident and injury reduction program that promotes safe and healthful working conditions and is based on clearly stated goals and objectives for meeting those goals.” The statute further provides content requirements for the program.⁴²

Employers include corporations who employs one or more employees.⁴³ Melrose Meat Shoppe had one employee working the front retail area of the store and two other employees, along with the owner, working in the back meat processing area of the establishment. It was therefore required to comply with the general duty clause and establish a written AWAIR program. Accordingly, both cited standards applied to the Worksite.

The undisputed facts establish that Respondent violated the cited standards. “A hazard is deemed ‘recognized’ when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry.”⁴⁴ In September 2020, the hazard of individuals contracting and potentially dying from COVID-19 was well-known both generally throughout the world, and specifically in the workplace. Mr. Bauer’s statements to the inspector make it clear he was aware of the global pandemic and of the requirements for establishments such as his but that he refused to comply with the requirements. Melrose Meat Shoppe failed to implement a COVID-19 Preparedness Plan or to implement any of the recommended precautions to reduce the transmission of COVID-19 and therefore, failed to furnish to its employees a workplace free from a recognized hazard that could result in serious injury or death.

The facts also establish that there were many feasible measures Melrose Meat Shoppe could have taken to reduce the risk of COVID-19 to its customers and its employees. It could have enforced mask-wearing, it could have enforced social distancing, and it could have required frequent cleaning of high-touch areas. The Department established that these measures were feasible and known to be effective in preventing the spread of the virus.

The MNOSHA investigator’s declaration and supporting exhibits, along with Dr. Frank Rhame’s expert report, overwhelmingly establishes that there is no genuine issue of material fact to dispute that Melrose Meat Shoppe failed to render its workplace free of a recognized hazard which was causing or likely to cause death or serious physical harm in violation of Minn. Stat. § 182.653, subd. 2. Furthermore, Respondent informed the

⁴² Minn. Stat. § 182.653, subd. 8(a).

⁴³ Minn. Stat. § 182.651, subd 7 (2020).

⁴⁴ *St. Joe Minerals Corp. v. Occupational Safety and Health Review Comm’n*, 647 F.2d 840, 845 (8th Cir. May 6, 1981); see also Dec. of M. Helms at Ex. 10, p. 47.

MNOSHA inspector that he did not have, and had not implemented, a written AWAIR program, in violation of Minn. Stat. § 182.653, subd. 8. While Mr. Bauer informed the Department that he was unaware of this requirement, his claimed lack of knowledge does not excuse the violation. Employers are required to know the laws they are required to follow.

C. The Citations Were Properly Classified and the Penalties Are Appropriate

A violation is rated “serious” when there is a substantial probability that death or serious physical harm could result.⁴⁵ To establish a serious violation, the Commissioner must show that the violation created a substantial probability that death or serious physical harm could result, unless the employer did not or could not, with the exercise of reasonable diligence, know of the presence of the violation.⁴⁶ There is no reasonable dispute that failing to take precautions to prevent the transmission of COVID-19 creates a substantial probability that death or serious physical harm to employees could result from the violation. More generally, an AWAIR program is a safety and health program that includes an overall plan for reducing hazards and risks to employees at the worksite without which employees are exposed to a significantly higher risk of accidents occurring. There is no dispute that the equipment used by Respondent’s employees could result in an accident resulting in serious injury or death.⁴⁷ Furthermore, citations issued for lack of an AWAIR program are always classified as serious.⁴⁸ The Department properly classified both citations as serious.

The unadjusted penalty for the general duty clause violation (Citation 01, Item 001) is \$7,000 and the unadjusted penalty for the AWAIR program violation (Citation 01, Item 002) is \$1,000.00. Once the unadjusted penalty is determined, it can be multiplied if there is evidence that the violation was willful, repeat, or contributed to a serious injury or fatality, or if the employer failed to abate the violation. Here, the Department concluded that neither violation was willful, repeat, or contributed to a serious injury or fatality, and Respondent did not fail to abate the violation.⁴⁹ The Department applied various credits that resulted in Respondent receiving a sixty-five percent credit to the unadjusted penalty.⁵⁰ After applying the penalty multipliers and credits, the adjusted penalty for Citation 01, Item 001 is \$2,450.00 and the adjusted penalty for Citation 01, Item 002 is \$300.00.⁵¹ There is no dispute that the penalties applied were appropriately calculated.

Finally, the Department established that the abatement period was reasonable. The MNOSHA investigator assigned a seven-day abatement period for the general duty clause violation and a twenty-one-day abatement period to comply with AWAIR program

⁴⁵ Minn. Stat. § 182.651, subd. 12 (2020).

⁴⁶ *Id.*

⁴⁷ Dec. of M. Helms at ¶ 12.

⁴⁸ *Id.* at Ex. 11, p. 2.

⁴⁹ *Id.* at ¶ 17.

⁵⁰ *Id.* at ¶ 19.

⁵¹ *Id.* at ¶ 20.

violation.⁵² The investigator was unable to confirm whether Melrose Meat Shoppe was agreeable to these abatement periods as the owner became angry during the inspection, and the police officer advised the investigator to avoid further interaction with Mr. Bauer.⁵³ There is no evidence to suggest that Melrose Meat Shoppe would not have been able to implement a COVID-19 Preparedness Plan or a written AWAIR program within the required abatement periods. Moreover, Executive Order 20-74 included a reference to a template COVID-19 Preparedness Plan available on the Stay Safe Minnesota website, making the adoption of such a plan simple for employers.⁵⁴

D. Respondent's Defenses

Respondent did not file a response to the present motion but did file an answer when he appealed.⁵⁵ Regarding COVID-19 precautions, he stated that his employees would quit if he made them wear masks. Regarding the AWAIR plan, he stated he was unaware of the requirement. Neither of Respondent's arguments are availing.

Minn. Stat. § 182.651, subd. 12, defines a "Serious Violation" of state work safety standards as:

[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.

Consistent with this definition, courts and MNOSHA have recognized the affirmative defense of unpreventable or unforeseeable employee misconduct in OSHA cases. Under this defense, an employer is shielded from liability for workplace safety violations if the employer: (1) established a work rule to prevent the reckless behavior or unsafe condition from occurring; (2) adequately communicated the rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rules whenever employees transgressed it.⁵⁶ The undisputed facts in this matter do not support a finding that Respondent met any of the elements of an employee misconduct defense.

⁵² *Id.* at Ex. 4 at OSHA 011, 013.

⁵³ *Id.* at Ex. 4 at OSHA 003.

⁵⁴ *Id.* at Ex. 1 at 10.

⁵⁵ Summons and Notice at Ex. 4.

⁵⁶ *Modern Continental Const'n. Co. Inc. v. Occupational Safety and Health Review Comm'n*, 305 F.3d 43, 51 (1st Cir. 2002).

V. Conclusion

The Department's Motion for Summary Disposition is granted because there are no material facts in dispute. The Department has established that Respondent violated the cited OSHA standards.

B. J. C