12-1901-10694-2

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

Gary W. Bastian, Commissioner, Department of Labor and Industry, State of Minnesota, Complainant, vs. Mid-America Dairymen, Inc., Respondent.	**ORDER PARTIALLY GRANTING COMPLAINANT'S MOTION FOR SUMMARY DISPOSITION AND DENYING RESPONDENT'S MOTION FOR EXTENSION OF TIME IN WHICH TO SUPPLEMENT RESPONDENT'S OBJECTIONS TO COMPLAINANT'S MOTION**

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick on Complainant's Motion for Summary Disposition and Respondent's Motion for Extension of Time in which to Supplement Respondent's Objections to Complainant's Motion for Summary Disposition.

Douglas W. Thompson, Douglas W. Thompson, Ltd., 332 Minnesota Street, Suite W-1260, St. Paul, Minnesota 55101, represents Respondent, Mid-America Dairymen, Inc. Susan C. Gretz, Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, Minnesota 55103-2102, represents Complainant, the Department of Labor and Industry (the Department or Complainant).

Based upon the record herein and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. Complainant's Motion for Summary Disposition is granted as to the following issues:

   a. Respondent failed to comply with the OSHA standards as set forth in Citations 1 and 2.

   b. Citation No. 2 is properly classified as serious.

c. The abatement date was reasonable and appropriate under the circumstances.

2. Complainant's Motion for Summary Disposition is denied as to the following issues:

a. Whether Citation 1 was properly classified as willful.

b. Whether the penalties issued to Respondent were reasonable and appropriate under the circumstances.

3. The hearing on the remaining issues of willfulness and penalties shall be held commencing June 16, 1997, at 9:30 a.m. in the Council Chambers of the Red Wing City Hall, 315 West 4th Street, Red Wing, Minnesota.

4. Respondent's Motion for Extension of Time in Which to Supplement Respondent's Objections to Complainant's Motion for Summary Disposition is denied.

Dated this 19th day of May, 1997.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

On April 28, 1997, Complainant filed a Notice of Motion and Motion for Summary Disposition, along with supporting affidavits. Complainant requested summary disposition in its favor on all issues in the matter, namely: That Respondent failed to comply with the standards cited in the two Citations in this matter, that Citation 1 was properly classified as willful, that Citation 2 was properly classified as serious, that the penalties issued under the Citations were both reasonable and appropriate under the circumstances, and that the abatement date was reasonable and appropriate.

On May 12, 1997, Respondent filed Respondent's Objections to Complainant's Motion for Summary Disposition, along with a supporting Memorandum and unsworn transcript of an interview of Brian Kesler. At the same time, Respondent also filed a Motion for Extension of Time in which to Supplement Respondent's Objections to Complainant's Motion for Summary Disposition, along with a supporting Affidavit. Complainant filed objections to the Motion for Extension of Time on May 13, 1997, and a Reply Memorandum on May 19, 1997.

In its Objections to Complainant's Motion for Summary Disposition, Respondent's single objection is that there exists a genuine issue of material fact as to whether Respondent's conduct constitutes a willful violation. In its Motion for Extension of Time, Respondent states that new information came to it through Complainant's depositions of three of Respondent's employees on May 8 and 9, 1997, and that it would like ten days after receipt of the deposition transcripts to supplement its objections to the Motion for Summary Disposition. Respondent does not state that it would seek to expand the objections beyond the single objection made.

Summary disposition may be granted under Minn. R. 1400.5500 K where there is no genuine issue as to any material facts. The standards applicable to summary judgment under Minn.R.Civ.P. 56 are applied to summary disposition.

Apparently Respondent concedes that the violations cited in Citations 1 and 2 existed, because it has now objected only to the classification of Citation 1 as willful. Even absent that concession, the Administrative Law Judge would have so concluded. Without reciting all the details, under the facts presented in the Affidavits attached to Complainant's Memorandum and the statement attached to Respondent's Memorandum, there are no genuine issues of material fact as to the description of the cheese grinder and its operation, the lack of point of operation guarding (there is no dispute that the grate was chained up), and the lack of cutoff switches at all points of operation. There are also no genuine issues of material fact that employees had access to the violative conditions, particularly while standing on the nearby pallet, but also while standing next to it and that the Respondent knew, or with the exercise of reasonable diligence could have known, of the violative condition and that there was a substantial probability that death or serious physical harm could result. Based upon these facts, it must be concluded that Respondent failed to comply with the OSHA

standards as set forth in Citations 1 and 2 and that Citation 2 was properly classified as serious. In addition, Respondent was given two weeks from the date of the Citations to abate each of the hazards. That period was clearly reasonable given the nature of the potential injury that could result if the condition continued unabated.

As to whether Respondent's conduct with regard to Citation 1 was willful, genuine issues of material fact exist. Respondent has raised sufficient fact issues to preclude summary disposition on this issue. There are claims that Respondent had a policy against employees standing on pallets on a raised fork lift, that Respondent lacked knowledge of such employee actions, that management believed the grate that was installed solved any safety problems, and that employees were trained not to stand on the raised pallet with the cheese. Moreover, since the evidence regarding this issue is critical in its minor details and nuances, the difficulty in appraising testimony in Affidavit and other written form renders such evidence inadequate. To understand and evaluate such evidence adequately, the Judge needs to observe the witnesses giving live testimony.

Since the penalty depends upon the characterization of the violation, the penalty for Citation 1 must await a determination as to whether that violation was willful. Moreover, the Administrative Law Judge, and the OSH Review Board if there is an appeal, are the final arbiters of penalties if the penalties are contested. ***See, Secretary of Labor v. OSHRC and Interstate Glass Co.***, 487 F.2d 438 (8th Cir. 1973), 1973-1974 OSHD ¶ 16,799. While great deference will normally be applied to the penalty calculation formula in the Field Compliance Manual and the Department's calculations, Respondent must be allowed to present evidence and argument as to the amount of the penalties to be imposed and the ALJ must redetermine those amounts. Therefore, summary disposition is inappropriate as to this issue.

Respondent's motion for additional time to supplement its response is denied for two reasons. First, the ALJ has agreed with Respondent's objection and not granted summary disposition as to whether the violation in Citation 1 was willful. Second, if Respondent intended to make a broader objection it should have done so within the ten days allowed and with its own affidavits or other evidence. It has had access to such evidence since the date of the accident and doesn't need to rely on the transcripts of depositions conducted by the adverse party.

S.M.M.