

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

Gary W. Bastian, Commissioner,
Department of Labor and Industry,
State of Minnesota,
Complainant,

**ORDER ON MOTION
FOR SUMMARY DISPOSITION**

v.

J & L Schwieters Construction, Inc.,
Respondent .

The above-entitled matter is before the undersigned Administrative Law Judge on Complainant's motion for summary disposition. Oral arguments were heard on Wednesday, April 15, 1998. The record closed on April 24, 1998, upon receipt of Respondent's response to the Affidavit of Richard Stever.

Nancy J. Leppink and Susan C. Gretz, Assistant Attorneys General, 525 Park Street, Suite 200, St. Paul, Minnesota, 55103-2106, appeared on behalf of the Complainant. Ernest F. Peake, Leonard, O'Brien, Wilford, Spencer & Gale, Attorneys at Law, 100 South Fifth Street, Suite 1200, Minneapolis, MN 55402, appeared on behalf of Respondent.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That Complainant's motion for summary disposition as to Respondent's violation of 29 CFR §§ 1926.451(u)(3) and 1926.28(a) (Citation 1, item 1) is GRANTED.
2. That Complainant's motion for summary disposition as to the characterization of Citation 1, item 1 as a willful violation is DENIED.
3. That Complainant's motion for summary disposition as to Citation 2, items 1 through 5 is GRANTED.
4. That Complainant's motion for summary disposition as to the penalty calculations is DENIED.

Dated this ____ day of June, 1998.

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

In the fall of 1994, J&L Schwieters Construction, Inc., ("J&L") entered into a Standard Subcontract Agreement with Kraus-Anderson Construction Company ("Kraus-Anderson") to complete the carpentry work at the Crookston Senior Housing Complex located in Crookston, Minnesota. On September 27, 1994, construction worker Kyle Shufelt was nailing plywood sheets on the roof trusses of the four story senior apartment complex, when he fell 37-40 feet to the ground sustaining numerous serious injuries. In response to the accident, the occupational safety and health division of the Minnesota Department of Labor and Industry ("MN OSHD") inspected Respondent's work site the following two days. On February 28, 1995, MN OSHD issued six citations to Respondent and assessed a \$33,600.00 penalty. The citations allege one willful and five serious violations of occupational safety and health standards, including: Respondent's failure to provide catch platforms or other fall protection; Respondent's failure to have an adequate written work place accident and injury reduction program ("AWAIR"); Respondent's failure to provide and require the wearing of seat belts by its employees when they were operating a forklift; Respondent's failure to provide a ladder for accessing the roof; and Respondent's failure to provide appropriate "Right-to-Know" information and training. On March 20, 1998, Complainant filed a motion for summary disposition. Complainant argues that there are no genuine issues of material fact and that the citations should be affirmed as a matter of law. According to Complainant, Respondent violated the cited standards and exposed its employees to hazards, of which Respondent knew or could have known with the exercise of reasonable diligence.

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwgje v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, pt. 1400.5500K; Minn.R.Civ.P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. See, Minn. Rules, pt. 1400.6600. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party, in this case the Complainant, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. Id.;

Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 75 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing, Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984). All doubts and factual inferences must be resolved against the moving party. See, e.g., Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Thompson v. Campbell, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

The Minnesota Occupational Safety and Health Act (MN OSHA) requires each employer to comply with the occupational safety and health standards and rules promulgated pursuant to the Act. Minn. Stat. § 182.653, subd. 3 (1996). The Department adopted federal occupational safety and health standards, including 29 C.F.R. § 1926, by reference in Minn. R. 5205.0010, subd. 6 (1997). In order to establish a violation of a specific standard under the Act, the Commissioner must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) the employee had access or was exposed to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition. Dun-Par Engineered Form Co., 12 O.S.H. Cas. (BNA) 1962, 1985-86, 1986-87 O.S.H. Cas. (CCH) 27651 (Rev. Comm. 1986), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988). The Act defines "employer" as "a person who employs one or more employees and includes any person who has the power to hire, fire, transfer, or who acts in the interest of, or a representative of, an employer ...". Minn. Stat. § 182.651, subd. 7 (1996). "Employee" is defined as "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 ...". Minn. Stat. § 182.651, subd. 9 (1996).

As an initial matter, Respondent argues that the standards cited by Complainant are not applicable because there was no employer-employee relationship between it and any of the workers at the Crookston job site on the day of the accident. (Resp. Memo at 11). Although Respondent entered into a contract with Kraus-Anderson to provide the carpentry work, Respondent maintains that all of the carpenters and the two foremen (Tom Corbett and Terry Ostrom) were employed by Larry Barnabo Builders, Inc. Respondent contends that, because this was a large job, it made arrangements with Barnabo Builders to provide employees to work on the construction of the apartment building. In support of its claim that it was not the responsible employer, Respondent has submitted affidavits of Kyle Shufelt, Jason Eatros and J&L's president John Schwieters. Shufelt states in his affidavit that on the day of his accident, he was "working for Barnabo on a J&L job" located in Crookston. (Shufelt Aff. at 2). Eatros, who was one of the workers at the site on the day Shufelt fell, states that he was "employed as a carpenter by Larry Barnabo Builders, Inc." (Eatros Aff. at 2). And

Schwieters simply states that for the Crookston job, "J&L made arrangements with Barnabo to have Barnabo provide a number of workers to assist in the construction". (Schwieters at 8). Schwieters does not indicate specifically which of the employees were Barnabo's and which, if any, were employed by J&L.

The legal relationship between Respondent and Barnabo Builders at the time of the accident is unclear. Both companies are located in the same building. (Dept. Ex. G at 6). In his 1996 deposition, Respondent's safety director Peter Kulzer described Barnabo as being a subsidiary of Respondent. (Resp. Ex. F at 9). Whether or not this is an accurate description, Respondent may still be held responsible for the cited violations even if it did not employ the workers at the site. Federal courts have recognized two situations in which an employer on a multi-employer construction site may be cited for violations that do not result from the exposure of the employer's own workers to a hazard: (1) where the employer creates or controls the hazard; or (2) when the employer reasonably could be expected to have prevented or abated the violations due to its supervisory authority and control over the workplace. Bastian v. Carlton County Highway Dept., 555 N.W.2d 312, 316 (Minn. App. 1996), *citing*, Red Lobster Inns, 1980 O.S.H. Dec. (CCH) 24,636 at 30,220 (Rev. Comm'n July 18, 1980). Assuming that Respondent did not employ Shufelt and the other workers, Respondent still may be properly cited for occupational safety and health violations if Respondent exercised "oversight and control" over the workers or was "actively involved in directing" their work. See, CNG Transmission Corp., 1994 O.S.H. Dec. (CCH) 30,375 at 41,908; Gil Haugen, 1979 O.S.H. Dec. (CCH) 24,105 at 29,289-90 (Rev. Comm'n Dec. 20, 1979).

In support of its motion for summary disposition, Complainant has submitted a number of depositions taken in 1996 in preparation for Kyle Shufelt's personal injury action filed in district court. Depositions taken in a separate and unrelated proceeding may be used to support of a motion for summary judgment. Kessel v. Kessel, 370 N.W.2d 889, 894-95 (Minn. App. 1985). Complainant maintains that the depositions amply support a finding that J&L was the employer of the workers at the site or at least exercised sufficient oversight and control as to be held responsible for the OSHA violations. For example, in contrast to his recent affidavit, Kyle Shufelt stated in his 1996 deposition that he was a J&L employee and was hired in 1993 as a carpenter. (Dept. Ex. E at 13). Likewise, Jeff Homich, the other carpenter on the roof the day of Shufelt's accident, testified in 1996 that he had been employed by J&L for over three years. (Dept. Ex. F at 6). In addition, foremen Tom Corbett and Terry Ostrom identified themselves as long term J&L employees in their depositions. (Dept. Exs. D at 8-10; G at 5-8). Both Corbett and Ostrom testified that they had been employed by J&L since at least 1990. (Id.). It is undisputed that Corbett and Ostrom were the foremen at the Crookston site and in charge of overseeing the construction project and directing the activities of the workers. (Resp. Memo at 4; Ex. G at 8-9; Ex. D at 10).

Moreover, in a prior deposition submitted by Respondent, J&L's safety director Peter Kulzer made several statements indicating that Corbett and Ostrom were J&L employees and that J&L had control over the worksite. For example, Kulzer testified that he told Corbett to use roof brackets and that he assumed Corbett and "other foremen in the company" would in fact use them. (Resp. Ex. F at 22). Kulzer also

testified that J&L supplied the tools for the Crookston site and issued and placed four roof brackets in each foreman's van. (Id. at 27, 49). Kulzer further explained that when a work site is outside of the metro area, "we leave it up to our foreman and our employees of the company to take safety on as a general rule themselves." (Id. at 47). In addition, Kulzer testified that after Shufelt's accident, he met with the work crew to discuss "what happened and how to prevent it from happening again". (Id. at 50). Kulzer also made statements in his recent affidavit which support Complainant's contention that J&L exercised oversight and control over the Crookston site. For example, Kulzer stated that "[t]o further educate foremen and employees, J&L had on site demonstrations on the construction and installation of safety brackets and fall protection to be used on each job site." (Kulzer Aff. at 10).

The depositions submitted by Complainant and the statements by J&L's safety director Peter Kulzer are sufficient to support a finding that J&L was the responsible employer at the work site or exercised sufficient workplace authority to be held responsible. Kulzer's statements are consistent with Ostrom's and Corbett's prior deposition testimony that they were in fact J&L employees, that they were in charge of the work site and that they were acting in J&L's interest. Moreover, as further evidence that an employer-employee relationship existed between Respondent and the workers at the Crookston site, Complainant has submitted safety worksheet forms signed and dated December 17, 1993 by Tom Corbett, Jason Eatros and Terry Ostrom which contain a written acknowledgment that a violation of safety rules "could result in disciplinary action, up to and including termination of my employment with J&L Schwieters Construction, Inc." (emphasis added) (Ex. G). Also, in an interview with MN OSHD Senior Safety Investigator Richard Stever shortly after the accident, J&L's president stated that he had ten employees working at the Crookston complex work site. (Stever Aff. at 14). And finally, in J&L's 1996 AWAIR program, attached as an exhibit to Kulzer's deposition, Larry Barnabo is identified as J&L's Human Resource Director. (Resp. Ex. F, AWAIR attachment at 47).

After reviewing the memoranda and supporting documents submitted by counsel and viewing the facts in the light most favorable to Respondent, the Administrative Law Judge finds that Complainant has met its burden of showing the absence of a genuine issue of material fact regarding Respondent's status as the responsible employer at the Crookston site. Respondent has failed to show that there are specific facts in dispute which preclude a granting summary disposition as to this issue. The affidavits of Shufelt, Eatros and Schweiters, which contradict their prior deposition testimony, are insufficient to raise a genuine issue of material fact. Self-serving affidavits contradicting earlier damaging deposition testimony are not sufficient to create a genuine issue of material fact. Banbury v. Omnitrition International, Inc., 533 N.W.2d 876, 881 (Minn. App. 1995), *citing*, Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1365 (8th Cir. 1983). Respondent has submitted nothing beyond general averments and inconsistent statements to support its claim that the foremen at the worksite were not J&L employees. Consequently, the ALJ finds that Complainant has established that Respondent was the responsible employer at the Crookston site or at least exercised sufficient "oversight and control" over the workers as to be held responsible for each of the alleged violations cited.

Citation 1, item 1, alleges a willful violation of the requirement to install a catch platform and to require the wearing of appropriate protective equipment. 29 C.F.R. §§ 1926.451(u)(3) and 1926.28(a). At the time of the alleged violation, the applicable rule required catch platforms to be installed only on roofs more than 16 feet high and with a slope *greater* than 4 inches in 12 inches. 29 C.F.R. § 1926.451(u)(3). Respondent maintains that it was the good faith belief of the workers at the site that the pitch of the roof was not more than 4 inches in 12 inches in slope. At the hearing, Complainant submitted an affidavit from MN OSHD Investigator Stever. On April 8, 1998, Stever traveled to the Crookston complex to measure the roof's pitch. After measuring, Stever determined the roof's pitch to be 5 inches in 12 inches. (Stever Aff. at 6). Complainant also submitted an affidavit from Wilton Berger, president of the architectural firm that designed the complex. Berger stated that the roof "was designed to be a 5 inches in 12 inches (5/12) pitch". (Berger Aff, at para. 3). Respondent has submitted no evidence to contradict Stever and Berger's conclusions. Based on the affidavits of Richard Stever and Wilton Berger, the ALJ finds that Complainant has sufficiently established that the pitch of the roof is 5 inches in 12 inches and that the requirements set forth in 29 C.F.R. §§ 1926.451(u)(3) and 1926.28(a) applied. Complainant has also established the absence of any genuine issues of material fact as to Respondent's failure to comply with these regulations. Moreover, Complainant has shown that Respondent's failure to install a catch platform and to require the wearing of protective equipment exposed the workers to a violative condition, of which Respondent knew or with the exercise of reasonable diligence could have known. Accordingly, as a matter of law, Complainant has proven that Respondent's admitted failure to install a catch platform and to require the wearing of appropriate personal protective equipment at the Crookston site violated 29 C.F.R. §§ 1926.451(u)(3) and 1926.28(a).

Respondent maintains, however, that even if the roof was 5:12 and a platform was required, this violation should not be characterized as willful. Respondent asserts that it believed in good faith the slope of the roof did not require fall protection. In addition, Respondent points out that it made fall protection equipment such as brackets, safety ropes and toe holds available to the workers. Although the protective equipment was not installed or worn, Respondent contends that its availability reflects a good faith effort to comply with the cited standards. Finally, Respondent claims that the failure to put up the brackets and fall protection was due to unforeseeable employee misconduct. According to Respondent, J&L had a work place rule in place implementing their fall protection equipment requirement and this rule was communicated to the workers by Peter Kulzer and by means of J&L's AWAIR program and safety manual ("The Book"). See, Valdak Corp. v. Occupational Safety and Health, 73 F.3d 1466, 1469 (8th Cir. 1996). Despite this rule, however, the foremen allowed the workers to install the roof without fall protection. (Resp. Memorandum at 4).

To establish a willful violation, Complainant must show by substantial evidence that the employer intentionally disregarded or was plainly indifferent to the requirements of the Act. Valdak, 73 F.3d at 1468. Whether a violation is willful, as opposed to serious, is a question of fact. Anderson Excavating & Wrecking Co. v. Secretary of Labor, 131 F.3d 1254 (8th Cir. 1997). A violation is not willful if an employer had a good faith belief that the violative condition conformed to the requirements of the Act. Donovan v. Mica Construction Company, 699 F.2d 431, 432 (8th Cir. 1983). The test of

good faith is an objective one, that is, “whether the employer’s belief concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances.” Williams Enterp., Inc., 13 BNA OSHC 1249, 1259, 1986-87 CCH OSHD at p. 36, 591. Taking the evidence in the light most favorable to the Respondent, the ALJ finds that Complainant has not established as a matter of law that Respondent “willfully” violated 29 C.F.R. §§ 1926.451(u)(3) and 1926.28(a). Respondent has put forth specific disputed facts regarding the appropriate characterization of this violation. Respondent has raised genuine issues of material fact with respect to its good faith belief that it was in compliance and as to possible unforeseeable employee misconduct. Consequently, summary disposition as to the characterization of Citation 1, item 1 is inappropriate.

Citation 2, item 1 alleges that Respondent violated the Minnesota AWAIR Act. Pursuant to Minn. Stat. § 182.653, subd. 8 (1994), an employer covered by this section must establish a written work place accident and injury reduction program that describes how the program will be implemented; how hazards will be identified, analyzed and controlled; how the plan will be communicated to all affected employees; how accidents will be investigated and corrective action implemented; and how safe practices will be enforced. In addition, an employer must conduct and document, at least annually, a review of its AWAIR program. As Respondent was engaged in a covered business (carpentry) pursuant to Minn. Rules pt. 5205.1500, Respondent was required to comply with the AWAIR statute.

Complainant maintains that Respondent’s AWAIR program lacked a disciplinary policy which included methods of enforcement, an accident investigation policy, methods for identifying, analyzing and controlling hazards, and an annual review provision. (Stever Aff. at 36; Ex. C). For example, “employee safety” rule #17 listed in Respondent’s AWAIR manual reads: “Guard rails at all times where required”. The manual, however, provides no specific information as to when or where guard rails are required. (Ex. C, “Employee Safety” at 17). Complainant argues that Respondent’s failure to establish and implement an adequate AWAIR program was a serious violation. To establish a serious violation, the Commissioner must show that the violation created a substantial probability that death or serious physical harm could result. Minn. Stat. § 182.651, subd. 12 (1996). Complainant contends that Respondent’s violation of the AWAIR Act created a substantial probability of serious physical harm because, as a direct consequence, the workers were uninformed about potential work place hazards. (Stever Aff. at 56). Complainant has sought no monetary penalty with respect to this alleged violation. In response to this citation, Respondent simply claims that its AWAIR program did contain the necessary information and that a copy of the program was distributed to at least some of the workers at the site. (Kulzer Aff. at 6, 14).

Taking the evidence in the light most favorable to Respondent, the ALJ finds that Complainant has established the absence of any genuine issues of material fact regarding Citation 2, item 1. Respondent has not addressed the specific deficiencies alleged by Complainant, and has submitted only a general statement that its AWAIR program met the required standards. A mere averment is insufficient to successfully resist a motion for summary disposition. Minn.R.Civ.P. 56.05. Complainant has

established that the cited standard applied, that Respondent failed to comply with the standard, and that Respondent exposed the workers to a violative condition of which it knew or could have known. Respondent has failed to put forth any evidence to demonstrate that there are specific facts in dispute with respect to this citation. Consequently, the ALJ concludes that Complainant is entitled to summary disposition as to Respondent's violation of Minn. Stat. § 182.653, subd. 8 (1996).

Citation 2, item 2 alleges that Respondent violated occupational and safety rules by failing to provide and to require the wearing of seat belts while operating a forklift equipped with an overhead guard. 29 C.F.R §§1926.602(a)(2)(i) and 1926.28(a). On September 29, 1994, MN OSHD Investigator Stever observed a member of the work crew operating a pettibone forklift without wearing a seat belt. In addition, Stever observed that the seat belt was improperly threaded and was corroded and covered with dirt. (Stever Aff. at 40). Stever questioned foreman Corbett about his observations, and Corbett admitted that the seat belt was not used by employees. (Id.). During the time Stever was at the work site, the forklift was being operated on uneven and rutted ground. (Id.). Respondent admits that this violation occurred, but argues that the violation should not be considered "serious". (Resp. Brief at 24).

The undisputed facts establish, as a matter of law, that Respondent violated 29 C.F.R. 1926.602(a)(2)(i) and 1926.28(a) by failing to provide and to require the wearing of seat belts while operating a fork lift. The ALJ concludes that Complainant has established that this was a serious violation. Operating a forklift on rutted terrain without a seat belt could result in the driver being thrown from the forklift and seriously injured. (Stever Aff. at 56). Respondent has put forward no evidence or argument to support its claim that operating a forklift without a seat belt would not create a substantial probability that serious physical harm could result. Complainant has demonstrated the absence of any genuine issues of material fact as to Citation 2, item 2, and is entitled to summary disposition as a matter of law.

Citation 2, item 3 alleges that Respondent failed to provide a ladder to allow workers access to the roof in violation of 29 C.F.R. § 1926.1051(a). This regulation requires that a ladder be provided at all personnel points of access where there is a break in elevation of 19 inches or more, and no ramp, runway, sloped embankment, or personnel hoist is provided. While attempting to access the roof of the complex during his investigation, MN OSHD Investigator Stever discovered that no ladder was available. (Stever Aff. at 43). Corbett admitted to Stever that no ladder for accessing the roof was provided to the workers. (Id.) In addition, Homich told Stever that the employees accessed the roof by climbing through the trusses. (Id.) Respondent has put forward no evidence to dispute the facts attested to in Stever's affidavit. Instead, Respondent simply states in its reply memorandum that "certainly, ladders were made available" but that the workers "felt comfortable climbing the trusses to access the roof and, therefore, did not utilize a ladder". (Resp. Memorandum at 24). Respondent has provided no affidavits made on personal knowledge that a ladder was provided. Minn.R.Civ.P. 56.05. The ALJ finds that Respondent has failed to establish the existence of specific material facts in dispute with respect to this violation.

Complainant has demonstrated that the cited standard applies, that Respondent failed to comply with the standard and exposed the workers to the violative condition of

which it knew of could have known. Having established the absence of any genuine issues of material fact regarding this violation, Complainant is entitled to summary disposition on this citation as a matter of law. Moreover, although Respondent contends that this violation was improperly classified as “serious”, the ALJ concludes that Respondent’s failure to provide a ladder to access the roof was a serious violation which created a substantial probability that death or serious physical harm could result. Minn. Stat. § 182.651, subd. 12 (1996). A several foot fall from the roof due to the lack of a ladder could result in serious injury. (Stever Aff. at 56). Respondent has put forward no evidence to support its claim that this violation was not serious. Complainant’s motion for summary disposition as to Citation 2, item 3 is granted.

Citation 2, items 4 and 5 allege that Respondent failed to provide employees with Right-to-Know training programs regarding hazardous substances and harmful physical agents. Minn. R. 5206.0700, subps. 1-3 (1994). Respondent’s AWAIR program and a document entitled: “‘The Book’ ... For Field Managers”, constituted all of Respondent’s safety programs. (Stever Aff. at 35; Exs. C and D). Included in Respondent’s AWAIR program was one page of information on the Right-to-Know regulation’s material safety data sheet requirement. (Ex. C). Attached to the AWAIR program was a collection of Material Safety Data Sheets for the hazardous substances identified at the worksite. (Stever Aff. at 51; Ex. C). Among the hazardous substances identified were sealants, lubricants, caulk, anti-freeze and fuel. (Ex. C). In addition to these substances, Complainant also maintains that the workers at the Crookston site were exposed to harmful physical agents including high heat and humidity, coupled with strenuous work. (Stever Aff. at 52). No written program or training information regarding the hazardous substances or harmful physical agents was provided to the workers in either the AWAIR program or “The Book”. (Exs. C and D; Stever Aff. at 50.).

In response to this allegation, Respondent argues that it did provide Right-to-Know materials at the job site and denies that the workers were exposed to heat stress or excessive noise. (Resp. Memorandum at 25). Apart from the AWAIR manual and “The Book” (Exs. C & D), Respondent has put forth no evidence to support its position that it provided the required Right-to-Know materials and training. Respondent’s one page of information on the Right-to-Know regulation’s Material Data Safety Sheet requirement included in the AWAIR program does not meet the statute’s and regulation’s requirements. No written program or training information regarding hazardous substances and harmful physical agents was included in Respondent’s safety programs. (Stever Aff. at 50). Moreover, Respondent has failed to put forth any evidence to challenge Complainant’s conclusion that the workers at the Crookston site, who worked outdoors, were exposed to extreme weather conditions. Based on all the evidence, and viewing the facts in the light most favorable to Respondent, the ALJ finds that Complainant has established the absence of genuine material fact issues regarding the applicability of the cited Right-to-Know regulations and Respondent’s failure to comply. The ALJ also concludes that Respondent’s violation of Minn. R. 5206.0700, subps. 1-3 (1994) was serious. Respondent’s failure to provide the required information and training created a substantial probability of serious injury due to workers being uninformed about the hazards to which they were exposed. (Stever Aff. at 56). Complainant’s motion for summary disposition as to Citation 2, items 4 and 5 is granted.

Finally, Respondent argues that the penalty calculations are erroneous. Calculation of the penalties depends in part on the gravity of the violations, the size of Respondent's business, Respondent's good faith, and Respondent's history of previous violations. Minn. Stat. § 182.666, subd. 6 (1996). Respondent argues that Complainant miscalculated the size of its business. Respondent contends that it has only 10 employees, and not the more than 80 claimed by Complainant. Complainant conceded at the hearing that there is a genuine issue of material fact regarding the total number of employees at the worksite and whether Complainant correctly calculated the size factor credit accordingly. The ALJ concludes that the factors involved in determining the penalties concern issues of fact that may only be resolved after a hearing in this matter. Respondent must be allowed to present evidence and argument as to the amount of penalties to be imposed. Complainant's motion for summary disposition as to the amount of the penalties is denied. This issue and the alleged willful nature of Citation 1, item 1 will proceed to a contested case hearing as scheduled.

J.L.L.
