

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

Shirley I. Chase, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

v.

CBI Na-Con, Inc.,

Respondent.

**ORDER ON CROSS MOTIONS
FOR SUMMARY DISPOSITION**

This matter is before Administrative Law Judge (ALJ) Steve Mihalchick on cross-motions for summary disposition. Respondent filed its motion for summary disposition on August 5, 2002. Complainant filed her motion for summary disposition and a memorandum in opposition to Respondent's motion on August 27, 2002. Respondent filed its memorandum in opposition to Complainant's motion on September 16, 2002. Oral argument on the motions was heard on September 17, 2002 at the Office of Administrative Hearings and the record closed on that date.

Omar A. Syed, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, appeared on behalf of Complainant. Carl B. Carruth, Attorney at Law, Nationsbank Tower, 1301 Gervais Street, P.O. Box 11390, Columbia, South Carolina 29211 and Mark R. Kaster, Attorney at Law, Dorsey & Whitney, LLP, 50 South Sixth Street, Suite 1500, Minneapolis, Minnesota 55402-1498, 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,

IT IS HEREBY ORDERED:

1. That Respondent's motion for summary disposition is GRANTED.
2. That Complainant's motion for summary disposition is DENIED.
3. Complainant's Complaint is DISMISSED.

Dated this 16th day of October, 2002

S/Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Notice is hereby given that under Minn. Stat. § 182.664, subd. 5, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. Rules Ch. 5215.

MEMORANDUM

This is an enforcement proceeding involving a citation issued by Complainant's Occupational Safety and Health Division ("MNOSHA") to CBI Na-Con, Inc. ("CBI" or "Respondent") for a violation of the Minnesota Occupational Safety and Health Act. Complainant has alleged that Respondent violated MNOSHA standards relating to confined spaces. Both Complainant and Respondent maintain that there are no material facts in dispute and both have brought motions for summary disposition.

Factual Background

On July 27, 1996, Respondent was constructing a 200-foot water tower in Shorewood, Minnesota. The water tower is made up of a base, shaft, knuckle and ball. The base is called the "bell" because of its shape. The bell is approximately 36 feet in height with a 29-foot diameter at the bottom and 10-foot diameter at the top. The shaft of the tower is the stem: the long, narrow section of a water tower. There is a platform and structure known as the "knuckle" where the shaft is attached to the upper "ball" of the tower. The ball is the round, ball-shaped section of the tower located on top of the shaft. It is approximately 55 feet in diameter.

On July 27, 1996, Respondent had five employees working on the water tower site. One employee, Brian Scott Jungles, was involved in an accident while working inside the ball of the water tower. Jungles was last seen around closing time welding inside the bottom of the ball in the knuckle area. When he did not exit the tower with the other employees, the foreman and the "pusher" climbed back up the inside of the shaft to the ball area to look for him. Mr. Jungles was discovered at the base of the knuckle. It appeared that he had fallen and struck his head, but the distance he fell is unknown. His safety lanyard was not attached. When Jungles was discovered, he was unconscious and did not have a pulse. The foreman and the pusher quickly moved Jungles through the vent manhole and lowered him to the shaft platform, or floor of the knuckle, and began performing CPR.

The foreman yelled down to those at ground level to call 911. CPR was continued for several minutes while the employees waited for a rescue team. The Excelsior Fire Department and Ridgeview Ambulance Service of Waconia responded to

the call. The fire department attempted to reach the victim with its ladder truck, but the ladder was not long enough to reach the shaft door, and the fire department did not have a life safety line long enough to lower Jungles to the ground. CBI did have such equipment. A Stokes basket belonging to CBI was sent up the shaft and brought through the shaft door, a 30 inch manhole. Jungles was secured to the basket and lowered vertically through the middle of the shaft, to the shaft's floor, and then to the ground. When Jungles reached the ground, he was pronounced dead.

After an inspection, Minnesota OSHA (MNOSHA) cited Respondent with two violations. The first item (Citation 1, Item 1)^[1] alleged that Respondent violated MNOSHA standards^[2] relating to the inspection of personal fall arrest systems. The second item (Citation 1, Item 2) alleged that Respondent violated MNOSHA standards relating to confined space entry programs for employees entering the shaft or ball of the water tower. In a letter dated July 22, 1999, Complainant notified the ALJ and Respondent that it was rescinding item 1 of Citation 1. Accordingly, the confined space citation is the only remaining item at issue in this case.

Summary Disposition Motion

Summary disposition is the administrative equivalent to summary judgment.^[3] Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.^[4] A genuine issue is one that is not a sham or frivolous, and a material fact is one which will affect the outcome of the case.^[5] The moving party must demonstrate that no genuine issues of material fact exist.^[6] If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.^[7] It is not sufficient for the non-moving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.^[8]

In order to establish a *prima facie* violation of OSHA regulations, Complainant must prove that:

1. the cited standard applies;
2. the employer failed to comply with the standard;
3. the employer knew or should have known of the violative condition with the exercise of reasonable diligence; and
4. an employee was exposed to or had access to the violative condition.^[9]

Confined Space Standard

Unless exempted by a variance from the Department, each employer in the State of Minnesota must comply with occupational safety and health standards issued pursuant to the Minnesota Occupational Safety and Health Act.^[10] The Construction Confined Space Standard is one such standard and it applies to construction work, meaning work performed at a construction site.^[11]

Pursuant to the “Scope” section of the construction confined space standards, the confined space rules are intended to “prescribe minimum standards *for preventing worker exposure to dangerous air contamination, oxygen deficiency, or oxygen enrichment*” within:

such spaces as silos, tanks, vats, vessels, boilers, compartments, ducts, sewers, pipelines, vaults, bins, tubs, pits, and other similar spaces. A tank or other vessel under construction *may not* meet the definition of “confined space” until it is completely enclosed.^[12]

(Emphasis added.)

A “confined space” is defined as “a special configuration” that could result in any of the following:

- A. Atmospheric condition - a condition in which a dangerous air contamination, oxygen deficiency, or oxygen enrichment may exist or develop;
- B. Entry or exit access - a condition where the emergency removal of a suddenly disabled person is difficult due to the location or size of the access opening; or
- C. Engulfment condition - a condition where the risk of engulfment exists or could develop.^[13]

In order to establish a violation of Minnesota’s construction confined space standard, the Department must show that the standard is applicable to the conditions at issue. Respondent was engaged in construction work at the time of the accident and the Department maintains that the water tower qualified as a confined space because it satisfied the “entry/exit access” component of Minnesota Rule 5207.0301, subpart 2B. MNOSHA has charged CBI with failing to “implement an entry permit system, develop written operating and rescue procedures, and conduct worker training before any workers were allowed to enter a confined space.”^[14] The Department contends that MNOSHA standards were violated because CBI had no confined space entry program for employees who entered the shaft or ball of the water tower.

History of Minnesota’s Confined Space Standard

On November 12, 1987, the Department of Labor and Industry, Occupational Safety and Health Division (MNOSHA) held a public hearing on its proposed standards governing confined space entries in general industry work and construction work. MNOSHA standards are exempt from the rulemaking requirements of Minnesota’s Administrative Procedure Act (MAPA).^[15] The only constraints upon the Commissioner’s authority to promulgate an OSHA standard are contained in Minn. Stat. § 182.655 (2000). This section provides in part that the Commissioner must publish proposed rules, afford persons a period of 30 days to submit comments, and hold a public hearing if requested. Although an administrative law judge presided over the

public hearing on the proposed standards at issue in this matter, his role was essentially ministerial. That is, the administrative law judge did not review the standards for legality or approve the standards under the procedures set forth in the MAPA.

On February 22, 1988, the Department published notice that it had adopted the proposed standards with some modifications.^[16] In the “synopsis of comments” preceding the adopted standards published in the State Register, the Department noted that the confined space standard generated the most public comment of those proposed.^[17] The Department explained that the standards were proposed in order to bring confined space safety requirements into one comprehensive standard, and to address the potentially hazardous conditions that exist in confined spaces. The Department identified atmospheric conditions (oxygen deficiency, toxic gases) as the primary hazard responsible for most deaths and injuries in confined spaces.^[18]

The Department further discussed comments and suggestions it had received in response to its proposed standards. In discussing one area of concern, the Department stated:

Several commenters ... all of whom are involved in tank manufacturing, were concerned about the application of the confined space standard to tanks while they are under construction and the adverse effect it may have on the tank fabricating industry in Minnesota. They suggested that a tank under construction should not be considered a confined space and the exemption allowed under the American National Standards Institute standard, ANSI Z117.1-1977 “Safety Requirements for Working in Tanks and Other Confined Spaces”, should be incorporated into this standard. *Minnesota OSHA agrees* and appropriate revisions were made in 5205.1000^[19] indicating that “a tank or other vessel under construction may not meet the definition of ‘confined space’ until it is completely enclosed.” (Emphasis added.)^[20]

On January 14, 1993, the U.S. Department of Labor’s Occupational Safety and Health Administration (“Federal OSHA”) adopted general industry confined space standards, but declined to adopt a construction confined space standard.^[21] Federal OSHA explained that separate rulemaking was warranted to address confined spaces in construction, agriculture, and shipyard work.^[22] To date, Federal OSHA does not have a construction confined space standard.

On December 1, 1998, Federal OSHA revised its general industry confined space standards.^[23] The Department (MNOSHA) adopted the Federal OSHA permit-required confined space standard in its entirety On May 10, 1999. The Department replaced its existing general industry confined space standard with the federal standard, and moved the text of the existing general industry standard (chapter 5205) to Minnesota Rules chapter 5207 governing construction.^[24]

Differences Between MNOSHA and Federal Confined Space Standards

The Federal confined space standard applies to general industry but specifically exempts construction activity.^[25] In the Federal standard a “confined space” is defined to mean a space that:

- (1) is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (2) has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry.); and
- (3) is not designed for continuous employee occupancy.^[26]

Protective measures, training, or entry procedures are not required for a confined space under the Federal standard unless it is a “permit-required confined space”. A “permit-required confined space” means a confined space *that contains a hazard*. A “permit-required confined space” is specifically defined to mean a confined space that has one or more of the following characteristics:

- (1) contains or has a potential to contain a hazardous atmosphere;
- (2) contains a material that has the potential for engulfing an entrant;
- (3) has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or
- (4) contains any other recognized serious safety or health hazard.^[27]

Unlike the Federal standard, the Minnesota confined space standard defines a confined space to encompass all “special configurations” that could contain an atmospheric, engulfment, or access condition. Because access difficulties alone are enough to render a configuration a “confined space” under the Minnesota standard, the requirements regarding training and entry procedures apply even if the hazards that the standard is intended to prevent (atmospheric and engulfment) are not present.^[28] Thus, under Minnesota rules, a configuration where it is difficult to remove a suddenly disabled person because of the location or size of the access opening is a confined space regardless of any other hazards.

Arguments of the Parties

The Department argues that it has established a prima facie violation of a MNOSHA standard. According to the Department, the confined space standard applies as a matter of law and CBI failed to comply with it by maintaining a written confined space program. In addition, CBI’s employees had access to confined space hazards without a confined space program, and the Department asserts that CBI knew, or

should have known, that its employees worked in confined spaces without such a program. The Department maintains that the water tower satisfies the “entry/exit access” component of the confined space definition because the size or location of its access openings could make it difficult to remove a suddenly disabled person.^[29] The Department contends that the testimony of the fire department rescuers and CBI’s own employees establishes that the small size and extremely high location of the access openings in the ball and shaft of the water tower made it very difficult to remove Mr. Jungles.

CBI argues initially that Minnesota’s confined space standard is invalid because it differs from Federal law and therefore violates Minnesota Statute § 182.655, subd. 12. This section prohibits the Commissioner from promulgating standards that differ from federal standards “where the standard significantly affects interstate commerce, unless such standards are required by compelling local conditions and do not unduly burden interstate commerce.” The federal confined space standard applies only to general industry and specifically exempts construction work. Instead of having a comprehensive confined space standard for construction work, Federal OSHA has a number of construction standards that apply to specific confined space hazards.^[30] In addition, as discussed above, the Federal permit-required confined space standard is limited to spaces where an atmospheric, engulfment, configuration or other recognized serious hazard is present.^[31] For these reasons, CBI argues that the Minnesota standard differs substantially from the Federal standards in violation of Minn. Stat. § 182.655, subd. 12.

The Administrative Law Judge is not persuaded that MNOSHA’s construction confined space standard violates Minn. Stat. § 182.655, subd. 12. Subdivision 12 only applies when a MNOSHA standard differs from a corresponding federal standard. Federal OSHA does not have a construction confined space standard. Instead, existing Federal OSHA standards address confined space hazards in a piecemeal fashion.

Moreover, Minnesota is one of 24 states that maintains a federally-approved “state plan” for OSHA enforcement.^[32] As a “state plan” state, Minnesota may promulgate and enforce its own OSHA standards as well as existing federal standards, as long as it remains “at least as effective as” Federal OSHA’s enforcement scheme.^[33] That grant of authority allows Minnesota to establish standards that are more stringent than those promulgated by Federal OSHA.^[34] Because there is no corresponding federal standard from which the Minnesota standard can differ and because MNOSHA may establish standards as effective or more stringent than Federal OSHA standards, subdivision 12 does not apply.^[35]

CBI further argues that MNOSHA’s construction confined space standard is impermissibly vague and unenforceable. CBI contends that the definition of “confined space”, which contains such vague terms or words as “special configuration”, “could”, “difficult” and “may”, fails to provide fair notice to employers of conditions or spaces that fall within its terms. According to CBI, the definition of “confined space” is so broadly defined and poorly written that it could apply to almost any space. CBI notes that one of the authors of the standard and a designee of the Commissioner conceded that the

standard is difficult to implement because the definition is so broadly written.^[36] Thus, CBI contends that whether a space will be considered “confined” will depend almost entirely on the discretion of the compliance officer. In addition, although the term “human occupancy” is not in the definition, two designees of the Commissioner testified that if the space was designed for human occupancy, MNOSHA does not consider it to be a “confined space” within the meaning of the standard.^[37] CBI argues that such testimony establishes that the standard is vague and arbitrary.

CBI also points out that the standard does not state when a vessel under construction would be considered a confined space. Minnesota Rule 5207.0300, subp. 1, states that a tank or vessel under construction “may not meet the definition of ‘confined space’ until it is completely enclosed.” This discretionary language is used, despite the fact that the Department stated in its synopsis of comments preceding the standards’ publication that it agreed with comments from tank manufacturing interests that a tank or vessel under construction should not be considered a confined space.^[38] CBI argues that, because the water tower was under construction at the time of the accident, it should be exempted from the standard’s requirements and not be considered a confined space.

If the standard is found to apply and to be enforceable, CBI contends that the water tower was not a confined space because: (1) it was under construction and had never been completely enclosed; (2) it was designed for human occupancy during construction; (3) there was no reasonable likelihood that the water tower could develop an atmospheric hazard given its many openings and ventilation; (4) no engulfment hazard was present or possible; and (5) based on the testimony of CBI employees, the removal of Mr. Jungles from the water tower was not difficult.

MNOSHA argues that, given the size and location of the access openings in the water tower, CBI could reasonably have been expected to know that its tower contained confined spaces under Minn. R. 5207.0301, subp. 2, that required certain training and safety procedures. MNOSHA cites to the testimony of the rescue personnel to support its contention that removing Mr. Jungles from the tower was “difficult” due to the location and size of the tower’s access openings. MNOSHA insists that the standard is not unconstitutionally vague and that the word “difficult” is not a term of art. Rather, MNOSHA asserts that persons of common intelligence can understand that removing a disabled person from a 30” diameter access hole approximately 150 feet above ground is “difficult”, thereby making the space a “confined space”.

Constitutional Issues

As a general rule, neither an ALJ nor an agency head can declare a statute or rule unconstitutional on its face in a contested case proceeding, since that power is vested in the judicial branch of government.^[39] While administrative law judges must apply laws, rules, and ordinances in a constitutional manner, questions of the constitutional validity of such enactments are not normally within the jurisdiction of an ALJ or agency official.^[40] It is permissible, however, for an agency or ALJ to determine

a constitutional question in the interpretation or application of a statute or rule to particular facts taking into account relevant judicial decisions.^[41]

Vagueness

A rule, like a statute, is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.^[42] If a regulation defines an act in a manner that encourages arbitrary enforcement or is so indefinite that people must guess at its meaning, it is impermissibly vague.^[43] In the employee safety context, a regulation is not impermissibly vague if “an employer familiar with the circumstances of the industry could reasonably be expected to have had adequate warning of the conduct required by the regulation.”^[44] The burden of proving that a regulation is vague is upon the party challenging the constitutionality of the regulation.^[45]

The Administrative Law Judge finds that CBI has established that that MNOSHA’s construction confined space standard is vague when applied to the facts of this case and so indefinite that CBI did not have adequate warning that its water tower fell within the standard’s terms. First, the standard does not identify when a tank or other vessel under construction may be considered a confined space. Minnesota Rule 5207.0300, subpart 1, states only that a tank or other vessel “may not meet the definition of ‘confined space’ until it is completely enclosed.” It is unclear whether “may not” is meant to be discretionary or prohibitive. If discretionary, stating that a vessel under construction may or may not be a confined space is so lacking in standards that it fails to be a rule. That is, the rule provides no reasonably specific language to determine the intended scope of the regulations.^[46]

In addition, the use of the discretionary “may not” language conflicts with the Department’s intent expressed in comments preceding the standards’ publication in the State Register. In its synopsis of comments in the State Register, the Department indicated that it agreed with tank manufacturers’ comments that vessels under construction “should not” be considered confined spaces and should be exempted from the safety requirements. Given the discretionary language in the standard regarding tanks under construction and the conflicting intent expressed in the Department’s synopsis of comments, CBI could not reasonably have been expected to know whether the water tower it was constructing fell within the standards’ terms.

More important, the “confined space” definition itself is so broad and susceptible to different interpretations that the Administrative Law Judge cannot determine if it applies to CBI’s water tower and the facts at hand. Pursuant to Minnesota Rule 5207.0301, subpart 2B, any “special configuration” where it is difficult to remove a suddenly disabled person due to the location or size of the access opening is considered a confined space. Under this definition it is not necessary that the space be confined or enclosed, or that the space contain an atmospheric or engulfment hazard. The difficulty of removing a disabled person is the determinative criteria under subpart 2B. Thus, although not confined, a roofer working on the roof of a tall building might be deemed to be working in a confined space if his emergency removal is difficult due to

the location of the “access opening”. In the case at hand, the firefighters and other emergency rescue personnel testified that, given the height of the water tower and the size of the access openings, it was difficult to remove Mr. Jungles. CBI’s employees, on the other hand, who actually removed Mr. Jungles and who were familiar with climbing up and down the shaft’s ladder, maintain that it was not difficult to remove his body. In other words, removal would be difficult for persons unaccustomed to working at those heights and relatively easy for those who were accustomed to such work. The rule provides no standard for measuring difficulty.

The Department concedes that the water tower did not contain an atmospheric or engulfment hazard on the day of the accident. The only iteration of the “confined space” definition that the Department is relying on is subpart 2B, regarding an entry/exit access condition and the difficulty of removing a disabled person.^[47] Given the subjectivity of the word “difficult” and the overly broad definition of “confined space”, the Administrative Law Judge finds that MNOSHA’s construction confined space definition failed to provide CBI with sufficient standards or adequate warning that its water tower fell within its terms.

Reasonableness

The Administrative Law Judge also finds that it is unreasonable to apply Minnesota Rule 5207.0300, subp. 2B, to the facts of this case because the facts do not relate rationally to the objective the Department sought to achieve with these standards.^[48] In order to be valid, a rule must be reasonable.^[49] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.^[50] If a regulation is ambiguous, as in this case, the agency’s interpretation is entitled to considerable deference and will generally be upheld if it is reasonable.^[51] The extent to which the agency’s interpretation of the rule is in accord with “the express purpose of the [a]ct and the intention of the legislature” must also be considered.^[52]

In attempting to ascertain the legislature’s or rulemaking authority’s intent, it is proper to consider the title of the Act or rule under consideration.^[53] The rules at issue in this matter are Minn. Rules 5207.0300 to .0310 entitled “Confined Spaces”. The agency’s stated intent in promulgating the confined space standard was to “prevent worker exposure to dangerous air contamination, oxygen deficiency, or oxygen enrichment” within tanks, vessels and other compartments. A reading of the title, the scope, the synopsis of comments in the State Register publication, and the entire rule provisions indicates that the standards were intended to protect workers against atmospheric or engulfment hazards that develop in confined spaces.^[54] Minnesota Rule 5207.0301, subpart 2B, does not effectuate this intent because under this subpart, access difficulties alone are enough to render a space a “confined space” even if atmospheric or engulfment hazards are not present.

Research has uncovered no Minnesota case law construing the confined space standard. And the Department has not established a longstanding interpretation of the confined space standard that warrants considerable deference. In fact, designees of

the Commissioner who drafted the confined space standards admitted in deposition testimony that the standard is vague and broadly written.^[55] One of the authors of the confined space standard, Mr. Paul Ellringer, conceded that under Minnesota Rule 5207.0301, subpart 2B, a tower crane, which has a straight vertical ladder and an operating cab with a hatch opening for access, could meet the definition of a confined space.^[56] Mr. Ellringer stated that while he personally would not interpret the definition as covering a tower crane, others could interpret it that way.^[57]

There was no atmospheric or engulfment hazard present in the water tower, so the ease or difficulty of removing Mr. Jungles was not rationally related to the objective the Department sought to achieve with the confined space standards.^[58] In other words, the location or size of “entry/exit” access openings alone are not sufficiently linked to a confinement hazard and are not sufficiently tied to the rules’ expressed intent of preventing worker exposure to atmospheric and engulfment hazards. In a “confined space” standard, the ease or difficulty of removing a disabled person is relevant only when it is directly related to rescuing a worker exposed to dangerous air contamination or oxygen deficiency. MNOSHA can adopt a “rescue access” standard, but here they confused the issue by calling it a “confined space” standard.

Conclusion

There are no genuine issues of material fact in this matter. The only issue to be determined is whether CBI’s water tower was a “confined space” under MNOSHA’s construction confined space standard. Based on a review of the entire record, the Administrative Law Judge concludes that Minn. Rule 5201.0301, subpart 2B is vague and so lacking in specific standards that it cannot be applied to the facts at hand. Moreover, MNOSHA’s construction confined space standard as a whole, with its possible exclusion for tanks under construction and its subjective and discretionary criteria, is so indefinite that CBI could not reasonably have been expected to know that its water tower fell within its terms. Summary disposition must be granted in favor of CBI.

S.M.M.

^[1] Item 1 initially alleged a general duty violation under Minn. Stat. § 182.653, subd. 2. It was amended by motion without objection to charge a violation of a specific standard.

^[2] 29 C.F.R. § 1926.502(d)(21).

^[3] Minn. R. 1400.5500K (2000) and 1400.6600 (2000).

^[4] Minn. R. Civ. P., 56.03 and Minn. R. 1400.6600 (2000).

^[5] *Highland Chateau v. Minnesota Dep’t of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984) *rev. denied* (Minn. February 6, 1985).

^[6] *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

^[7] *Highland Chateau*, 356 N.W.2d at 808.

^[8] Minn. R. Civ. P., 56.05.

^[9] *Dun-Par Engineered Form Co.*, 12 OSHC 1962, 1986-87 OSHD ¶ 27,651 (1986), *rev’d on other grounds*, 843 F.3rd 1135 (8th Cir. 1988); *Gilles & Cotting, Inc.*, 3 OSHC 2002, 1975-76 OSHD ¶ 20,448 (1976).

[10] Minn. Stat. § 182.653, subds. 3 and 6 (2000).

[11] Minn. R. 5205.0015 (2001) and 5207.0300 to .0310 (2001).

[12] Minn. R. 5207.0300, subp. 1.

[13] Minn. R. 5207.0301, subp. 2.

[14] Citation 1, Item 2.

[15] Minn. Stat. § 182.655, subd. 1(2000); Minn. Stat. § 14.03, subd. 3(b)(5) (2000).

[16] See, 12 S.R. 1754 (Feb. 22, 1988).

[17] 12 S.R. 1761 (Feb. 22, 1988).

[18] *Id.*

[19] Now Minn. R. 5207.0300. The confined space standard was formerly located in Minnesota Rules chapter 5205. The standard was moved to chapter 5207 in 1999. To avoid confusion, all citations in this decision are to the current confined space standard. The standard has not changed since being re-codified in 1999.

[20] 12 S.R. 1762 (Feb. 22, 1988).

[21] 58 Fed. Reg. 4469 (Jan. 14, 1993).

[22] 58 Fed. Reg. 4469-70.

[23] 63 Fed. Reg. 66018 (Dec. 1, 1998).

[24] 23 S.R. 2132 (May 10, 1999).

[25] 29 CFR 1910.146(a); 58 Fed. Reg. at 4468-70.

[26] 29 CFR 1910.146.

[27] *Id.*

[28] See, Minn. R. 5207.0300, subp. 1 Scope.

[29] Minn. Rule 5207.0301, subp. 2(B) (2001).

[30] 29 CFR § 1926.21(b)(6).

[31] 29 CFR § 1910.146.

[32] See, 29 U.S.C. §667(e).

[33] See, 29 U.S.C. §667(c)(2); Minn. Stat. § 182.655, subd. 13 (2000).

[34] See, 29 U.S.C. §667(a).

[35] See, *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 461, 654 A.2d 449, 465 (Md. Ct. App. 1995) (upholding a Maryland OSHA standard on smoking in enclosed workplaces despite the existence of several general Federal OSHA standards regulating smoking.)

[36] Depo. Testimony of Ellringer at 45-49.

[37] Depo. Testimony of Mueller at 15-17; Depo. Testimony of Ellringer at 29, 45-46.

[38] 12 S.R. 1762 (Feb. 22, 1988).

[39] *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *In the Matter of Rochester Ambulance Service, a Div. of Hiawatha Aviation of Rochester, Inc.*, 500 N.W.2d 495 (Minn. App. 1993). Respondent suggested that the ALJ could pass on the validity of a rule under Minn. Stat. § 14.14. This statute, however, governs pre-enforcement challenges brought as declaratory judgment actions and not contested case enforcement actions. See, *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Peterson v. Minnesota Dept. of Labor & Industry*, 591 N.W.2d 76, 78 (Minn. App. 1999), *rev. denied* (Minn. May 18, 1999).

[40] *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d at 368. Under the rulemaking procedures of the Minnesota Administrative Procedure Act (MAPA), an ALJ may disapprove a proposed rule if the rule is not rationally related to the agency's objective or the rule is unconstitutional. Minn. R. 1400.2100 (2001). Once approved, rules adopted under the MAPA procedures enjoy a presumption of legality. Minn. Stat. § 14.37, subd. 1 (2000). Because MNOSHA standards are exempt from MAPA rulemaking requirements, they do not enjoy the presumption of legality afforded rules adopted under MAPA procedures.

[41] *Pettersen v. Commissioner of Employment Services*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (1975); *Jackson County Education Ass'n v. Grass Lake Community*, 291 N.W.2d 53 (Mich. App. 1980).

[42] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed* 106 S.Ct. 375 (1985).

[43] *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001); *Humenansky v. Minnesota Bd. of Md. Exam'rs*, 525 N.W.2d 559, 564 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995).

[44] *National Industrial Constructors, Inc. v. Occupational Safety and Health Review Commission*, 583 F.2d 1048, 1054 (8th Cir. 1978).

[45] Essling v. Markman, 335 N.W.2d 237, 239 (Minn. 1983).

[46] See, Georgia Pacific Co. v. Occupational Safety & Health Review Comm'n, 25 F.3d 999, 1005 (11th Cir, 1994).

[47] Transcript of summary disposition oral argument at 52-53.

[48] Mammenga v. State, Dept. of Human Services, 442 N.W.2d 786, 789 (Minn. 1989).

[49] Juster Bros. v. Christgau, 214 Minn. 108, 118, 7 N.W.2d 501, 507 (1943); *In re* Application of Q Petroleum, 498 N.W.2d 772, 777 (Minn. App. 1993), *rev. denied* (Minn. July 15, 1993).

[50] Mammenga v. Dept. of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Dept. of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985).

[51] St. Otto's Home v. Minnesota Dept. of Human Services, 437 N.W.2d 35, 40 (Minn. 1989), *citing*, Aluminum Co. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389, 104 S.Ct. 2472, 2479, 81 L.Ed.2d 301 (1984).

[52] Rocco Altobelli, Inc. v. State, Dept. of Commerce, 524 N.W.2d 30, 36 (Minn. App. 1994), *citing*, Geo. A. Hormel & Co. v. Asper, 428 N.W.2d 47, 50 (Minn. 1988).

[53] LaBere v. Palmer, 232 Minn. 203, 44 N.W.2d 827 (1950); Cleveland v. Rice County, 238 Minn. 180, 56 N.W.2d 641 (1952); Essling v. Markman, 335 N.W.2d 237, 240 (Minn. 1983).

[54] See, Minn. R. 5207.0330, subp. 1 Scope; 12 S.R. 1761.

[55] Testimony of Ellringer at 29-31.

[56] Testimony of Ellringer at 45-49.

[57] *Id.*

[58] Mammenga v. State, Dept. of Human Services, 442 N.W.2d 786, 789 (Minn. 1989).