

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.

Mike Jensen,

Respondent.

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

The above matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of and Order for Hearing issued by the Department of Labor and Industry on September 7, 1997, and the Department's Motion for Summary Disposition filed on November 6, 1997. Nancy J. Leppink, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of Complainant, the Commissioner of the Department of Labor and Industry (hereinafter referred to as the "Department" or the "Complainant"). Mike Jensen, 823-5th Avenue N.W., Rochester, Minnesota 55901, appeared on his own behalf, without benefit of counsel. The record with respect to the motion closed on December 8, 1997, when the Department's letter reply was received.

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 in Minn. Rules Chapter 5215.

ORDER

Based upon all of the files, proceedings, and arguments herein, and for the reasons set forth in the Memorandum below,

IT IS HEREBY ORDERED as follows:

1. Complainant's Motion for Summary Disposition is GRANTED. The hearing previously scheduled for January 13, 1998, is hereby canceled.

2. The citations, proposed penalties, and abatement dates issued to the Respondent by the Minnesota Department of Labor and Industry on February 26, 1997, are hereby AFFIRMED.

3. The Respondent shall forthwith pay a penalty in the total amount of \$2,800.00 to the Commissioner of the Minnesota Department of Labor and Industry. Pursuant to Minn. Stat. § 182.666, subd. 7 (1997), upon the penalty becoming a final order, if not paid within sixty days, the amount of the penalty increases to 125 percent of the penalty imposed. After that sixty days, the unpaid fine shall accrue an additional penalty of ten percent per month compounded monthly until paid in full or until the fine has accrued to 300 percent of the original assessed amount.

Dated this 6th day of January, 1998.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The Complainant has filed a motion for summary disposition in this matter. Summary disposition is the administrative equivalent to summary judgment. Minn. R. 1400.5500 K. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings follows the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. See Minn. R. 1400.6600.

It is well established that, in order to successfully resist a motion for summary judgment, the non-moving party (here, the Respondent) must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving 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 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof as to an issue at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Id. To meet this burden, the party must offer

“significant probative evidence” tending to support its claims. A mere showing that there is some “metaphysical doubt” as to material facts does not meet this burden. Id.

For the purpose of this motion, based upon the memoranda, affidavits, and other materials filed by the parties, the facts in this case appear to be as follows. On February 10, 1997, the Occupational Safety and Health Division of the Department received a complaint alleging that two men were working on unsafe scaffolding on the south side of the Carson Art Company, which is located at 325 South Broadway in Rochester, Minnesota. On the same day, James Emmons, a Senior Safety Investigator employed by the Department, went to the worksite to investigate. Emmons Affidavit, ¶¶ 1, 5-6 (attached to the Department’s Motion for Summary Disposition). After he arrived at the worksite, Mr. Emmons observed two men, who later identified themselves as Ralph Eversman and Wes Wussow, working from the top section of a tubular welded frame scaffold. The men were installing sheets of plywood on the upper section of the south exterior wall of the Carson Art Company building. The scaffold was erected on the blacktop parking lot and was five sections high (25 feet). To determine the height of the scaffold, Mr. Emmons measured one section of it and determined that that section was five feet high. Mr. Emmons saw that guardrails and toeboards were not installed on the open sides and ends of the scaffold that were more than ten feet above the ground. The scaffold was not fully planked, it lacked baseplates, and it was not tied to the building. Id., ¶¶ 9-10. Mr. Emmons saw Mr. Wussow climb from the top section of the scaffold up to the roof of the building, and saw him kneel on the roof and lean over the edge to install a piece of plywood on the brick wall with a hammerdrill. The top of the roof was approximately five feet above the top section of the 25-foot scaffold. Mr. Wussow was not wearing fall protection at the time, nor was there any guardrailing or safety nets to protect him from a fall to the ground of approximately 30 feet. Id., ¶ 11.

Mr. Emmons yelled up to the two men several times to come down. Mr. Eversman finally climbed down from the scaffolding and identified himself as the lead man. Mr. Emmons showed Mr. Eversman his identification, told him that he was there to conduct an occupational safety and health inspection of the worksite, and held an opening conference with Mr. Eversman. Mr. Eversman indicated that his employer was Mike Jensen and said that both he and Mr. Wussow were being paid by Mr. Jensen by the hour. He also said that Mr. Jensen had no insurance. Id., ¶¶ 12-15. After Mr. Wussow came down from the roof of the building, he also said that he had been hired by Mr. Jensen and that he was being paid by Mr. Jensen by the hour. Id., ¶ 16. Mr. Eversman and Mr. Wussow told Mr. Emmons that they had not received any training from Mr. Jensen on how to safely complete the work and, in particular, had not received any training regarding scaffolding and fall protection. At the end of the inspection, Mr. Emmons held a closing conference with the two men. He advised them that citations and penalties might be issued as a result of the inspection, explained the right to contest, posting requirements, and progress reports, and left a summary of the AWAIR statute and a copy of the fall protection standard. Id., ¶¶ 17-18.

On February 10, 1997, Mr. Emmons called Mr. Jensen on the telephone to discuss his inspection and concerns about the lack of guardrailing for the scaffolding and fall protection for Mr. Wussow while he was working on the roof. Mr. Jensen told

Mr. Emmons that he was a brick layer and had provided the materials for the work, including the scaffold. *Id.*, ¶ 19. On February 11, 1997, Dr. Harold Perry contacted Mr. Emmons and told him that he was the owner of the Carson Art Company building. Mr. Emmons discussed with Dr. Perry the observations he made during the inspection and his concerns about the lack of guardrailing for the scaffolding and fall protection for Mr. Wussow while he was working on the roof. Shortly thereafter, Mr. Emmons received a copy of a letter dated February 11, 1997, from Milton A. Rosenblad, Dr. Perry's attorney, to Mr. Jensen. *Id.*, ¶ 20. In the letter, Mr. Rosenblad informed Mr. Jensen that he was writing on behalf of Dr. Perry with regard to "the work which Dr. Perry had asked [Mr. Jensen] to do at the building located at 325 South Broadway in Rochester" and was writing to advise Mr. Jensen that he "should cease work immediately and not commence further work until Dr. Perry has returned from Florida" The letter further indicated that Dr. Perry wanted Mr. Jensen to supply him with a certificate that he was carrying liability insurance and was covered by worker's compensation insurance, and stated that Mr. Jensen would be required to comply with OSHA safety requirements. In addition, Dr. Perry wanted Mr. Jensen to present him with a written undertaking of what he proposed to do and an estimate for his charges. *See* Ex. C to Emmons Affidavit. Mr. Emmons recommended the issuance of citations for violations of 29 C.F.R. §§ 1926.451(d)(10), 1926.501(b)(1) and 1926.503(a)(1) and (2), and Minn. Stat. § 182.653, subd. 8, proposed adjusted penalties totaling \$2,800.00, and abatement periods for the various citations. Emmons Affidavit, ¶¶ 21-51.

In accordance with Mr. Emmons' recommendations, the Department issued a Citation and Notification of Penalty to Mr. Jensen on February 26, 1997. Complaint, Ex. A. Respondent filed a Notice of Contest on or about May 8, 1997, in which he contested each of the citations, including whether a violation occurred, the type of violation, the abatement date, and the amount of penalty. He further indicated as the reason for his contest that "the work was done by Raulf [sic] Everson [sic]" and attached a note dated Jan. 31, 1997, and signed by Ralph Eversman, that said, "I Ralph Eversman Will do Wall Repair at Carson Art. You supply all Materials for Job. Labor at \$600.00 Too [sic] Be Paid When Check Comes From Owner." On August 1, 1997, the Department issued the Complaint in this matter.

The Department filed its Motion for Summary Judgment on November 6, 1997. In support of its motion, the Department provided an affidavit of Mr. Emmons setting forth the facts described above, along with pictures of the worksite taken by Mr. Emmons on the date of the inspection. The Department also provided an affidavit of Mr. Eversman. (Mr. Wussow refused to provide Mr. Emmons with his address or telephone number, said that he and the Respondent had been friends for fifteen years, and stated that he did not want to get involved in the OSHA matter. Emmons Affidavit, ¶ 52.) In his affidavit, Mr. Eversman stated that he was a former employee of Mr. Jensen. He began working for Mr. Jensen in April, 1996, at \$8.00 per hour, doing cement work, snow removal and other odd jobs. In the winter of 1997, Mr. Jensen directed Mr. Eversman to secure plywood to the upper exterior brick wall of the Carson Art Company building. The brick exterior of the building was deteriorating, and Mr. Jensen directed Mr. Eversman to install plywood over the brick wall to prevent bricks and mortar from falling off the side of the building. It was Mr. Eversman's understanding that this was a

temporary repair until the wall could be permanently repaired in the spring. Mr. Eversman did not know who hired Mr. Jensen to repair the wall of the building. Prior to Mr. Eversman beginning the work on the building, he and Mr. Jensen agreed that Mr. Jensen would pay him \$8.00 per hour. Mr. Jensen introduced him to Mr. Wussow and said that he had hired Mr. Wussow to work with Mr. Eversman on the building. Eversman Affidavit, ¶¶ 1-4. The day before they began work on the building, Mr. Jensen drove Mr. Wussow and Mr. Eversman to the building and explained what needed to be done. He told them that he wanted plywood secured to the upper exterior wall of the building to prevent brick and mortar from falling off, and explained to them how to secure the plywood to the building with screws. Mr. Jensen did not discuss safety issues with them or instruct them how to safely complete the work. Mr. Eversman had no expertise or prior experience in doing this type of work. Id., ¶ 5.

Mr. Eversman and Mr. Wussow began working on the building on February 10, 1997. They did not bring any materials, tools or equipment with them to complete the work on the building because Mr. Jensen told them that he would supply all of the materials, tools, and equipment. Mr. Jensen met them at the building on February 10 and provided all of the materials, tools and equipment to complete the repair work, including the scaffolding, the scaffolding boards, the plywood to cover the brick, the hammer drill and the screws. Although Mr. Jensen was aware that the repair job would require them to work close to the rooftop of the building, he did not provide guardrails for the scaffolding or any fall protection, such as lanyards and lifelines. Mr. Jensen did not instruct Mr. Eversman or Mr. Wussow to provide their own fall protection. Mr. Jensen left the worksite after delivering the materials, tools, and equipment. Id., ¶ 6. While they were working on the building, Mr. Wussow climbed to the rooftop of the building in an effort to secure the plywood to the upper exterior of the wall. He leaned over the edge of the building to accomplish this. Mr. Eversman confirmed that the photographs taken by Mr. Emmons and provided with his affidavit were of Mr. Wussow (wearing a black jacket and gloves) and himself (wearing a plaid shirt). Mr. Eversman also confirmed in his affidavit that he told Mr. Emmons during the inspection that he had been hired by Mr. Jensen and was paid by the hour. Id., ¶7-8.

After they were interrupted by Mr. Emmons and stopped working on the worksite, Mr. Eversman and Mr. Wussow went to see Mr. Jensen and explain why they stopped working. After hearing the explanation, Mr. Jensen asked Mr. Eversman to sign a statement which is attached to his affidavit as Exhibit G. That statement is identical to the note attached by the Respondent to his Notice of Contest. In his affidavit, Mr. Eversman said that he signed the statement on February 10, 1997 (even though it is dated January 31, 1997) and that the statement “does not accurately describe the payment agreement between Mr. Jensen and me.” Other than taking down the scaffolding and leaving it next to the building for Mr. Jensen to pick up, Mr. Eversman did no more work at the worksite. He was not paid by Mr. Jensen for the hours that he had worked. Id., ¶ 9.

After the Department filed its motion for summary disposition, the Administrative Law Judge sent the parties a letter on November 14, 1997, which, among other things, explained the nature of a motion for summary judgment and the type of information that

the Respondent should include in his response if he desired to oppose the motion and stressed the need for the Respondent to file affidavits to adequately contest the motion. The letter informed the Respondent that he should, in his memorandum in opposition to the motion:

summariz[e] any argument that he may wish to make that (1) genuine issues of material fact remain in dispute between the parties which make it necessary for the Judge to hold a hearing and make findings of fact; (2) the Department is not entitled to judgment as a matter of law due to the alleged inapplicability of the standards which the Department asserts have been violated or some other legal basis; (3) the penalty issued or abatement date was not reasonable or appropriate; (4) a continuance should be ordered to permit affidavits to be obtained or depositions or other discovery to be taken; and/or (5) Mr. Jensen is himself entitled to judgment as a matter of law. A party opposing the entry of summary judgment may not rely solely upon mere allegations or denials of the adverse party's pleadings but is required to present specific facts showing that there is a genuine issue for trial. The materials filed by Mr. Jensen in opposition to the Department's Motion may include a memorandum arguing that the Motion should not be granted and explaining the reasons for Mr. Jensen's position, as well as supporting information, such as pleadings, depositions, answers to interrogatories, admissions, and affidavits.

Because the Department has provided affidavits in support of its arguments, Mr. Jensen must also provide affidavits in order to adequately contest the motion. Affidavits must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the person completing the affidavit is competent to testify to the matters stated therein. Affidavits should be notarized by a notary public. If Mr. Jensen wishes to rely upon facts that are within his personal knowledge, he must submit his own affidavit in addition to simply discussing those facts in his memorandum in opposition to the motion.

On December 4, 1997, the Administrative Law Judge received a two-page letter from Mr. Jensen in which he asserted that "there are no genuine facts," there is a dispute between the parties, Mr. Jensen "is entitled to materials facts," "penalty is Mr. Jensen protecting himself from the Commission with a signed blank check and no facts," and no continuance should be ordered because this case should be dropped. The Respondent asked "for the true facts in the case" and requested that Mr. Eversman produce payment records regarding his employment by Mr. Jensen and that a contract be produced between the building owner and Mr. Jensen. The Respondent asserted that the case was based only on hearsay and not on "real facts" because the "building owner only protected himself from this case after his call from OSHI informing owner to send statement from owner's attorney." The Respondent did not provide any affidavits of himself or other individuals.

In order to establish a violation of a specific standard under the Minnesota Occupational Safety and Health Act, the Commissioner must show by a preponderance of the evidence that the cited standard applies, there was a failure to comply with the cited standard, one or more employees were exposed or had access to the violative condition, and the employer knew or with the exercise of reasonable diligence could have known of the violative condition. Dun-Par Engineered Form Co., 1986-87 O.S.H. Cas. (CCH) ¶ 27,651 (Rev. Comm. 1986), rev'd on other grounds, 843 F.2d 1135 (8th Cir. 1988). To establish a serious violation, the Commissioner must demonstrate that the violation created "a substantial probability that death or serious physical harm could result" Minn. Stat. § 182.651, subd. 12 (1997). In addition, the Commissioner must establish that the penalties are appropriate and take into consideration the size of the employer's business, the gravity of the violations, the employer's good faith, and the employer's history of previous violations, and show that the abatement periods were reasonable. Minn. Stat. § 182.666, subd. 6, and 182.66, subd. 1 (1997).

As a threshold matter, the Department has demonstrated that the cited standards apply to the Respondent. Employers in Minnesota are required to comply with the occupational safety and health standards and rules promulgated under the Minnesota Occupational Safety and Health Act. Minn. Stat. § 182.653, subd. 3 (1997). Pursuant to Minn. R. 5205.0010, subd. 6 (1997), the Department adopted by reference Part 1926 of Volume 29 of the U.S. Code of Federal Regulations. Part 1926 includes three of the standards that the Department alleges were violated by the Respondent in the present case: 29 C.F.R. § 1926.451(d)(10); 29 C.F.R. § 1926.501(b)(1); and 29 C.F.R. § 1926.503(a)(1) and (2). See Citation 1, items 1 and 2. It is clear that Mr. Wussow and Mr. Eversman were engaged in construction work (defined in 29 C.F.R. § 1910.12(a) as "work for construction, alteration, and/or repair, including painting and decorating") at the time of the inspection. Accordingly, their employer must comply with the construction standards set forth in 29 C.F.R. Part 1926. In addition, Minn. Stat. § 182.653, subd. 8 (1997), which is relied upon in Citation 1, item 3, applies to all employers covered by the standard industrial classification ("SIC") codes set out in Minn. R. 5205.1500 (1997), including Respondent's masonry business (SIC code 1741).

The Respondent's submission is not sufficient to raise a genuine issue of material fact as to whether the cited standards applied to him. The statute defines "employer" to mean "a person who employs one or more employees and includes any person who has the power to hire, fire, or transfer, or who acts in the interest of, or as a representative of, an employer and includes a corporation, partnership, association, group of persons, and the state and all of its political subdivisions." Minn. Stat. § 182.651, subd. 7 (1997). "Employee" is defined to mean "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 (1997). The Department has provided evidence through the affidavits of Mr. Emmons and Mr. Eversman that Mr. Eversman and Mr. Wussow considered the Respondent to be their employer, Mr. Eversman had been working for the Respondent since April, 1996, the Respondent hired Mr. Eversman and Mr. Wussow and agreed to pay them an hourly wage for their work, the Respondent was the one who obtained the job and was

ultimately responsible for completing it, the Respondent instructed Mr. Eversman and Mr. Wussow how to perform the work and supplied all of the materials, tools and equipment, the Respondent had the responsibility to control the workers, and the work performed by Mr. Eversman and Mr. Wussow was part of the Respondent's regular business and required no specialized skill--in fact, Mr. Eversman had no prior experience with this type of work. These factors have been found to be significant in analogous cases in establishing the existence of an employment relationship. See, e.g., Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-26 (1992); Loomis Cabinet Co. v. O.S.H. Review Commission, 20 F.3d 938, 942 (9th Cir. 1994); Griffin & Brand of McAllen, Inc., 1978 O.S.H. Dec. (CCH) ¶ 22,829 (Rev. Comm. 1978); Commissioner v. James Dickman, d/b/a B & D Construction, OAH Docket No. 86-1901-8440-2 (Report issued July 22, 1994). Moreover, according to the affidavit of Mr. Eversman, the statement of Mr. Eversman purportedly dated January 31, 1997, does not accurately reflect the relationship between the parties and was written and signed after the workers told the Respondent about the inspection of the worksite. Even if Mr. Eversman in fact agreed to be paid a fixed fee for his work on the building, applicable case law still supports a finding that such workers are employees if they are under the supervision and control of the cited employer, did not supply any materials, and were considered to be employee. See, e.g., H & S Formco, 1977-78 O.S.H. Dec. (CCH) ¶ 22,386 (Rev. Comm. 1977).

Respondent's primary contention appears to be that he did not enter into an agreement to repair the wall and that he was not acting as the employer of Mr. Eversman or Mr. Wussow but that they were acting as independent contractors. Despite receiving a detailed letter from the Administrative Law Judge regarding what he was required to provide and show in order to avoid the entry of summary judgment against him, the Respondent did not provide affidavits of himself or others supporting his contentions or disagreeing with Mr. Eversman's assertion that the statement was inaccurate and was written after the inspection occurred. The Respondent has failed to provide any affidavit evidence or other competent materials contradicting the information contained in the affidavits supplied by the Department or supporting the existence of genuine issues of material fact regarding these issues. His unsworn and conclusory assertions are insufficient to create an issue of fact in this case regarding the existence of an employment relationship.

The Department has provided ample evidence that there was a failure to comply with the cited standards, the Respondent's employees had access to the violative conditions, and the Respondent knew or could have know of the violative conditions. The first item of the citation issued to the Respondent involved a violation of 29 C.F.R. § 1926.451(d)(10), which provides that tubular welded frame scaffolds must have guardrails and toeboards of certain specified heights at all open sides and ends on all scaffolds more than 10 feet above the ground floor. The second item of the citation issued to the Respondent alleged violations of the fall protection standard for construction work set forth in 29 C.F.R. §§ 1926.501(b)(1) and 1926.503(a). These standards require that employees on a walking/working surface with an unprotected side or edge which is 6 feet or more above a lower level shall be protected from falling by the use of guardrail, safety net, or personal fall arrest systems, and also mandate

that employers provide training programs for each employee who might be exposed to fall hazards and ensure that each employee has been trained by a competent person. The third item of the citation issued to the Respondent alleges that the Respondent failed to comply with the provisions of the "AWAIR" statute that require employers to establish a written work place accident and injury reduction program and provide instruction and training in how to safely complete the work.

Mr. Emmons' affidavit reporting his observations and the statements made to him by Mr. Wussow and Mr. Eversman, the photographs taken by Mr. Emmons, and Mr. Eversman's affidavit clearly establish violations of these standards. There is no dispute that Mr. Wussow and Mr. Eversman were working from a tubular welded frame scaffold 25 feet above the ground that lacked guardrails, or that Mr. Wussow climbed to the roof of the building and leaned over the edge of the building approximately 30 feet above the ground to attach the plywood without any fall protection in place. The Respondent instructed Mr. Eversman and Mr. Wussow about how to do the work, and thus knew (or should have known through the exercise of reasonable diligence) that they would be working at heights well above 6 and 10 feet from the ground. He provided them with scaffolding that did not include guardrails or toeboards, did not provide them with any fall protection system, and obviously knew that he had not established or implemented an AWAIR program. The Respondent did not provide any affidavits or other information showing that he had in fact implemented an AWAIR program or otherwise undermining the Department's contentions.

In addition, the Respondent made no attempt to dispute the classification of the citations as serious, the amount of the penalties, or the abatement dates. The affidavit filed by Mr. Emmons explains why he classified the citations as serious. It is obvious that a 25- to 30-foot fall to a blacktop parking lot could result in a substantial probability of death or serious physical harm and thus warrants a finding of a serious violation pursuant to Minn. Stat. § 182.651, subd. 12 (1997). In addition, the Respondent's failure to establish and implement an AWAIR program created a substantial probability of serious injury or death because the Respondent's employees were not informed about the hazards to which they were exposed and the means available to abate the hazards. The classification of the AWAIR violation as serious is also supported by the lost workday injury rate for the Respondent's SIC code, as described in the Minnesota OSHA Field Compliance Manual. Mr. Emmons' affidavit also explains the basis for the amount of the penalty and the abatement dates that were ordered by the Department.

The Department has shown that the Respondent hired Mr. Wussow and Mr. Eversman to do the work in question, the cited standards were violated, employees had access to the violative condition, and the Respondent knew or with the exercise of reasonable diligence could have known of the violative condition. In addition, the Department has shown that the citations were properly classified as serious and the penalties and abatement dates were appropriate. The Respondent has not identified any genuine issues of material fact that he contends remain for hearing, has not made any argument that the Department is not entitled to judgment as a matter of law, and has not submitted any affidavits or other materials in support of his response. Accordingly, the Department's Motion for Summary Disposition has been granted.

B.L.N.