

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

Ken Peterson,  
Commissioner of Labor and Industry,  
Complainant,

**ORDER DENYING RESPONDENT'S  
MOTION FOR SUMMARY  
DISPOSITION**

v.

Central Specialties, Inc.,  
Respondent

This matter is pending before the Administrative Law Judge pursuant to a Notice of and Order for Hearing issued on December 21, 2010, and the Respondent's Motion for Summary Disposition. Jackson Evans, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department). Thomas R. Revnew, Attorney at Law, Seaton, Beck and Powers, appeared on behalf of Central Specialties, Inc. (Central Specialties or Respondent).

**ORDER**

Based upon the record in this matter, and for the reasons set forth in the attached Memorandum, IT IS HEREBY ORDERED as follows:

1. Central Specialties' Motion for Summary Disposition is DENIED.
2. This matter shall proceed to hearing. A telephone conference call shall be held on March 2, 2012, at 2:30 p.m. to schedule a hearing date. The prehearing conference will be held by call-in telephone conference. To participate, please call **1-888-742-5095** and enter **371-152-3559#** when asked for the conference code.

Dated: February 15, 2012

s/Barbara L. Neilson  
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BARBARA L. NEILSON  
Administrative Law Judge

## MEMORANDUM

### I. Summary Disposition Standard

The Respondent, Central Specialties, has moved for entry of summary disposition in this matter. Summary disposition is the administrative equivalent of summary judgment.<sup>1</sup> The standards for summary disposition in a contested case proceeding are equivalent to the standards for summary judgment under Rule 56.03 of the Minnesota Rules of Civil Procedure.<sup>2</sup> The ALJ may recommend summary disposition of the case or any part of the case “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.”<sup>3</sup> A genuine issue is one that is not a sham or frivolous. A fact is material if its resolution will affect the result or outcome of the case.<sup>4</sup>

When considering a motion for summary disposition, the ALJ must view the facts in the light most favorable to the non-moving party and resolve all doubts and factual inferences in that party’s favor.<sup>5</sup> The Board, as the moving party, has the initial burden to show that there is no genuine issue concerning any material fact.<sup>6</sup> To successfully resist a motion for summary disposition, the non-moving party cannot rely upon general statements or allegations, but must show by substantial evidence that there are specific facts in dispute that have a bearing on the outcome of the case.<sup>7</sup> The evidence presented to defeat a summary disposition motion need not be in a form that would be admissible at trial.<sup>8</sup> “Substantial evidence” refers to the legal sufficiency of the evidence and not the quantum of evidence.<sup>9</sup> Speculation alone, without some concrete evidence, is insufficient to survive summary disposition.<sup>10</sup> However, if reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>11</sup>

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<sup>1</sup> *Pietsch v. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004); Minn. R. 1400.5500 (K).

<sup>2</sup> See Minn. R. 1400.6600 (the Minnesota Rules of Civil Procedure may apply to motions in contested cases as appropriate).

<sup>3</sup> Minn. R. Civ. P. 56.03; *Osborne v. Twin Town Bowl, Inc.* 749 N.W.2d 367, 371 (Minn. 2008) (citing *Anderson v. State Dep’t of Natural Res.*, 683 N.W. 2d 181, 186 (Minn. 2005)); *Sauter v. Sauter*, 244 Minn. 482, 484-85, 70 N.W.2d 351, 353 (Minn. 1955)

<sup>4</sup> *O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996); *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Dep’t of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

<sup>5</sup> *Osborne*, 749 N.W.2d at 371; *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

<sup>6</sup> *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

<sup>7</sup> *Papenhausen v. Schoen*, 268 N.W.2d 565, 571 (Minn. 1978).

<sup>8</sup> *Carlisle*, 437 N.W.2d at 715, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

<sup>9</sup> *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-70 (Minn. 1997); *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976).

<sup>10</sup> *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

<sup>11</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *DLH, Inc.*, 566 N.W.2d at 69.

## II. Factual Background

Central Specialties is a road contractor that performs asphalt paving in Minnesota. For the purposes of this motion only, the following facts appear to be undisputed.

On September 29, 2009, a Central Specialties' paving crew was laying asphalt on a stretch of Highway 25 in Mahanomen, Minnesota. A crew of three workers was operating two pieces of equipment: a Blaw-Knox PF-3180 approach paver (road paver) and a John Deere 210 LE Landscape Loader (loader). One employee was driving the road paver. A second employee, the screw operator, was riding on the "screed," which is a platform on the back of the paver. The screw operator is responsible for operating screws that adjust the thickness of the asphalt as it is being laid. The third employee was operating the loader.<sup>12</sup>

On the day in question, the road paver was laying asphalt at each driveway approach in advance of the main paving crew's installation of the roadway asphalt. Because the distances between the driveways ranged from 10 feet to 500 feet, the road paver repeatedly started and stopped laying asphalt. The loader was following the road paver with its blade down to scrape up the excess asphalt and any remnants that fell as the road paver moved between the driveway approaches.<sup>13</sup>

While moving between two driveways that were between 500 feet and one-quarter mile apart, the loader blade collided with the road paver. The screw operator was on the back of the road paver's screed, facing forward. The road paver driver had slowed down to hear the CB radio; the loader driver was watching his work behind the loader while he was driving toward the road paver and did not see the road paver slow down. The loader blade struck the back of the road paver and the screw operator's leg below the knee. The screw operator was seriously injured.<sup>14</sup>

## III. Department Inspection

The serious injury to Central Specialties' employee triggered an inspection by the Department. The investigation was conducted by Minnesota Occupational Safety and Health Inspector (OSHI) Lee Craig beginning on October 7, 2009. Mr. Craig had graduated from Minnesota State University – Moorhead in 2004 with a B.A. degree in Construction Management. At the time of the inspection, Mr. Craig had been employed by the Department for approximately one year. Prior to his employment with the Department, Mr. Craig had worked for five years as a job site supervisor for Ryland Homes. Mr. Craig had not previously been on a highway construction project and had never before been involved in an inspection involving a serious injury or road paving equipment.<sup>15</sup>

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<sup>12</sup> Department's Inspection Report at DOLI-000005-000007 (attached to Craig Dep. as Ex. 3).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Craig Dep. at 25-36, 43-45, 50 (attached to Revnew Aff. as Ex. A).

On December 30, 2009, the Department cited Central Specialties for two alleged safety violations that it asserted had occurred on September 29, 2009. Citation 1, Item 1 alleged that a serious violation of Minn. R. 5207.0850, subp. 3(A), had occurred because an employee had been allowed to ride on the back of the road paver while traveling.<sup>16</sup> That rule states, “Under no circumstances shall any employee be allowed to ride in a standing position or with arms or legs outside of the vehicle body, or seated on the side fenders, cabs, cabshields, rear of vehicle, or on the load unless such a position is dictated by a job assignment.” The Department imposed a penalty of \$1,750 for Citation 1, Item 1.<sup>17</sup>

Citation 1, Item 2 alleged that a serious violation of Minn. R. 5207.1000, subp. 2(C), had occurred. Subpart 1 of that rule states that the rule identifies minimum safety requirements for the safe operation of “mobile earth-moving equipment used for earth moving, building, or road construction or demolition.” Subpart 2(A) requires that the operators of such equipment and all other employees exposed to such equipment “shall be trained in the safe work procedures pertaining to mobile earth-moving equipment and in the recognition of unsafe or hazardous conditions.” Subpart 2(C) of the rule states:

C. Training programs must include the following elements:

- (1) safe work procedures on how to approach mobile earth-moving equipment, whether in use or idling, including:
  - (a) visual, voice, or signal communication that shall be made with the operator prior to approaching earth-moving equipment;
  - (b) maintaining one's visibility to the operator while approaching the equipment; and
  - (c) operator responsibilities, such as placing the transmission in neutral, setting the parking brake, and indicating that it is safe to approach the equipment;
- (2) identification of the operator's blind spots on various earth-moving equipment used;
- (3) instruction for mobile earth-moving equipment operators in conducting daily equipment inspections according to the manufacturer's recommendations, and checking the area around the equipment for a clear path prior to beginning operation;

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<sup>16</sup> See Citation 1, Item 1 (attached to Notice and Order for Prehearing Conference as Ex. 1(A)).

<sup>17</sup> *Id.*; see also Craig Dep. at 64; Department's Inspection Report at DOLI-000007-000009 (attached to Craig Dep. as Ex. 3).

- (4) safe operating procedures of equipment, including traveling, backing, parking, loading for transport, maintenance, and operation;
- (5) safe work procedures when working around or adjacent to overhead or underground utilities, as described in Code of Federal Regulations, title 29, parts 1926.600(a)(6) and 1926.651(b); and
- (6) additional hazards that could be created by changing conditions.

The Department's citation indicated that Central Specialties' training program on safe work practices pertaining to mobile earth-moving equipment was missing "one or more of the required elements" and specifically noted that the employer "did not provide adequate training for employees in regards to the safe operating procedures of equipment including traveling, backing, parking, loading for transport, maintenance, and operation" while using the loader and road paver in connection with the September 29, 2009, accident. The Department imposed a penalty of \$2,100 for Citation 1, Item 2.<sup>18</sup> The Department's Inspection Report indicated that employees were instructed in the classroom that the practice of riding on the back of the paver while it was traveling was not allowed, but riding on the paver while traveling was a common practice in the field. The Report concluded that, "[a]lthough training in the classroom was adequately instructed, the hands on portion of the training in the field was not." The Inspection Report further noted that the instances leading up to the accident suggested that the training regarding operation of the loader was also inadequate because the loader operator was following too closely behind the paver and was looking backwards, in the opposite direction of travel.<sup>19</sup>

Central Specialties submitted a timely notice of contest indicating that it was contesting the issuance of Citation 1, Items 1 and 2, the type of violations alleged, the abatement dates, and the proposed penalties. On April 13, 2010, the Department issued a Summons and Complaint to Central Specialties and, on April 22, 2010, Central Specialties submitted an Answer to the Complaint in which it denied that it had violated Minn. Stat. § 182.653, subd. 3 or any other statute or regulation. In its Answer, Central Specialties also asserted as affirmative defenses that the Complaint failed to state a claim upon which relief may be granted, compliance with the standard would pose a greater hazard, and compliance with the standard is infeasible. On December 21, 2010, the Department issued a Notice and Order for Prehearing Conference initiating the present contested case proceeding.

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<sup>18</sup> See Citation 1, Item 2 (attached to Notice and Order for Prehearing Conference as Ex. 1(A)).

<sup>19</sup> Department's Inspection Report at DOLI-000010-000012 (attached to Craig Dep. as Ex. 3); *see also* Craig Dep. at 73-75.

## IV. Analysis

In its Motion for Summary Disposition, the Respondent argued that it is entitled to the entry of summary disposition with respect to both citations. The Respondent's arguments and the Department's responses are discussed in detail below.

### A. Minn. R. 5207.0850 (Citation 1, Item 1)

#### 1. Applicability to Road Paver

As a threshold matter, Central Specialties contends that the road paver at issue is not a vehicle that is covered by Minn. R. 5207.0850. Subpart 1 of Minn. R. 5207.0850 states that the rule applies to "all motorized, self-propelled vehicles *used off the highway* including industrial type trucks, crawler equipment, and rubber-tired vehicles."<sup>20</sup> The Respondent maintains that the plain language of Minn. R. 5207.0850 does not apply to road pavers because they are designed for use *on* the highway, and emphasizes that the road paver at issue in the citation was, in fact, being used on a highway at the time of the accident. The Respondent thus interprets 5207.0850 to apply only when one of the described vehicles is operating in certain "off highway" locations. Because a road paver is always used on roads that are paved or in the process of being paved or re-paved, it is, in Respondent's view, absurd to suggest that such equipment is designed to be used anywhere other than on roads and highways.<sup>21</sup> Accordingly, Respondent argues that it is entitled to summary disposition regarding the Department's claim that it violated Minn. R. 5207.0850.

In contrast, the Department interprets Minn. R. 5207.0850 to encompass all self-propelled, motorized vehicles that are not intended to travel on public roadways. The Department thus contends that it is the *type* of vehicle that is determinative, not *where* the vehicle is being operated. Because a road paver is a type of vehicle that frequently operates in an area not open to public travel, such as a construction site, the Department asserts that it falls within the scope of the standard. The Department maintains that its interpretation is logical and consistent with the remainder of the language of the standard, which focuses on types of vehicles and not the location where work is being performed. The Department points out that its interpretation is consistent with a 1981 determination by the federal Occupational Safety and Health Review Commission (OSHRC) in an analogous case.<sup>22</sup> The Department finds further support

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<sup>20</sup> Minn. R. 5207.0850, subp. 1 (emphasis added). Subpart 1 also specifies that the rule does not apply to vehicles with less than a 20 horsepower motor.

<sup>21</sup> Respondent's Reply Memorandum of Law at 4.

<sup>22</sup> *Secretary of Labor v. Gerard Leone & Sons, Inc.*, 9 O.S.H. Cas. (BNA) 1819, 1981 W.L. 18886 (O.S.H.R.C. 1981). That decision involved a different standard (29 C.F.R. 1926.601(a)), which indicated that motor vehicles covered by the standard "are those vehicles that operate within an off-highway jobsite, not open to public traffic." The employer contended that a dump truck lacking safety devices was not subject to the cited standard because it was being operated on a highway open to public traffic at the time of the inspection. In a 2-1 decision, the OSHRC rejected that argument and stated that the intention of the standard was "to protect employees on construction sites from the hazards of unsafe motor vehicles regardless of the on- or off-highway character of the site." To effectuate this intent, the OSHRC majority ruled that section 1926.601 "applies to trucks that can operate both on and off highway regardless of their

for its interpretation in Minnesota statutes that set requirements for vehicles used primarily on the highway. Minnesota Statutes Chapter 169 governs the operation of motor vehicles upon the state's highways. Section 169.467, subd. 2, defines motor vehicles as "any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads and highways . . . ." Virtually the same definition is repeated in Minn. Stat. 168.002, subd. 18: "Motor vehicle' means any self-propelled vehicle designed and originally manufactured to operate primarily on highways . . . ." In contrast, road construction equipment and road maintenance machinery are expressly included in the definition of "special mobile equipment" set forth in Minn. Stat. § 168.02, subd. 31, which encompasses "every vehicle not designed or used for the transportation of persons or property and only incidentally operated or moved over a highway."

After consideration of the parties' arguments, the Administrative Law Judge concludes that the Department correctly interpreted Minn. R. 5207.0850 to apply to road pavers. The Department's interpretation is in keeping with the plain language and overall focus of subpart 1 of 5207.0850, which describes vehicles within the scope of the rule by referring to the type of truck involved (industrial type trucks, crawler equipment and rubber-tired vehicles) and not the location of their operation. If the standard had been intended to apply only to vehicles that are being operated off the highway, it is reasonable to assume that the further explanatory language in the rule would have described road conditions rather than types of vehicles.

The Department's interpretation that road pavers are not "on highway" equipment is also consistent with relevant Minnesota statutes. The road paver, with a maximum speed of approximately 12 miles per hour, is clearly not designed as a passenger vehicle or intended to transport passengers or goods on the highway.<sup>23</sup> It is evident that a road paver is "only incidentally operated or moved over a highway."<sup>24</sup> The motor vehicle safety laws set forth in Minn. Stat. §§ 169.684 -169.686 restrict passengers from riding outside of a moving vehicle and require that passengers be in proper restraints inside the vehicle. The purpose of part 5207.0850 is to extend similar safety requirements to vehicles not ordinarily used for passenger transport, and the Department's interpretation effectuates that purpose. The Administrative Law Judge finds that the Respondent's proposed interpretation of the standard is strained and at odds with the obvious intent of the standard. Application of the Respondent's interpretation would lead to an illogical and absurd result in that the safety requirements associated with the standard would apply to road pavers only when they were being operated *off* the highway, and would not apply when they were being operated *on* the highway, even though the latter situation may present more of a safety hazard to employees riding on the rear of the paver.<sup>25</sup>

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actual [or] general use or the location where they are operated at any particular time." 1981 W.L. 18886 at \*2.

<sup>23</sup> The Operator's Manual for the paver (attached to Evans Affidavit as Ex. E) warns on pages 3-4 that personnel and passengers should not be transported on the machine.

<sup>24</sup> Minn. Stat. § 168.02, subd. 31.

<sup>25</sup> The Respondent objected to the Department's reliance upon a notarized letter provided by Frank Martinelli of Volvo Construction Equipment, the successor to Blaw-Knox, Inc. (the manufacturer of the

## 2. Exception for Situations where Position is Dictated by Job Assignment

Minn. R. 5207.0850, subp. 3, generally requires that vehicles being used to transport employees be equipped with a securely-anchored seating arrangement, a rear-end gate, a guardrail, and steps or a ladder for mounting and dismounting. Subpart 3(A) specifies, "Under no circumstances shall any employee be allowed to ride in a standing position or with arms or legs outside of the vehicle body, or seated on the side fenders, cabs, cabshields, rear of vehicle, or on the load *unless such a position is dictated by a job assignment.*" (Emphasis added.)

The Respondent argues that, even if Minn. R. 5207.0850 applies to the road paver at issue here, the injured employee's position on the back of the paver at the time of the incident was dictated by his job assignment and the situation thus falls within the exception set forth in subpart 3(A). According to Central Specialties, the injured employee was required to ride on the back of the paver while it travelled between driveways in order to raise and lower the screed, monitor the four burners, and monitor the flow of fuel into the burners. The Respondent asserts that the heat gauges and fuel flow cannot be monitored from other locations on the road paver and contends that a fire hazard can be created if the burners get too hot or if one of the burners goes out and excess fuel rolls into another burner.<sup>26</sup>

In response, the Department contends that both the Respondent's own accident analysis<sup>27</sup> and the letter from Respondent's insurance provider<sup>28</sup> indicate that the employee was not required to remain on the back of the paver while it moved between driveways. The Department also provided a letter from Frank Martinelli, Manager of Product Safety and Compliance, Road and Utility Platforms, for the successor company to Blaw-Knox, Inc., in which he states that "[t]he screed platform was designed to support one or two paver crewman [sic] during the actual paving operations, which usually occur at speeds below 2 MPH, and with the screed lowered to ground level" but thereafter indicates that "[t]he "screed platform was not designed to transport personnel under other dynamic conditions, such as roading" and he does "not believe there is any operational necessity for a paver crewman to ride on the screed while roading."<sup>29</sup> The

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paver). Although Mr. Martinelli's letter supports the view that the road paver would qualify as an "off-road work machine," the Administrative Law Judge has not found it necessary to rely on Mr. Martinelli's letter in resolving the issue of whether the road paver is considered a vehicle used "off the highway" under Minn. R. 5207.0850.

<sup>26</sup> Aff. of Susan K. Vieregge, ¶¶ 3-4.

<sup>27</sup> Aff. of Evans, Ex. F.

<sup>28</sup> Aff. of Evans, Ex. G.

<sup>29</sup> July 13, 2011, Letter from Frank Martinelli. In its reply brief, the Respondent contended that Mr. Martinelli's letter should not be considered because his letter is not in proper affidavit form, he was not disclosed as an expert witness by the Department prior to the April 2011 deadline, and he ignored the fact that a separate screed was attached to the paver. The Administrative Law Judge is not persuaded that it would be appropriate to disregard the letter. It is well established that the evidence presented to defeat a summary disposition motion need not be in a form that would be admissible at trial. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988) *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 324

Department further argues that riding on the back of the road paver was contrary to the express instruction of the manufacturer, noting that a decal on the paver states: “Warning: Do Not Transport Personnel or Allow Passengers on This Machine.”<sup>30</sup>

It is evident that there are disputed issues of fact regarding whether the screw operator’s position on the screed was dictated by his job assignment under the circumstances presented here (i.e., where the road paver is travelling at low speeds between driveways while laying asphalt). Because genuine issues of material fact remain for hearing on this issue, the Respondent’s Motion for Summary Disposition on this ground must be denied.<sup>31</sup>

### **3. Greater Hazard Affirmative Defense**

In its Answer to the citations, the Respondent asserted as an affirmative defense that compliance with the standard would pose a greater hazard than noncompliance.<sup>32</sup> In order to prevail in demonstrating a greater hazard affirmative defense, the employer must show that: (1) the hazards created by complying with the standard are greater than those of noncompliance; (2) other methods of protecting its employees from the hazards are not available; and (3) a variance is not available or application for a variance is inappropriate.<sup>33</sup>

In its Motion for Summary Disposition, Central Specialties argues that the citation should be dismissed because requiring the screw operator to get into the extra seat on the paver or dismount from the screed between driveways would, in its view, present a greater hazard than having the screw operator remain standing on the screed. It asserts that the screw operator would be unable to monitor the burners or the flow of fuel for potential safety hazards if either of those approaches were employed. It also contends that requiring a screw operator to repeatedly dismount, travel by foot or in a vehicle to the next driveway, and remount the screed would present a greater hazard

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(1986). The letter apparently was obtained in July 2011, in response to Ms. Vieregge’s June 2011 affidavit in support of Respondent’s motion in which she provided her opinions about the safe operation of the paver and industry standards. Finally, contrary to the Respondent’s contentions, Mr. Martinelli did acknowledge in his letter that a screed platform was being used on the paver.

<sup>30</sup> Aff. of Evans, Ex. E, pp. 3-4.

<sup>31</sup> The Administrative Law Judge does not agree that the information pertaining to the Respondent’s post-accident investigation and the letter from the Respondent’s insurer must be excluded from consideration under Rule 407 of the Minnesota Rules of Evidence, which pertains to subsequent remedial measures. Rule 407 specifies that evidence of measures that are taken after an injury which would have made the event less likely to occur if taken previously are not admissible “to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction.” Rule 407 does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, feasibility of precautionary measures, or impeachment. The Department is not offering the Respondent’s investigation or the letter from the insurer to prove culpable conduct but is rather offering it for the purpose of casting doubt on the Respondent’s claim that employee was required to remain on the back of the paver while it moved between driveways.

<sup>32</sup> The Respondent’s Answer and Affirmative Defenses are attached to the Notice and Order for Prehearing Conference as Ex. 2.

<sup>33</sup> See *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 895 (1<sup>st</sup> Cir. 1981), citing *Noblecraft Industries et al. v. Secretary of Labor*, 614 F.2d 199, 205 (3<sup>rd</sup> Cir. 1978).

due to slipping, tripping, or falling than remaining on the screed.<sup>34</sup> The Respondent points out that the MnOSH inspector agreed during his deposition that it is often easier to see someone who is on a piece of equipment than when they are on the ground.<sup>35</sup>

The Respondent also asserts that highway contractors seek to minimize the number of vehicles working on highway projects. It argues that adding an additional vehicle to the project to transport a screw operator would create congestion and limit navigable space, which in turn would create a hazardous condition, and maintains that screw operators would be required to walk along the busy highway project to get to the transport vehicle, thereby exposing themselves to on-going traffic.<sup>36</sup> Central Specialties also contends that “a variety of studies . . . have found construction workers are less likely to be injured while on construction equipment than while walking on foot,” and attached supporting materials to the affidavit provided by its safety manager.<sup>37</sup> Central Specialties maintains that, for this reason and others, it is common in the industry for screw operators to stand on the road paver between approaches rather than dismount and walk to the next approach.<sup>38</sup>

The Department argues that Central Specialties has not shown that it can meet the required elements to show the greater hazard defense. The Department does not dispute that safety measures must be taken to protect employees on the side of a highway or that walking along a highway is a hazard. However, the Department contends that the Respondent has not shown that walking along a highway is a *greater* hazard than riding exposed on the back of a piece of construction equipment, and stresses that the manufacturer’s instructions and the Respondent’s insurance carrier provide support for the Department’s view that employees should be prevented from riding on the back of the paver. The Department also notes that the Respondent has not provided any evidence that it has applied for a variance, and emphasizes that failure to show compliance with the variance element is fatal to the defense.<sup>39</sup> In response to

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<sup>34</sup> Aff. of Vieregge, ¶¶ 3-5.

<sup>35</sup> Craig Dep. at 47.

<sup>36</sup> Second Aff. of Vieregge, ¶ 3.

<sup>37</sup> Vieregge Aff. ¶¶ 3, 5, 6 and Ex. B.

<sup>38</sup> Vieregge Aff. ¶ 6 and Ex. B. The materials included in Ex. B include the following: “Factors Influencing Injury Severity to Highway Workers in Work Zone Intrusion Accidents” (analysis of injury data relating to work zones in California between 1998 and 2007 found, among other things, that “workers on foot have greater odds of experiencing a more severe injury versus workers inside vehicles . . . likely due to the added protection provided by the vehicle itself”) (see RSP 000695); “Serious and Fatal Injuries to Workers on Highway Construction Projects” (an analysis of 240 accidents in New York resulting in hospital-level or fatal injuries to highway and bridge construction projects between 1993 and 1997 found, among other things, that “about two-thirds of the traffic accident serious injuries involved pedestrian workers, with the other third involving workers in construction vehicles or equipment”) (see RSP 000701); “Building Safer Highway Work Zones: Measures to Prevent Worker Injuries from Vehicles and Equipment” (the National Institute for Occupational Safety and Health (NIOSH) reported that 318 of 465 vehicle and equipment-related fatalities within work zones between 1992 and 1998 involved workers on foot) (see RSP 000705); and NIOSH website excerpts noting the importance of safety efforts to protect construction workers within work zones who are working on foot around moving vehicles and equipment, in part due to limited visibility around the equipment (see RSP 000723 – RSP 000738).

<sup>39</sup> See, e.g., *Secretary of Labor v. Altor, Inc.*, 2011 WL 1682629 (O.S.H.R.C.); *Secretary of Labor v. J.E. Dunn Construction Co.*, 2005 WL 1927104 (O.S.H.R.C.).

the Department's assertions, the Respondent points out that an employer is not required to seek a variance where application for a variance is inappropriate and contends that it would have been inappropriate for Central Specialties to request a variance from a standard that does not apply to road pavers (reiterating the argument discussed above that road pavers are not "used off the highway").

As noted above, the Administrative Law Judge has concluded that road pavers are vehicles that are subject to Minn. R. 5207.0850. Accordingly, the Respondent is required to show that it made a variance application in order to prevail on its greater hazard defense. It is uncontroverted that the Respondent did not seek a variance. As noted by the U.S. Court of Appeals for the First Circuit, compliance with the variance requirement is "necessary in order to ensure that employers will not subject their employees to safety hazards on the basis of an incorrect assumption that their non-complying work places are safer than sites complying with the standards."<sup>40</sup> Whether a variance would be granted cannot be known until the application is made.<sup>41</sup> In addition, the reports provided by the Respondent in support of its motion do not demonstrate as a matter of law that walking along a highway is a greater hazard than riding on the back of a road paver. As a result, the Respondent has not shown that it is entitled to the entry of summary disposition based on the greater hazard affirmative defense.

#### **4. Constitutionality**

Central Specialties further argues that Minn. R. 5207.0850 is impermissibly vague as it applies to the facts presented here and may not be enforced. In particular, the Respondent contends that the rule is ambiguous regarding whether it applies to the road paver and whether the employee's position on the rear of the paver was "dictated by job assignment." It argues that the rule is unconstitutionally vague because it fails to give a person or ordinary intelligence a reasonable opportunity to know what is prohibited and failed to provide sufficient standards for enforcement, and urges that the citation be dismissed. In response, the Department contends that the Administrative Law Judge lacks authority to declare a rule unconstitutional and asserts that the Respondent can only raise its constitutional claims in the event of a later appeal.

As a general rule, neither an Administrative Law Judge nor an agency head have the authority to declare a statute or rule unconstitutional on its face in a contested case proceeding since that power is vested in the judicial branch.<sup>42</sup> However, it is permissible for an Administrative Law Judge or an agency to determine a constitutional question with respect to the interpretation or application of a statute or rule to particular facts, taking into account relevant judicial decisions.<sup>43</sup>

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<sup>40</sup> *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 895 (1<sup>st</sup> Cir. 1981), *citing Noblecraft Industries v. Secretary of Labor*, 614 F.2d 199, 205 (9<sup>th</sup> Cir. 1980).

<sup>41</sup> *General Electric Co. v. Secretary of Labor*, 576 F.2d 558, 561 (3d Cir. 1978).

<sup>42</sup> *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. App. 1993).

<sup>43</sup> *Pettterssen 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).

A rule is impermissibly vague 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.<sup>44</sup> If a rule defines an act in a manner that encourages arbitrary enforcement or is so indefinite that people must guess at its meaning, it is void for vagueness.<sup>45</sup> In the context of occupational safety and health, 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.”<sup>46</sup> The burden of proving that a regulation is vague is upon the party challenging the constitutionality of the regulation.<sup>47</sup>

The Administrative Law Judge finds that Central Specialties has not established that Minn. R. 5207.0850 is vague when applied to the facts of this case or so indefinite that the Respondent did not have adequate warning that the road paver fell within the standard’s terms. The rule includes reasonably specific language describing the intended scope of the regulations and employers familiar with the road construction industry reasonably could be expected to have had adequate warning of the conduct required by the regulation. As discussed above, it is reasonable and logical to interpret the rule to apply to road pavers, and the rule is not impermissibly vague in that regard. Although the phrase “dictated by job assignment” is not defined in the rule, the inclusion of this phrase does not render the rule so vague or unclear as to deprive companies of a reasonable opportunity to know what is encompassed within the exception.

The Administrative Law Judge concludes that the Respondent has not shown that it is entitled to summary disposition because Minn. R. 5207.0850 is unconstitutionally vague as applied to the particular facts of this case. The language of the rule is sufficiently clear to provide fair warning to the regulated public and guide the Department’s enforcement efforts.

#### **B. Minn. R. 5207.1000 (Citation 1, Item 2)**

The second item of the citation issued by the Department alleged that Central Specialties had failed to properly train the employees who operate mobile earth-moving equipment or other employees working on the ground who are exposed to mobile earth-moving equipment, in violation of Minn. R. 5207.1000, subp. 2(A) and (C). Such employees must receive training on elements specified in the rule.

The rule specifies that it sets minimum safety requirements for the safe operation of “mobile earth-moving equipment used for earth moving, building, or road construction or demolition, including, but not limited to bulldozers, motor graders, scrapers, loaders,

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<sup>44</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed* 106 S.Ct. 375 (1985).

<sup>45</sup> *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).

<sup>46</sup> *National Industrial Constructors, Inc. v. Occupational Safety and Health Review Commission*, 583 F.2d 1048, 1054 (8<sup>th</sup> Cir. 1978).

<sup>47</sup> *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983).

skid-steer loaders, compaction equipment, backhoes, end dumps, side dumps, and dump trucks.”<sup>48</sup> As such, the standard clearly encompasses road construction equipment such as the road paver and the loader. Moreover, all of the training elements required by the rule would certainly apply to the operation of the road paver in road construction, as is apparent from the close alignment of the rule’s required training to the warnings included in the road paver manufacturer’s directives.<sup>49</sup>

The Respondent also maintains that the training records provided during the inspection prove that it provided its employees with the required training,<sup>50</sup> and the failure of its employees to follow the training does not warrant a citation for improper training. In its response, the Department agrees that the classroom training involved instruction not to ride on equipment while it is in transport. The Department’s Inspection Report further noted that the training syllabus included the operation of earth moving equipment, including safe work procedures, identification of operator’s blind spots, instruction for mobile earth moving equipment, and safe operating and work procedures.<sup>51</sup> However, the Department’s Inspection Report also indicated that “[m]uch of the training on the particular equipment was conducted in the field by either a supervisor or a foreman of the crew.”<sup>52</sup> And the Respondent admitted in its Response to Requests for Admission that “the positioning and location of the injured employee at the time of the accident was not contrary to the on-the-job training that he received.”<sup>53</sup> The Department asserts that Central Specialties violated the training standard in the field during “on-the-job” training when it did not require adherence to the classroom instruction and permitted the employee to stand on the back of the road paver when it was travelling between driveways. It also alleges that the training of the loader operator was inadequate based on its findings that the loader operator was following too closely behind the paver and was looking backwards, in the opposite direction of travel.<sup>54</sup> Despite the fact that the citation was based on allegations that on-the-job training was inadequate, the Respondent did not make any demonstration in its Motion that the on-the-job training provided to the crew operator and the loader operator met the criteria set forth in Minn. R. 5207.1000.

The Administrative Law Judge concludes that the Respondent’s Motion for Summary Disposition regarding the citation under Minn. R. 5207.1000 must be denied because there are disputed issues of fact relating to whether the on-the-job training provided to the screw operator and the operator of the loader complied with the standards set forth in the rule. The determination of whether this violation occurred will depend in part on resolution of the factual issues relating to whether the employee’s position on the back of the road paver while the paver was travelling between driveways was necessary for him to perform his job duties.

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<sup>48</sup> Minn. R. 5207.1000, subp. 1.

<sup>49</sup> See Aff. of Evans, Ex. E.

<sup>50</sup> Craig Investigation Report, Ex. 3 at DOLI00010.

<sup>51</sup> Inspection Report at DOLI-000010.

<sup>52</sup> *Id.*

<sup>53</sup> Aff. of Evans, Ex. H at 3.

<sup>54</sup> See Inspection Report at DOLI-000010-000011; Craig Dep. at 74-76.

## Spoliation of Evidence

Finally, Central Specialties asserts that the Department's Compliance Officer destroyed evidence upon which the Department's claim rests. The Department denies that there is any evidence of spoliation.

After he completed his inspection, Mr. Craig "entered all relevant information from [his] notes into [his] inspection report."<sup>55</sup> Once his inspection report was completed, Mr. Craig shredded equipment manuals pertaining to the paver and loader and other documents he had received from the Respondent during the investigation.<sup>56</sup> He also shredded notes he had taken during interviews with employees which had been reviewed and signed by those employees.<sup>57</sup> He destroyed notes of his conversations with a third-party trainer who had provided training to Respondent's employees and deleted an email message from the trainer and an attached Power Point presentation after he was unable to open the Power Point.<sup>58</sup> Finally, Mr. Craig shredded his notes pertaining to the "board meeting" that occurred with principals and his supervisor in the Department prior to issuance of the citations.<sup>59</sup> He testified that he believed that the Department had instructed inspectors to shred documents "once the file is done" and thought that such an instruction was contained in the Department's field inspection manual.<sup>60</sup> During his deposition, Mr. Craig was unable to remember who attended the board meeting or the substance of much of the information contained in the destroyed documents.<sup>61</sup>

Central Specialties asserts that the undisputed facts show that the inspector destroyed evidence that is crucial to its defense. It contends that the inspector's destruction of the documents impeded the Respondent's ability to challenge the rationale behind the citations or impeach the "findings." It also argues that this practice was inconsistent with the Department's Field Compliance Manual, which states that "[a]ny notes or records (written and/or electronic) made by an OSHI concerning an inspection or the performance of official duties are the property of the State of Minnesota and must be included in the case file where necessary to support the inspection findings."<sup>62</sup> As a result, the Respondent argues that the Department's Complaint should be dismissed and summary disposition entered in its favor or, in the alternative, that the Administrative Law Judge should infer that the destroyed evidence would have been unfavorable to the Department.<sup>63</sup>

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<sup>55</sup> Aff. of Lee Craig, ¶4.

<sup>56</sup> Craig Dep. at 13-14, 51.

<sup>57</sup> *Id.* at 19-20, 22.

<sup>58</sup> *Id.* at 15-18.

<sup>59</sup> *Id.* at 54; Aff. of Craig, ¶ 5.

<sup>60</sup> *Id.* at 14, 20.

<sup>61</sup> *Id.* at 17-19, 22, 54, 69.

<sup>62</sup> See Ch. III-1, A.2.a. of MnOSHA Field Compliance Manual, attached to Craig Dep. as Ex. 4.

<sup>63</sup> See, e.g., *Federated Mutual Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436-37 (Minn. 1990) (Minnesota Supreme Court permitted "an unfavorable inference to be drawn from failure to produce evidence in the possession and under the control of a party to litigation" under which the jury could infer that the evidence, if produced, would have been unfavorable to that party).

The Department contends that the doctrine of spoliation does not prevent a party from taking handwritten notes and then entering the contents of those notes into a computer. The Department alleges that this approach is consistent with the Minnesota OSHA Operations System Exchange Manual (MOOSE), which is the Division's data management system that houses inspection and inspection-related data and transmits it to Federal OSHA. According to the Affidavit of James Krueger, a Director with the Department's OSH Division, the MOOSE Manual sets forth the procedures for entering and processing compliance data and the portion of the manual addressing scanning has been the Division's policy since 2007:

This policy requires inspectors to enter in all relevant information into their electronic inspect[ion] reports and then shred their notes. The inspectors are required to input all relevant information, including information helpful to the employer. This policy ensures operational efficiency. Supervisory staff such as myself must be able to access the inspection reports remotely and electronically. Remote access would be rendered insufficient if an inspector kept relevant information in a paper file and did not insert that information into the electronic database. Shredding the notes forces the inspectors to input the relevant information into the electronic database.<sup>64</sup>

The Department argues that the evidence that was destroyed is not critical to the Respondent's claims and contends that the Respondent has not shown that it has suffered any actual prejudice as a result. The Department maintains that cases in which spoliation has been found all involve the destruction of tangible physical evidence.

Whether or not the inspector acted in a fashion that was consistent with the agency's investigation and recordkeeping policies is not determinative of the question of whether spoliation occurred. Rather, to determine spoliation, one must look at what was destroyed and the relevance of what was destroyed to the facts at issue, and whether the destruction of the notes was prejudicial to the Respondent.

The cases involving spoliation of evidence upon which the Respondent relies all turn on whether key physical evidence that supported the alleged cause of action was destroyed. For example, in *Dillon v. Nissan Motor Company*,<sup>65</sup> the car alleged to have a defect was inspected by the plaintiffs' expert but destroyed before the defendant had the opportunity to inspect it. In *Patton v. Newmar Corporation*,<sup>66</sup> the plaintiffs alleged a defect in their motor home that caused a fire. Plaintiffs hired a fire investigator who conducted an investigation, took photos, and removed and retained some components of the motor home. When the defendant requested the opportunity to inspect, it was informed that the location of the vehicle was not known and the removed components had been lost. In *Miller v. Lankow*,<sup>67</sup> the plaintiff alleged that the contractor had failed to

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<sup>64</sup> Aff. of James Krueger, ¶¶2-4.

<sup>65</sup> 986 F.2d 263 (8<sup>th</sup> Cir. 1993).

<sup>66</sup> 538 N.W.2d 116 (Minn. 1995).

<sup>67</sup> 776 N.W.2d 731 (Minn. App. 2009).

remediate mold and mildew problems in her home. However, before the contractor was notified and had the opportunity to determine the cause of the problem, the plaintiff removed all of the stucco and plywood on the side of the house in order to address the moisture problem.<sup>68</sup>

In each of these cases, the underlying evidence that supported the cause of action was not available for the defendant to examine. Respondent cannot and does not make such a claim here. In the present proceeding, it was Mr. Craig's notes, including his impressions, and documents not exclusively in his possession (such as training materials and equipment manuals) that were destroyed, and not evidence of the accident *per se*. The vehicles involved, the location of the accident, the Respondent's employees, and any other witnesses to the accident remained available to both parties. Nothing that Mr. Craig did affected the Respondent's ability to view the evidence and question the witnesses. Moreover, Central Specialties had the opportunity to conduct (and did conduct) its own investigation of the accident.

In order to successfully assert that spoliation of evidence has occurred, one must also demonstrate prejudice. In each of the cases referenced above, the defendant was clearly prejudiced because it could not examine the alleged defects that formed the basis of the litigation and properly evaluate and formulate its defense. Thus, in the cited cases, a sanction was imposed because the destruction of crucial evidence was clearly prejudicial to the defendant.

No such claim can be made here. It is not the Department's investigation that is the subject of this contested case proceeding but rather the accident itself. If the OSHA personnel who determined what citations would be issued cannot back up their claims with objective evidence, the citations will not stand. Their discussions prior to the issuance of the citations, or information that Mr. Craig may have had that did not make it into the investigative report, will not be determinative in evaluating whether the alleged violations in fact occurred. Whether the injured employee was required to stand on the back of the road paver to perform his job duties as the paver travelled between driveways involves issues of fact that will not be determined by information that might have been contained in Mr. Craig's notes of the accident or whether Mr. Craig made mistakes when he transcribed his notes into the report. In addition, the Respondent has not alleged that the individual who provided the training or the Power Point presentation itself are otherwise unavailable to Central Specialties, and this information is not, in any event, critical to the issue of whether employees received on-the-job training that conflicted with their classroom training.

Respondent's request that the citations be dismissed and summary disposition be granted for the Respondent because of spoliation or, in the alternative, that adverse inferences be drawn against the Department, is denied.

**B.L.N.**

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<sup>68</sup> Respondent also cites *Lee v. Metropolitan Airport Commission*, 248 N.W.2d 815 (Minn. App. 1988). In that case, transcripts of co-workers' conversations were ruled inadmissible in a defamation action because the underlying tapes were not available and had not been completely transcribed. That evidence was not excluded on the basis of spoliation but because the transcripts were not true and accurate copies.