

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Ken Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,

FINDINGS OF FACT,
CONCLUSIONS
AND ORDER

Complainant,

Vs .

Fenske Welding,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 1 :00 p.m. on Tuesday, September 12, 1989 in the Clearwater County Courthouse, Bagley, Minnesota. The record on this matter closed at the conclusion of the hearing on September 12, 1989.

Nancy Leppink, Special Assistant Attorney General , Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Department of Labor and Industry. Gerald Fenske, Route 2, Box 222, Bemidji, Minnesota 56601, appeared and testified on his own behalf.

Prior to commencing the hearing, the parties entered into a stipulation which resolved all but one issue in this case. That stipulation is set forth in the Order herein. The issue which was litigated is set forth below.

Notice is hereby given, pursuant to Minn. Stat. 182.664, subd. 5, that the Findings of Fact and Order of the Administrative Law Judge may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee or their authorized representatives within 30 days following the publication of said Findings and Order. The procedures for appeal are set out at Minn. Rule 5215.4900 - 5215.5250.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether Minnesota OSHA had legal authority to inspect Respondent's work site on July 15, 1987.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The parties agreed that the stipulation entered into concerning all of the citations and proposed penalties issued by the Department would rise or fall contingent upon resolution of the issue set forth above.

2. In July of 1987, Gerald Fenske owned two companies and maintained work sites at four separate locations. A stove manufacturing plant was located in Bemidji, Minnesota; Fenske Welding had locations at Washington Avenue South (Highway 71 South), Bemidji, and Route 2, Box 222, which was approximately ten miles southwest of the Washington Avenue South location; and a "Job shop" in Bagley, Minnesota. Mr. Fenske employed fewer than ten employees at these four locations.

3. Sometime prior to July of 1987, Respondent's employee who worked at the Bagley location was assigned to work a one-day job at the Potlach plant east of Bemidji. While working on the Potlach job, Respondent's employee was injured. Responsibility for this injury has not been determined and is still in litigation.

4. Due to the injury noted above, Respondent's experience modification rate for workers compensation insurance went from .8 to 1.3. The larger number meant that Respondent was paying 30% more for workers compensation than the average company in the same industry.

5. The Minnesota Department of Labor and Industry, OSHA Division, uses an inspection selection method to determine which construction sites and manufacturing plants in Minnesota should be inspected. Inspections are generally scheduled by priority using the following factors:

1. sites where an imminent danger exists;
2. sites where a fatality or catastrophe has occurred;
3. sites where conditions are the basis for employee complaints; and
4. generally scheduled types of inspections.

The fourth category includes inspections of especially dangerous industries and companies whose insurance experience modification rating is 1.1 or above.

6. Because Fenske Welding was on a list showing that its experience modification rating was 1.3, OSHA determined that an inspection of the work site should be done. The address on the rating list was "Route 2-- Bemidji".

7. On July 15, 1987, James C. Parent, an OSHA inspector, went to the Fenske Welding location at Washington Avenue South on Highway 71 South, south of Bemidji, Minnesota. When Mr. Parent entered the work site, he spoke with Emile Melberg, and learned that Gerald Fenske was out of town that day. Melberg

informed Parent that Fenske could not be reached by telephone. Parent then was informed by Melberg that he (Melberg) was a foreman, had authority to sign for materials, had authority to take in jobs and money, and could represent management. Consequently, Mr. Parent held an opening conference with Mr. Melberg and conducted an inspection of the job site without objection by Mr. Melberg. Melberg told Parent that the address of that job site was Route 2 and that the mailing address was P.O. Box 222. There was no mail receptacle at the job site, however. Route 2, Box 222, Bemidji was the mailing address for both the Washington Avenue South location and the Box 222 work site.

8. In July of 1987, Mr. Fenske's workers compensation insurance policy covered all four job sites.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Occupational Safety and Health Review Board have jurisdiction over this matter pursuant to Minn. Stat. 14.50, 182.661 and 182.664.

2. The Board gave proper notice of the hearing in this matter and the Complainant and the Board have complied with all substantive and procedural requirements of statute and rule.

3. The Respondent is an employer as defined by Minn. Stat. 182.651, subd. 7.

4. For the reasons set forth in the Memorandum below, the Judge concludes that Minnesota OSHA had legal authority to conduct the inspection on Respondent's work site on July 15, 1987. Because legal authority to inspect has been proved, the Order below will reflect the agreement stipulated to by both parties prior to the commencement of this proceeding.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

1. The alleged willful violation set forth in Citation No. 2 is reduced to a serious violation and is hereby AFFIRMED. All remaining Citations are AFFIRMED as written.

2. All penalties for the non-serious violations are hereby RESCINDED.

3. Respondent shall abate all of the violations issued within 30 days of the issuance of this Order.

4. Respondent shall permit OSHA to reinspect the job site after the 30-day period for abatement has expired to verify whether or not the violations have been abated.

5. Respondent shall pay the Minnesota Department of Labor and Industry the sum of \$2,000 in penalties.

6. If Respondent refuses entrance to OSHA for reinspection or a reinspection shows that abatement has not occurred, all citations and penalties shall be enforceable as originally issued.

Dated this 19th day of September, 1989.

PETER C. ERICKSON
Administrative Law Judge

Reported: Taped.

MEMORANDUM

The issue litigated in this matter was whether Minnesota OSHA had legal authority to inspect Respondent's work site on July 15, 1987. Gerald Fenske contends that the inspection: (1) was at the wrong job site; (2) was without consent; and (3) was without probable cause.

Subdivision 1 of Minn. Stat. 182.659 specifically permits inspections by Minnesota OSHA as follows:

182.659 INSPECTIONS.

Subdivision 1. In order to carry out the purposes of this chapter, the commissioner, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized to enter without delay and at reasonable times any place of employment; and to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

This statutory provision must be read within the limits imposed by the United States Supreme Court in *Marshall v. Barlow's -Inc.*, 436 U.S. 307, 98 S. Ct. 1816, 56 L.Ed.2d 305 (1978). In *Marshall*, the Supreme Court held that nonconsensual OSHA inspections can only be made pursuant to a warrant. It went on to state that ex parte warrants could be issued for unannounced inspections and that only administrative probable cause was needed for the issuance of the warrant. Administrative probable cause for an inspection can be demonstrated if an agency shows that the inspection is being conducted pursuant to an administrative plan containing specific neutral criteria. 436 U.S. at 323. These neutral criteria may be embodied in an agency general administrative plan for the enforcement of the Occupational Safety and Health Act which is derived from impartial sources. 436 U.S. at 320-21.

There is no requirement to seek a warrant for an OSHA inspection, however, if the inspection is conducted with the consent of the employer. Consent need not be expressly stated but can be implied from an employer's failure to object to the inspection itself. *United States v. Thriftmart, Inc.*, 429 F.2d 1006

(9th Cir. 1970). A valid "consent" may be given by a foreman on the job site. Dorey Electric, Company v. OSHRC, 553 F.2d 357 (4th Cir. 1977). In this case, Emile Melberg told the inspector that he was a foreman and could represent management. Mr. Melberg did not object to the inspection. Consequently, valid consent for the inspection was obtained by James Parent and no warrant was required.

Respondent argues that the OSHA inspection was conducted at the wrong job site because the injury which triggered the inspection had occurred at the Potlach plant to an employee who normally worked at the Bagley job site.

Additionally, Mr. Parent intended to inspect the Route 2, Box 222 job site but wound up inspecting the Washington Avenue South job site instead. The record in this case shows that the inspection was done pursuant to an administrative plan based on experience modification rating increases issued by the insurance rating bureau. Respondent's experience rate had risen from .8 to 1.3 for a policy which covered all four of his job sites. James Parent did inspect a job site which had a mailing address of Route 2, P.O. Box 222, Bemidji. The Judge finds no merit to Respondent's claim that the "wrong" work site was inspected.

For the reasons set forth above, the Judge has concluded that Minnesota OSHA has demonstrated sufficient legal authority to conduct the inspection which occurred on July 15, 1987. Consequently, the stipulated agreement between the parties is set forth in the Order above.

P.C.E.