

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,

ORDER

Complainant,

vs.

St. Louis County Highway Department,

Respondent.

The above matter was commenced by service of a Summons and Notice to Respondent and Complaint by mail on March 4, 1994. Respondent served interrogatories upon Complainant by mail on April 11, 1994. They were answered by the Complainant on December 16, 1994. On January 23, 1995, the Respondent filed a Motion to Compel Answers to Interrogatories with the Department. The Motion was forwarded by the Department to the Office of Administrative Hearings on August 16, 1995. The Motion was the subject of a telephone conference between the parties and the Administrative Law Judge on August 28, 1995, at 1:30 p.m.

Vernon D. Swanum, Assistant St. Louis County Attorney, 100 North Fifth Avenue West, #501, Duluth, Minnesota 55802-1298, participated in the telephone conference on behalf of the Respondent. Susan C. Gretz, Assistant Attorney General, 445 Minnesota Street, 900 NCL Tower, St. Paul, Minnesota 55101, participated on behalf of the Complainant.

Based upon the written Motion submitted and the oral argument, and upon all the filings in this case and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED that the Respondent's Motion is DENIED.

Dated this ____ day of September, 1995

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

This case involves a citation issued to the County for alleged violations committed by a contractor with the County at a road construction worksite. The Respondent is seeking an order compelling the Complainant to produce certain discovery.

The Complainant objected to Respondent's Interrogatory No. 9 which stated as follows:

Please indicate in detail each and every incident within the previous five years in the State of Minnesota where a unit of government was cited for an alleged OSHA violation of a subcontractor with whom that local unit of government had contracted for a road construction contract, rather than performing the activity with its own work force.

Complainant's Response was as follows:

Response: Complainant objects to this Interrogatory on the basis that the information it seeks is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence.

In its Motion, the Respondent states that its partial defense to the citations in this case is that the inspector who issued the citation is incorrectly interpreting the statute which has resulted in discriminatory and selective enforcement of the statute and regulations. The Respondent believes that it is only in the Duluth area that government entities are being cited by OSHA for violation of its general contractor's on-road construction projects. It therefore seeks an order compelling the Complainant to answer the Interrogatory.

The Complainant argues that production of this information would be burdensome to the Complainant since this data is not computerized and a search would have to be made by hand to uncover this information. It also argues that the information is irrelevant in that it would not make it more or less probable that the OSHA standard in this case had been either complied with or violated. Even without the information requested, the Respondent will be able to argue that the citation is incorrectly interpreted.

The general rule concerning a selective enforcement defense in OSHA cases, as stated in *Rothstein*, Occupational Safety & Health Law (3rd Ed. 1990) at § 124, is as follows:

A related defense that also has not been successful is selective enforcement. The Commission has held that the decision of which employers to inspect is a discretionary enforcement function of the Secretary.

See *Truax and Hovey Drywall Corp.*, 6 OSHC 1654, 1978 OSHD paragraph 22, 799 (1978); and *Fleming Foods of Nebraska, Inc.*, 6 OSHC 1233, 1978 OSHD paragraph 22, 889 (1977). There are a large number of recognized substantive defenses in OSHA cases. Given the lack of authority for a defense of selective enforcement, the burdensome nature of producing this information, and the lack of relevance as to whether the standard was in fact violated, it is appropriate to deny this motion. The Respondent has failed to establish that this discovery is

needed for the paper presentation of its case or that the issues or amounts in controversy are significant enough to justify the discovery within the meaning of Minn. Rule 1400.6700, subp. 2.

Given the substantial delay in moving this matter toward a resolution, the Department is urged to promptly set this matter on for hearing if it cannot be settled.

G.A.B.