

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

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

Complainant,

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

vs.

Gateway Building Systems, Inc.,

Respondent.

This matter came before Administrative Law Judge Ann O'Reilly pursuant to a Notice and Order for Hearing and Prehearing Conference dated September 27, 2012.

Jackson Evans, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department). Aaron Dean, Best and Flanagan, appeared on behalf of Respondent Gateway Building Systems, Inc. (Respondent or Gateway).

On February 14, 2013, Respondent served a Motion for Summary Disposition, Memorandum of Law, and supporting documentation. On March 11, 2013, the Department filed its Memorandum in Opposition and supporting documents. Respondent served a Reply Brief and supporting affidavits on March 29, 2013. On March 1, 2013, the Department filed an executed copy of a Statement from Nick Buell. Oral argument occurred on April 2, 2013. The hearing record on Respondent's Motion closed on April 2, 2013.

This proceeding arises out of one Citation issued to Respondent on April 30, 2012, by the Minnesota Occupational Safety and Health Administration (MNOSHA). The Citation consisted of two separate violations: Item 001(violation of 29 C.F.R. § 1910.178) and Item 002 (violation of Minn. R. 5207.110). Prior to the hearing, the Department stipulated to the dismissal of Item 001. Accordingly, the only remaining issue subject to Respondent's Motion for Summary Disposition is Item 002 of the Citation.

Based upon the proceedings, memoranda and files herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent's Motion for Summary Disposition with respect to Citation 1, Item 001 (violation of 29 C.F.R. § 1910.178) is **GRANTED**.
2. Citation 1, Item 001 (violation of 29 C.F.R. § 1910.178) is **DISMISSED** with prejudice and the fine associated with Citation 1, Item 001 is **VACATED**.
3. Respondent's Motion for Summary Disposition with respect to Citation 1, Item 002 is **DENIED**.
4. This matter shall proceed to hearing on **May 13 and 14, 2013**, commencing at 9:30 a.m., at the Office of Administrative Hearings in St. Paul, Minnesota.

Dated: April 11, 2013

s/Ann O'Reilly
ANN O'REILLY
Administrative Law Judge

Reported: Digitally Recorded. No transcript prepared.

MEMORANDUM

FACTUAL BACKGROUND

For purposes of the parties' cross Motions for Summary Disposition, the following facts are considered undisputed:

Respondent Gateway is a building contractor.¹ Gateway was hired to install a roof on a grain bin at the Mattson Dairy Farm in Farwell, Minnesota, in 2012.²

On January 4, 2012, two Gateway employees, Nick Buell (Buell) and Anthony Lambutis (Lambutis), were working in an elevated "man basket" or platform attached to

¹ Respondent's Memorandum of Law in Support of Motion for Summary Disposition at pp. 3-4

² *Id.*

a forklift.³ The employees were hoisted approximately 30 feet in the air, working on a roof of a large grain bin, when the hydraulic brakes of the forklift malfunctioned.⁴ As a result, the forklift rolled backwards, toppled over, and seriously injured the two employees.⁵

Following the accident, the Minnesota Occupational Safety and Health Administration (MNOSHA) conducted an investigation. The parties stipulate to the accuracy of MNOSHA's description of the accident, as follows:

On January 04, 2012, at approximately 12:22 p.m., two employees were working from a Haugen elevated work platform that was attached to an Ingersoll Rand VR-90B all-terrain forklift. At the time of the accident, the forklift was parked⁶ immediately adjacent to the grain bin on an inclined surface. Contacts #3 & 4 [Buell and Lambutis] were in the elevated platform approximately 30 feet above the ground level, attaching the bolts to the new corrugated metal roof that had been put into place on the grain bin. Contact #5 [Dale Beneke] was at the controls of the forklift in the cab. According to Contact #1, Contact #5 [Beneke] cut the power to the forklift while the employees were in the elevated platform, because the employees were having troubles hearing each other over the noise of the engine. Shortly after Contact #5 [Beneke] cut the power to the forklift, the hydraulic brakes failed and the forklift began to roll backwards down the hill it had been parked on. After rolling backwards approximately 15-25 feet, the forklift fell over with the boom still extended approximately 30 feet in the air. Contact #1 stated that he believed the parking brake was engaged at the time of the accident. The employees were not equipped with fall arrest systems or positioning devices the day of the accident. Both employees sustained multiple broken bone injuries as a result of the fall while in the elevated work platform. Both employees were transferred to a hospital to treat their injuries.⁷

Both Buell and Lambutis received extensive and serious injuries.⁸ It is undisputed that neither Buell nor Lambutis was wearing fall protection devices at the time of the accident.⁹ Respondent contends, but the Department does not stipulate,

³ Affidavit of Jason Albertson, dated February 14, 2013 (hereafter referred to as "Albertson Aff. #1") at Para. 4

⁴ *Id.*

⁵ *Id.* at Para. 4 and Ex. 2.

⁶ Respondent denies that the forklift was "parked," as defined by the forklift's operating manual, but admits that the forklift was stopped, its power was turned off, and its brakes "failed" at the time of the accident. (See Respondent's Memorandum in Support of Summary Disposition at pp. 4-5.) Whether the vehicle was "parked" is not material to the fall protection citation at issue in Respondent's Motion.

⁷ *Id.* at Ex. 2.

⁸ See, recording of Oral Argument, April 2, 2013.

⁹ *Id.*; See also, Affidavit of Anthony Lambutis and Statement of Nick Buell, dated March 27, 2013.

that the use of fall protection devices would not have prevented the accident or the injuries.¹⁰

Also present on the job site at the time of the accident was Dale Beneke (Beneke), the forklift operator, and Timothy Lewis (Lewis), the project foreman.¹¹ At the time of the accident, Lewis was operating a crane on the opposite side of grain bins and did not witness the accident occur.¹²

The Department does not dispute that Respondent had established a work rule requiring the use of fall protection devices when working above six (6) feet and when working in a “man basket” attached to a forklift.¹³ The Department also does not dispute that such rules were adequately communicated to Respondent’s employees prior to the accident.¹⁴

All four employees present at the time of the accident, including Buell and Lambutis, were disciplined for violation of the fall protection rules in April 2012.¹⁵ As part of the discipline, the four employees did not receive a pay raise for 2012.¹⁶ Lambutis eventually returned to work at Gateway.¹⁷ Buell did not.¹⁸

On or about May 2, 2012, MNOSHA issued Respondent one Citation asserting two serious-level violations (Items 001 and 002).¹⁹ Citation 01, Item 001 asserts a violation of 29 C.F.R. 1910.178(1)(3) and alleges that the forklift operator did not receive initial training in applicable topics of the standard.²⁰ After reviewing Respondent’s documents, the Department agreed to rescind Item 001 of the Citation.²¹ Accordingly, by stipulation of the parties, Citation 01, Item 001 shall be dismissed by this Order.

Citation 01, Item 002 asserts a violation of Minn. R. 5207.1100 and alleges that the two employees, who were working from the forklift platform, were not protected from falling by the use of a personal fall arrest system or positioning device.²² Minn. R. 5207.1100, subp. 2 provides:

¹⁰ Respondent’s Memorandum of Law in Support of Summary Disposition at p. 5; *See also*, recording of Oral Argument on April 2, 2013.

¹¹ Albertson Aff. #1; Affidavit of Timothy Lewis.

¹² Lewis Aff.

¹³ Lambutis Aff.; Lewis Aff.; Albertson Aff. #1; Department’s Memorandum in Opposition to Motion for Summary Disposition at p. 4.

¹⁴ *Id.*

¹⁵ Lambutis Aff.; Lewis Aff.; Albertson Aff. #1 at Ex. 29.

¹⁶ Albertson Aff. #1 at Ex. 29.

¹⁷ Lambutis Aff.; *See also*, recording of Oral Argument, April 2, 2013.

¹⁸ *See*, Recording of Oral Argument, April 2, 2013.

¹⁹ *Id.* at Exs. 1 and 2; *See also*, Respondent’s Memorandum in Support of Motion for Summary Disposition at p. 12.

²⁰ Albertson Aff. #1 at Ex. 1.

²¹ *See* email correspondence from Jackson Evans to Judge O’Reilly and Aaron Dean, dated February 26, 2013. *See also*, recording of Oral Argument, April 2, 2013.

²² Albertson Aff. #1 at Ex. 1.

An employee, while occupying a boom-supported elevated work platform or a personnel elevating platform supported by a rough-terrain forklift truck, shall be protected from falling by the use of personal fall arrest systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(d), or positioning device systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(e).

On or about May 9, 2012, Respondent served a Notice of Contest and Service to Affected Employees (Notice) upon MNOSHA.²³ The Notice disputed the Citation, type of violation, abatement date, and penalty.²⁴ In a letter accompanying the Notice, Respondent asserts “an employee misconduct defense.”²⁵

The MNOSHA Field Compliance Manual (Manual), dated May 28, 2012,²⁶ recognizes an employer’s affirmative defense of unpreventable employee misconduct.²⁷ The Manual provides that “Before issuing Citations to an employer with employees exposed to a hazard, it must first be determined whether the exposing employer has a legitimate defense to the Citation.”²⁸ The Manual further provides:

Burden of Proof

Although affirmative defenses must be proved by the employer at the time of the hearing, MNOSHA must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense, especially in fatalities, serious injury, or catastrophe cases. The case file shall contain documentation which refutes the more common defenses.²⁹

“Unpreventable employee misconduct” is listed in the Manual as a common affirmative defense.³⁰

UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

Minn. Stat. § 182.651, subd. 12, defines a “Serious Violation” of state work safety standards as:

²³ Albertson Aff. #1 at Ex. 4.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Notably, the Manual cited by Respondent is dated May 28, 2012. This post-dates the date of the accident and investigation in this case.

²⁷ Affidavit of Aaron Dean, dated February 14, 2013 (Dean Aff. #1), at Ex. A, p. 59 (Unpreventable Employee Misconduct or “Isolated Event” – The violative conduct was unknown to the employer and in violation of an adequate work rule which was effectively communicated and uniformly enforced through a disciplinary program.)

²⁸ Dean Aff. #1 at Ex. A, p. 57.

²⁹ *Id.* at p. 59.

³⁰ *Id.*

[A] violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*³¹

Consistent with this definition, courts and MNOSHA have recognized the affirmative defense of unpreventable or unforeseeable employee misconduct in OSHA cases. Under this defense, an employer is shielded from liability for workplace safety violations if the employer: (1) established a work rule to prevent the reckless behavior or unsafe condition from occurring; (2) adequately communicated the rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rules whenever employees transgressed it.³²

In applying these factors, courts have held that “[T]he proper focus in employee misconduct cases is on the effectiveness of the employer’s implementation of its safety program.”³³ Because employee misconduct is an affirmative defense, the employer bears the burden of establishing all four factors.

RESPONDENT’S ARGUMENTS IN SUPPORT OF MOTIONS FOR SUMMARY DISPOSITION

Respondent asserts that MNOSHA should not have cited Gateway [for Item 002] “because Gateway has an employee misconduct affirmative defense.”³⁴ Respondent first argues that MNOSHA failed to investigate Respondent’s affirmative defense prior to issuing the Citations, and, therefore, the Citation should be dismissed. Next, Respondent argues that the undisputed facts support the imposition of the affirmative defense of employee misconduct, and, thus, summary dismissal of the Citation is warranted.

In response, the Department disputes that the MNOSHA Field Manual establishes a substantive right to the investigation of an affirmative defense or that failure to fully investigate such defense should result in dismissal of a Citation. Further, the Department asserts that there is a dispute as to the material facts establishing factors #3 and #4 of the unpreventable employee misconduct affirmative defense, and, therefore, summary disposition is precluded.

³¹ Emphasis added.

³² *Modern Continental Construction Company, Inc. v. Occupational Safety and Health Review Commission, et al.*, 305 F.3d 43, 51 (1st Cir. 2002), *citing P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Committee, et al.*, 115 F.3d 100, 109 (1st Cir. 1997); *See also, Valdek Corporation v. Occupational Safety and Health Review Commission*, 73 F.3d 1466, 1769 (8th Cir. 1996) (“To establish the defense of unforeseeable employee misconduct, [the employer] must prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule.”).

³³ *Valdek*, 73 F.3d at 1469, *citing Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*, 484 U.S. 989, 108 S. Ct. 479, 98 L.Ed.2d 509 (1987).

³⁴ *See*, Respondent’s Memorandum of Law in Support of Summary Disposition.

STANDARD FOR SUMMARY DISPOSITION

Summary disposition is the administrative law equivalent to summary judgment. Summary disposition is appropriate where there is no genuine issue of material fact and where a determination of the applicable law will resolve the controversy.³⁵ The Office of Administrative Hearings has generally followed the summary judgment standards developed in the district courts in considering motions for summary disposition of contested case matters.³⁶

The Administrative Law Judge's function on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but solely to determine whether genuine factual issues exist.³⁷ The judge does not weigh the evidence on a motion for summary judgment.³⁸

In deciding a motion for summary disposition, the judge must view the evidence in the light most favorable to the non-moving party.³⁹ All doubts and factual inferences must be resolved against the moving party.⁴⁰ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.⁴¹

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact.⁴² If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts that are in dispute that can affect the outcome of the case.⁴³

To successfully defeat a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.⁴⁴ It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.⁴⁵ A genuine issue is one that is not sham or frivolous.⁴⁶ A material fact is a fact whose resolution will affect the result or outcome of the case.⁴⁷

³⁵ See, *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); *Gaspord v. Washington County Planning Commission*, 252 N.W.2d 590, 590-591 (Minn. 1977); Minn. R. 1400.5500(K) (2009); Minn. R. Civ. P. 56.03.

³⁶ See, Minn. R. 1400.6600 (2011).

³⁷ See e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

³⁸ *Id.*

³⁹ *Ostendorf v. Kenyon*, 247 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁴⁰ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁴¹ *DLH*, 566 N.W.2d at 69.

⁴² *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

⁴³ *Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 6, 1985).

⁴⁴ *Thiele*, 425 N.W.2d at 583; *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

⁴⁵ Minn. R. Civ. P. 56.05.

⁴⁶ *Highland Chateau*, 356 N.W.2d at 808.

⁴⁷ *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976); See also, *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

While the purpose and useful function of summary judgment is to secure a just, speedy, and inexpensive determination of an action, summary disposition cannot be used as a substitute for a hearing where any genuine issue of material fact exists.⁴⁸ Accordingly, summary disposition is only proper where there is no fact issue to be decided.⁴⁹

LEGAL ANALYSIS

A. *Applicability of the MNOSHA Field Compliance Manual*

Respondent asserts that MNOSHA did not follow the dictates of its Field Compliance Manual and failed to fully investigate Respondent's affirmative defense of preventable employee misconduct. As a result, Respondent argues that the Citation should be dismissed. Respondent's argument, however, fails on its merits.

It is true that the Manual instructs MNOSHA investigators to determine whether an employer has a legitimate defense to a Citation before issuing a Citation, and to include in the case file documentation that refutes the common affirmative defenses.⁵⁰ However, this Manual and its mandates are meant for the instruction of MNOSHA investigators in the preparation of MSOSHA case files, and not for the protection of the employers cited. The Manual's purpose is to assist MNOSHA investigators in preparing MNOSHA's case for hearing and to ensure that MNOSHA is prepared to defend against affirmative defenses raised by the parties cited.

For this reason, Federal Occupational Safety and Health Commission case law has repeatedly rejected Respondent's argument on this issue. See *e.g.*, *Secretary of Labor v. Mautz & Oren, Inc.*, 1992 O.S.H.D. (CCH) P 29591, 1991 WL 30784 (O.S.H.R.C.A.L.J., Dec. 19, 1991) (failure to strictly adhere to the guidelines of an OSHA field manual was a procedural error and was not grounds for vacating a Citation); *Secretary of Labor v. Aquatek Systems, Inc.*, 21 O.S.H. Cas. (BNA) 1755, 2006 WL 2548486 (O.S.H.R.C., June 26, 2006) (employer is not entitled to an investigation into a possible affirmative defenses prior to Citation).⁵¹

The Manual is an internal document, instructive in nature, and is not law or rule. The provisions are procedural directions for MNOSHA investigators, and do not create substantive rights for those investigated. As articulated in *Secretary of Labor v. and FMC Corporation*:

The manual contains only guidelines for the execution of enforcement operations for which the [investigator] has general responsibility.

⁴⁸ *Sauter*, 70 N.W.2d at 353.

⁴⁹ *Id.*

⁵⁰ Dean Aff. #1 at Ex. A.

⁵¹ Federal OSHA decisions are instructive in so much as Minnesota has adopted and MNOSHA applies federal OSHA regulations.

Moreover, the guidelines provided by the manual are plainly for internal application to promote efficiency and not to create an administrative straightjacket. They do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals.⁵²

Thus, while a failure to comply with the Manual's protocols may well hinder MNOSHA's ability to adequately defend against an employer's later-asserted affirmative defenses, such failures do not result in the automatic dismissal of Citations.

In addition, as an affirmative defense, it is the employer's burden to establish the elements of the employee misconduct defense. Imposing a legal obligation on MNOSHA to investigate and develop an employer's affirmative defenses would unfairly shift the burden onto MNOSHA and, as the Department asserts, "throw the concept of an affirmative defense on its head."⁵³ The information and documentation to support such defense is in the hands of the employer. Thus, it would be inequitable to impose a duty on MNOSHA to develop the employer's defense and then dismiss a case if MNOSHA failed to investigate or develop it sufficiently for the employer.

Thus, because the Manual does not have the force or effect of law or rule, and because it is Respondent's burden to establish the elements of its affirmative defense in this action, Respondent's Motion for Summary Disposition on this issue is denied.

B. Respondent's Unpreventable Employee Misconduct Affirmative Defense

To obtain summary disposition on the affirmative defense of unpreventable employee misconduct, Respondent must show that there is no issue of material fact as to whether it: (1) established a work rule to prevent the reckless behavior or unsafe condition from occurring; (2) adequately communicated the rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rules whenever employees transgressed it.⁵⁴

The Department concedes that Respondent has established elements #1 and #2 (that work rules related to the use of fall protection were established and were adequately communicated to its employees prior to the accident). However, the Department asserts that there is a dispute of material fact as to factors #3 and #4 (i.e., whether Respondent took steps to discover incidents of noncompliance with fall protection rules and whether Respondent effectively enforced its fall protection rules).

An Administrative Law Judge's function on a motion for summary disposition, like that of a trial court, is not to decide issues of fact, but solely to determine whether genuine factual issues exist.⁵⁵ The ALJ does not make findings of fact or determine the

⁵² 5 O.S.H. Cas. (BNA) 1707, 1977-1978 O.S.H.D (CCH) P 22060, 1997 WL 7715 at *4 (O.S.H.R.C. Aug.4, 1977) (citations omitted).

⁵³ Memorandum of Law in Opposition to Motion for Summary Disposition at p. 3.

⁵⁴ See e.g., *Modern Continental*, 305 F.3d at 51.

⁵⁵ *DLH, Inc.*, 566 N.W.2d at 70.

credibility of witnesses.⁵⁶ A genuine issue of material fact exists, precluding summary judgment, “when reasonable persons might draw different conclusions from the evidence presented.”⁵⁷

With its Motion, Respondent presented voluminous documentation of its rules and policies related to fall protection, as well as employee training records related to those rules and policies.⁵⁸ Respondent asserts that it strictly enforced its fall protection rules by conducting surprise audits/inspections and imposing discipline upon those employees found in violation. To that end, Respondent submitted documentation of various site audits from 2008 to 2011, and Employee Warning Notices and other disciplinary notices from 2008 to 2012.⁵⁹ Respondent argues that there is no dispute of material fact that such enforcement and disciplinary action establishes factors #3 and #4 of the affirmative defense of unpreventable employee misconduct, and that summary disposition should be granted dismissing Item 002 of the Citation.

Respondent has submitted evidence that it took steps to discover incidents of noncompliance and that it strictly enforced fall protection rules. According to Jason Albertson, Gateway’s Safety Director, “Gateway has an extensive program of surprise job site audits/inspections.”⁶⁰ Albertson contends that fall protection is one of the “key items” assessed during the audits.⁶¹ Albertson asserts that Gateway conducted at least 20 documented surprise inspections in the year before the accident, and estimates that Gateway management conducts approximately 200 undocumented inspections per year.⁶² Albertson, Lambutis, and Lewis all submitted affidavits acknowledging the occurrence of surprise safety audits at Gateway by Albertson, Gateway’s owner, Kevin Johnson, and the 19 project managers.⁶³ Albertson, Lambutis and Lewis all assert that Gateway enforces its safety regulations and disciplines employees for safety violations, including failure to wear required fall protection.⁶⁴ However, a Gateway site audit, dated July 22, 2009, evidences that an entire crew was caught not using fall protection with the knowledge of its site foreman and that no discipline was imposed in that instance.⁶⁵ This site audit, and the lack of any other discovery of, or disciplinary actions for, fall protection violations over the years, establishes a dispute of fact as to whether Gateway was, indeed, actively seeking to discover violations and whether it was actively enforcing its fall protection policies.

⁵⁶ *Id.*

⁵⁷ *Id.* at 69.

⁵⁸ See, Albertson Aff. #1.

⁵⁹ Albertson Aff. #1 at Exs. 27 and 28; Affidavit of Jason Albertson, dated March 28, 2013 (Albertson Aff. #2), at Exs. C, D, and E.

⁶⁰ Albertson Aff. #2 at Para. 14.

⁶¹ Albertson Aff. #1 at Para. 59.

⁶² Albertson Aff. #2 at Para. 14-22 and Exs. C and D. See *also*, Albertson Aff. #1 at Para. 59 and Ex. 27.

⁶³ Albertson Aff. #2, Lambutis Aff., Lewis Aff.

⁶⁴ *Id.*

⁶⁵ Albertson Aff. #1 at Ex. 27; Albertson Aff. #2 at Ex. C, pp. GBS-000105-000107.

In addition, to oppose Respondent's Motion, the Department submitted a signed, but un-notarized, statement from Buell (Statement).⁶⁶ In the Statement, Buell asserts that he worked at Gateway at approximately "50-75 job sites" and "[t]here were never really any surprise audits."⁶⁷

Buell further states that he worked on the elevated lift all morning on January 4, 2012, and for approximately 30 minutes after lunch before the accident occurred.⁶⁸ Buell estimates that he worked for four (4) hours in the elevated lift without fall protection.⁶⁹ Buell notes that Beneke (the forklift driver) observed Buell and Lambutis working without fall protection but did not object.⁷⁰ Buell's Statement does not mention whether or not Timothy Lewis, the job foreman, observed Buell or Lambutis working without fall protection.⁷¹ However, according to Buell's Statement:

At Gateway, a foreman is not really going to discipline you for not wearing fall protection. If a foreman finds you without fall protection, he will just tell you to put it on. It's only if the foreman catches you a second time that you will be formally disciplined.⁷²

Buell's Statement,⁷³ while minimal, does establish a genuine issue of material fact as to whether Respondent took steps to discover incidents of noncompliance and/or whether Respondent effectively enforced the rules whenever employees violated them. It is undisputed that the project foreman, Lewis, was present at the jobsite the day of the

⁶⁶ According to Assistant Attorney General Jackson Evans, legal counsel for the Department, Buell lives in out-state Minnesota and was unable to locate a notary. As a result, counsel could only obtain a signed statement from Buell prior to the motion hearing. (See recording of Oral Argument on April 2, 2013.)

⁶⁷ Statement of Nick Buell, dated March 27, 2013.

⁶⁸ Buell Statement at Para. 2.

⁶⁹ *Id.*

⁷⁰ *Id.* at Para. 3.

⁷¹ Buell Statement.

⁷² *Id.* at Para. 4.

⁷³ Respondent objects to the consideration of Buell's Statement because it is not a notarized or sworn affidavit, and was not executed by Buell until March 27, 2013 – weeks after the Department served its responsive Memoranda. In a district court, Respondent's objections would likely be sustained under Minn. R. Civ. P. 56.05. However, the rules applicable to contested administrative hearings, such as this, allow for broader inclusion of evidence than the Minnesota Rules of Civil Procedure and Rules of Evidence. According to Minn. R. 1400.7300:

The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs....

Although Buell's Statement is not notarized, it is signed by Buell (albeit late). By his signature, Buell is acknowledging the veracity of the statements contained therein, and is identifying the substance of his anticipated hearing testimony. There is no allegation or other indication that the document was forged, that it is inauthentic, or that it is untrue. If the Statement was not executed, it would, indeed, be disregarded as not possessing probative value. However, given his signature, the evidence of authenticity, and the lower threshold for the admission of evidence in administrative hearings, the fact that the Statement was not notarized is not fatal to its admission for purposes of responding to this Motion.

accident.⁷⁴ Lewis states that he was unable to see Buell and Lambutis because he was working on the other side of the 30 x 60 foot grain bins and was, therefore, unaware that the two employees were working without fall protection.⁷⁵

Buell asserts that he was on the elevated lift for approximately four hours prior to the accident.⁷⁶ Lambutis and Lewis acknowledge that Buell and Lambutis were working in the “man basket” for “less than two hours” at the time of the accident.⁷⁷ Accordingly, the evidence suggests that the two employees were working between two and four hours before the accident occurred in an elevated “man basket” of a forklift, while their foreman was present on the jobsite and working with them.

As the foreman, Lewis was charged with the duty of supervising the employees and enforcing safety rules on behalf of Gateway. The fact that the employees were working with him for a significant length of time (2-4 hours) without fall protection, in violation of the rules, and Lewis did not object or even notice the violations, presents a question of material fact as to whether there was a lack of enforcement of the fall protection rules and/or whether there was a failure to take steps to discover non-compliance. These facts, in combination with: (1) Buell’s Statement that the fall protection rules are not strictly enforced by foremen at Gateway; and (2) the lack of any prior discipline imposed for violation of fall protection rules, especially in an instance when a violation clearly existed, is sufficient to establish a thin, but, nonetheless, existent, issue of material fact as to the applicability of the unpreventable employee misconduct defense.

Accordingly, Respondent’s Motion for Summary Disposition is denied. The issues of whether Respondent established factors #3 and #4 of the affirmative defense of unpreventable employee misconduct shall proceed to an evidentiary hearing with respect to Item 002 of the Citation. Item 001 of the Citation is dismissed by stipulation of the parties.

A. C. O.

⁷⁴ Lewis Aff. at Para. 2-3.

⁷⁵ *Id.*

⁷⁶ Buell Statement.

⁷⁷ Lambutis Aff. at Para. 1.