

STATE OF MINNESOTA
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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

DECISION

Complainant,

OAH Docket No. 65-1901-23109

v.

Gateway Building Systems, Inc.,

Respondent.

The above-entitled matter came before the Minnesota Occupational Safety and Health Review Board (“the Board”) on March 4, 2015. Assistant Attorney General Eric J. Beecher, Suite 900, 445 Minnesota Street, St. Paul, Minnesota, appeared for and on behalf of the Commissioner of the Department of Labor and Industry (“Commissioner”). Attorney Aaron Dean, Esq., Moss & Barnett, P.A., 150 S. 5th Street, Suite 1200, Minneapolis, Minnesota, appeared for and on behalf of Respondent Gateway Building Systems, Inc. (“Gateway”). Assistant Attorney General Erik M. Johnson, Suite 1800, 445 Minnesota Street, St. Paul, Minnesota 55101-2127 was present as legal advisor to the Board.

PROCEDURAL HISTORY

On April 30, 2012, the Commissioner cited Gateway for two violations: Item 001 (violation of 29 C.F.R. § 1910.178) and Item 002 (violation of Minn. R. 5207.1100).

On May 4, 2012, Gateway filed a notice of contest.

On October 3, 2012, the Commissioner filed a Notice and Order for Hearing and Prehearing Conference related to Gateway’s contest of the citation.

Gateway brought a motion for summary disposition. Prior to the hearing, Respondent stipulated to the dismissal of Item 001. On April 2, 2013, Administrative Law Judge Ann C. O'Reilly ("ALJ") heard argument from the Commissioner and Gateway.

On April 11, 2013, the ALJ issued an Order granting Gateway's motion for summary disposition of Item 001 based on the stipulation of the parties, vacated the fine associated with Item 001, and denied Gateway's motion for summary disposition of Item 002 based on the ALJ's conclusion that the evidence created genuine issues of material fact.

On May 13 and May 14, 2013, the matter came before the ALJ for a contested case hearing.

On October 22, 2013, the ALJ issued Findings of Fact, Conclusions of Law, and Order, affirming the citation for Item 002 and affirming the \$2,800.00 penalty imposed for Item 002.

Gateway filed a timely Notice of Appeal of the ALJ Order with the Board.

On May 20, 2014, Gateway requested that its time to make oral argument be 35 minutes, rather than 10 minutes. The Board granted Gateway's request and allowed both parties up to 35 minutes to make oral argument at the March 4, 2015, hearing.

ISSUES BEFORE THE ALJ¹

1. Whether Gateway employees violated Minn. R. 5207.110, subpt. 2?
2. Whether the Commissioner demonstrated by a preponderance of the evidence that Gateway knew of the violation or should have known with the exercise of reasonable diligence?
3. Whether Gateway established the affirmative defense of unpreventable employee misconduct by a preponderance of the evidence?

¹ See Statement of Issues, ALJ Order at 1-2.

4. Whether the \$2,800.00 penalty issued for the citation was appropriate or should have been reduced to \$2,200.00?

ISSUES BEFORE THE BOARD²

1. Whether the Board should reverse the ALJ determination that Gateway did not establish the affirmative defense of unpreventable employee misconduct by a preponderance of the evidence?

2. Whether the Board should reverse the ALJ determination that the \$2,800.00 penalty issued for the citation was appropriate?

STANDARD OF REVIEW

The Board has the authority to “revise, confirm, or reverse the decision and order” of an administrative law judge. Minn. Stat. § 182.664, subd. 5 (2014). “The board is limited in its review of an administrative law judge’s decision and order to matters preserved in the record.”

Minn. R. 5215.5210, subpt. 1. The Board:

may revise or reverse the administrative law judge’s decisions and orders if substantial rights of the petitioner . . . may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- A. in violation of constitutional provisions;
- B. in excess of statutory authority or jurisdiction of the agency;
- C. made upon unlawful procedure;
- D. affected by other error of law;
- E. unsupported by substantial evidence in view of the entire record as submitted³; or

² See Resp.’s Not. Of Appeal at 1-5; Resp.’s Br. at 4.

³ “Substantial evidence consists of: 1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than ‘some evidence’; 4) more than ‘any evidence’; and 5) evidence considered in its entirety.” *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm’rs*, 713 N.W.2d 817, 832 (Footnote Continued on Next Page)

F. arbitrary or capricious⁴.

Id., subpt. 2.

“Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record.” Minn. Stat. § 14.60, subd. 4 (2014).

Based on the files, records, and proceedings herein, the Board has made an independent decision based on the record and hereby makes the following:

FINDINGS OF FACT

1. The ALJ’s findings in regard to whether Gateway established the third element of the affirmative defense of unpreventable employee misconduct by a preponderance of evidence were supported by substantial evidence in the record.

2. The ALJ’s findings in regard to whether Gateway established the fourth element of the affirmative defense of unpreventable employee misconduct by a preponderance of evidence were supported by substantial evidence in the record.

3. The ALJ’s findings in regard to the amount of the penalty were supported by substantial evidence in the record.

(Footnote Continued from Previous Page)

(Minn. 2006). The finder of fact “is not required to accept even uncontradicted testimony if improbable or if surrounding facts and circumstances afford reasonable grounds for doubting its credibility.” *Waite v. Am. Family Mut. Ins. Co.*, 352 N.W.2d 19, 22 (Minn. 1984).

⁴ “[A]n agency ruling is arbitrary and capricious if the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.” *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 832.

CONCLUSIONS OF LAW

1. Gateway has not established any of the bases set forth in Minn. R. 5215.5210, subpt. 1, for this Board to revise or reverse the findings or conclusions as to the third element of the affirmative defense of unpreventable employee misconduct, that the employer has taken steps to discover violations.

2. As a consequence of this Board's conclusion of law number 1, the ALJ's conclusion that Gateway did not establish the affirmative defense of unpreventable employee misconduct should be affirmed, even without considering whether Gateway's arguments as to the fourth element.

3. In light of the parties' analysis of the fourth element of the affirmative defense of unpreventable employee misconduct, that the employer has effectively enforced the rules when violations have been discovered, this Board will consider it independently of its analysis of the third element.

4. Gateway has not established any of the bases set forth in Minn. R. 5215.5210, subpt. 1, for this Board to revise or reverse the findings or conclusions as to the fourth element of the affirmative defense of unpreventable employee misconduct, that the employer has effectively enforced the rules when violations have been discovered.

5. As a consequence of this Board's conclusion of law number 4, the ALJ's conclusion that Gateway did not establish the affirmative defense of unpreventable employee misconduct should be affirmed, even without considering whether Gateway's arguments as to the third element.

6. On the facts in this matter, determining the percentage of the work day that the employees were exposed to hazard, for purpose of calculating duration as part of the probability

factor, involves comparing the time the employees were exposed to hazard to the actual numbers of hours worked, rather than to a hypothetical 8-hour day.

7. Gateway has not established any of the bases set forth in Minn. R. 5215.5210, subpt. 1, for this Board to revise or reverse the findings or conclusions as to the amount of the penalty.

ORDER

IT IS HEREBY ORDERED:

1. The Commissioner's Citation 1, Item 002, to Gateway Building System, Inc., for violation of Minn. R. 5207.1100, subpt. 2, is **AFFIRMED IN ALL RESPECTS**.
2. The attached Memorandum is incorporated as if fully set forth herein.

Dated this 17th day of June, 2015


Leonard Price, Board Chair
Minnesota Occupational Safety and Health
Review Board

MEMORANDUM

I. Unpreventable Employee Misconduct.

Item 002 of Gateway's citation was issued for violation of the following regulation:

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).

Minn. R. 5207.1100, subp. 2. The parties do not dispute and the record reflects that Gateway's on-site employees violated this rule. Gateway asserts that it has established the affirmative defense of unpreventable employee misconduct

"To establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove: (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Sec'y of Labor v. Precast Servs., Inc.*, O.S.H.R.C. Docket No. 93-2971, 1995 WL 693954, *1 (O.S.H.R.C. Nov. 14, 1995); *Western World, Inc. v. Sec'y of Labor*, No. 14-1838, 2015 WL 1285332, at *2 (3d Cir. Mar. 20, 2015).

"A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence." Minn. R. 1400.7300, subpt. 5. "[P]reponderance of the evidence, and by that term is meant that the evidence offered to prove a given fact must fairly outweigh the evidence offered in opposition to it and be of greater convincing force and effect." *Carpenter v. Nelson*, 101 N.W.2d 918, 920 (Minn. 1960).

Failure to establish any one of the four elements prevents a conclusion that Gateway established the affirmative defense. *Andrews v. Andrews*, 212 N.W. 408, 412 (Minn. 1927)

("[A]n affirmative defense . . . imposes the burden upon the one asserting it to prove every element necessary to establish it.").

The ALJ concluded that the affirmative defense did not apply because Gateway did not establish the third element (that it had taken steps to discover violations) or the fourth element (that it has effectively enforced the rules when violations have been discovered). Gateway contends that the ALJ conclusions that it did not establish these two elements were not supported by substantial evidence.

A. Element (3): Whether Employer Has Taken Steps to Discover Violations.

Gateway introduced testimony from current employees that Gateway undertakes hundreds of surprise site visits to discover safety violations. The evidence included Gateway documentation of five site visits in 2010 and 20 in 2011, notwithstanding that Gateway performed over 300 jobs in 2011. The evidence included the statement of Buell that he had worked at 50 to 75 job sites and there were "never really any surprise audits." (Doc. 10, Stmt. Buell). The evidence included the fact that the work site where the accident occurred did not experience a visit even though the workers had been on site for four days. The evidence included the fact that on-site supervisor Lewis did not verify whether workers Buell and Lambutis had, and were planning to use, fall protection before he went to operate a crane in an area from which he could not personally see Buell and Lambutis. The evidence included the fact that while Buell and Lambutis were elevated and working, Lewis could communicate with a two-way radio. The evidence included the fact that Lewis did not remind the workers of the safety rules at any time on-site before the accident occurred.

Gateway contends that the ALJ was required to accept as true the testimony of its employees that it conducts hundreds of safety visits because that testimony was not directly

contradicted. The finder of fact “is not required to accept even uncontradicted testimony if improbable or if surrounding facts and circumstances afford reasonable grounds for doubting its credibility.” *Waite v. Am. Family Mut. Ins. Co.*, 352 N.W.2d 19, 22 (Minn. 1984). The ALJ, who had the opportunity to personally observe the witnesses and consider their testimony in light of other evidence in the record, did not accept that testimony. In light of the totality of the evidence in entire record as submitted, this Board concludes that the ALJ’s determination as to the testimony from Gateway witnesses was supported by substantial evidence.

In considering the totality of the evidence in light of this Board’s experience, technical competence, and specialized knowledge, the ALJ’s conclusion that Gateway did not establish the third element by a preponderance of the evidence was supported by substantial evidence in view of the entire record as submitted. Gateway has not established any of the bases set forth in Minn. R. 5215.5210, subpt. 1, for this Board to revise or reverse the findings or conclusions as to the third element of the affirmative defense of unpreventable employee misconduct. This Board hereby confirms the ALJ’s findings, conclusions, and order as to the third element of the affirmative defense of unpreventable employee misconduct.

B. Element (4): Whether Employer has effectively Enforced the Rules when Violations have been Discovered.

Gateway introduced testimony that employee violations of safety rules are always subject to employee discipline by Gateway. The record also included evidence of a 2009 incident which a foreman and workers at a jobsite were discovered working without fall protection and the foreman was not disciplined. (Doc. 18, Ex. 5). The evidence included the statement of Buell that “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.” (Doc. 10, Stmt. Buell). The record also includes evidence that both Buell and Lambutis knew that fall protection was

required but did not wear it and that the forklift operator could see that they did not have fall protection but said nothing. The fact that all three of those employees (Buell, Lambutis, and Beneke) said nothing suggests ineffective enforcement of the work safety rules. “Where all the employees participating in a particular activity violate an employer’s work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule.” *Sec’y of Labor v. Gem Indus., Inc.*, O.S.H.R.B. Docket No. 93-122, 1996 WL 710982, *4 (O.S.H.R.C. Dec. 6, 1996) (in *Gem Industrial*, “none of the three employees . . . w[as] using the required fall protection.”).

In considering the totality of the evidence in light of this Board’s experience, technical competence, and specialized knowledge, the ALJ’s conclusion that Gateway did not establish the fourth element by a preponderance of the evidence was supported by substantial evidence in view of the entire record as submitted. Gateway has not established any of the bases set forth in Minn. R. 5215.5210, subpt. 1, for this Board to revise or reverse the findings or conclusions as to the fourth element of the affirmative defense of unpreventable employee misconduct. This Board hereby affirms the ALJ’s findings, conclusions, and order as to the fourth element of the affirmative defense of unpreventable employee misconduct.

The Board affirms the ALJ’s conclusion that Gateway did not establish the affirmative defense of unpreventable employee misconduct.

II. Amount of the Penalty.

Gateway contends that the amount of the \$2,800.00 penalty was calculated incorrectly, resulting in a penalty that was arbitrary and capricious and not supported by substantial evidence. The unadjusted penalty was \$7,000.00, reduced by 60 percent credit to \$2,800.00. Gateway does not dispute the calculation of the credits, but rather contends that the unadjusted penalty was too

large. One factor compares the “actual amount of time the employee[s] is or has been exposed to the hazardous condition during the normal (8-hour) work day.” Here, the employees were exposed to the hazard for 30-45 minutes before the accident and the work day ended after 4-5 hours; the work was not finished and the work day would have continued but for the accident. If the actual time of exposure is compared to 8 hours, it would be less than 10 percent of the day, and the unadjusted penalty would be \$5,500.00 (which, after 60 percent credit would result in a penalty to \$2,200.00). If the actual time of exposure is compared to the 5-hour length of the actual day worked, it would be greater than 10 percent of the day and the penalty would be accurate.

There is no dispute as to the underlying facts and thus there is no basis for the Board to conclude that the penalty amount is not supported by substantial evidence.

Gateway contends that the time of an employee’s exposure to hazard is always compared to an 8-hour work day, even when the actual day worked is less than 8 hours. Here, an accident stopped both the time that the employees were exposed to hazard and all work for the day. Such a day is not, as Complainant notes, a normal work day. On such facts, a conclusion that the actual time of exposure is compared to the actual length of the work day, rather than a normal 8-hour day, is not counter to the evidence and may explained as a difference in view and the result of the agency’s expertise. The ALJ’s conclusion on this point was not arbitrary and capricious. Gateway has not established any of the bases set forth in Minn. R. 5215.5210, subpt. 1, for this Board to revise or reverse the findings or conclusions as to the amount of the penalty. The Board affirms the ALJ’s conclusion that a penalty of \$2,800.00 is appropriate in this matter.



June 19, 2015

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RE: Commissioner, et al. v. Gateway Building Systems, Inc.
OAH Docket No. 65-1901-23109

Dear Parties:

Enclosed please find and served upon you by United State Mail, is a copy of the Occupational Health and Review Board's Decision in the above-referenced matter.

If you have any questions or concerns, please contact our office.

Sincerely,

A handwritten signature in blue ink that reads 'Debra K Jevne'. The signature is written in a cursive style.

Debra K. Jevne
Executive Secretary
Occupational Safety and Health Review Board

Enclosures

cc: Erik Johnson (by email)
Ev Kuehl (by email)
James Krueger (by email)