

STATE OF MINNESOTA
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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

Complainant,

DECISION

v.

OAH Docket No. 60-1901-31010

United Parcel Service, Inc.,

Respondent.

The above-entitled matter came before the Minnesota Occupational Safety and Health Review Board (“Board”) on February 4, 2015. Assistant Attorney General Eric J. Beecher, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127 appeared for and on behalf of the Commissioner of the Department of Labor and Industry (“Commissioner”). Attorney Carla J. Gunnin, Jackson Lewis, P.C., 1155 Peachtree Street, Suite 1000, Atlanta, Georgia 30333 appeared for and on behalf of Respondent United Parcel Service, Inc. (“UPS”). Assistant Attorney General Fiona B. Ruthven, Suite 1800, 445 Minnesota Street, St. Paul, Minnesota 55101-2127 was present as legal advisor to the Board.

PROCEDURAL HISTORY

On January 13, 2010, the Commissioner cited UPS for violating Minn. R. 5205.0110, subp. 3 (“Indoor Heating Standard”) at its distribution facility located at 3312 Broadway Avenue NE, Minneapolis, MN 55413 (“Facility”). On December 20, 2012, the Board issued a Decision (“Decision”) affirming the Commissioner’s January 13, 2010 citation against UPS. The Decision specifically held that the Indoor Heating Standard applied to the Facility. UPS failed to perfect its appeal of the Decision, and, thus the Decision became a final order of the

Commissioner. *See Peterson v. United Parcel Serv., Inc.*, Nos. A13-2378, A14-0467, 2014 WL 4672393 at *6 (Minn. Ct. App. Sept. 22, 2014).

After receiving complaints that UPS was failing to abide by the Decision, the Commissioner attempted to inspect UPS's compliance with the Indoor Heating Standard at the Facility. On January 28, 2013, UPS prevented the Commissioner's inspector from completing his inspection at the Facility. On March 7, 2013, the Commissioner's inspector, accompanied by Hennepin County Sheriff's deputies, was able to complete an inspection of the Facility. This March 7th inspection showed that temperatures in the Facility did not meet the Indoor Heating Standard. On June 12, 2013 the Commissioner issued (1) a failure-to-abate citation to UPS for violating the Indoor Heating Standard at the Facility ("FTA Citation") and (2) a failure-to-certify-abatement citation to UPS for violating Minn. R. 5210.0532, subp. 2 (2013) ("FTC Citation"). The Commissioner imposed a \$7,000.00 penalty against UPS in the FTA Citation and a \$1,000 penalty against UPS in the FTC Citation. UPS timely contested the FTA and FTC Citations.

The Commissioner filed a Notice and Order for Hearing and Prehearing Conference related to UPS's contest of the FTA and FTC Citations with the Office of Administrative Hearings on December 20, 2013. The Commissioner filed a Motion for Summary Disposition on December 31, 2013. UPS filed its opposition to the Commissioner's Motion on January 15, 2014. The Commissioner filed a reply in support of the Motion on January 15, 2014. Administrative Law Judge James E. LaFave ("ALJ") heard argument from the Commissioner and UPS on March 6, 2014. The record closed on that date. On May 7, 2014, the ALJ issued an Order Granting the Minnesota Department of Labor and Industry's Motion for Summary

Disposition (“ALJ Order”). The ALJ Order granted the Commissioner’s motion for summary disposition and affirmed the FTA and FTC Citations issued to UPS.

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

ISSUES BEFORE THE ALJ¹

1. Whether UPS failed to abate its violation of Minn. R. 5205.0110, subp. 3(A) at its Minneapolis distribution center?
2. Whether UPS failed to submit progress reports regarding the abatement of the violation of Minn. R. 5205.0110, subp. 3(A), at its Minneapolis distribution center?

ISSUES BEFORE THE BOARD²

1. Did the ALJ err in granting summary disposition to the Commissioner?
2. Did the ALJ err in finding that the Commissioner was only required to prove two elements to sustain the failure to abate (“FTA”) citation: 1) that the original citation issued to UPS had become a final order; and 2) that upon re-inspection the identical condition was found again?
3. Did the ALJ err by improperly placing the burden of proof on UPS to establish whether the previously cited condition had existed continuously from the time of the final order until re-inspection of the facility?

STANDARD OF REVIEW

Pursuant to Minn. Stat. § 182.664, subd. 5 (2014) the Board has the authority to “revise, confirm, or reverse the decision and order” of an administrative law judge. Under Minn. R. 5215.5210, subp. 1 (2013), “[t]he board is limited in its review of an administrative law judge’s decision and order to matters preserved in the record.” The Board

¹ See Statement of Issues, ALJ Order at 1.

² See Resp.’s Not. of Appeal at 2; Resp.’s Br. at 2.

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 submitted; or
- F. arbitrary or capricious.

Id., subp. 2 (2013).

Based on the files, records and proceedings herein, the Board hereby enters the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Commissioner's June 12, 2013 FTA Citation to UPS for failure to abate its violation of the Indoor Heating Standard is **AFFIRMED IN ALL RESPECTS**.
2. The Commissioner's June 12, 2013 FTC Citation to UPS for failure to certify its abatement of its violation of the Indoor Heating Standard is **RECLASSIFIED AS NONSERIOUS³ AND OTHERWISE AFFIRMED IN ALL RESPECTS**.

³ Both the Commissioner and UPS agree that the FTC Citation should be classified as Non-Serious.

3. Other than the re-classification of the Commissioner's June 12, 2013 FTC Citation as non-serious in accordance with Paragraph 2 of this Order, the ALJ Order is **CONFIRMED IN ALL RESPECTS.**

4. The attached Memorandum is incorporated as if fully set forth herein.

Dated this 4th day of March 2015



Leonard Price, Board Chair

MEMORANDUM

The sole issue for decision in this proceeding is whether the ALJ erred in granting summary disposition to the Commissioner.⁴ After review and consideration of all the files, records, and proceedings in this matter, the three members of the Board unanimously concluded that the ALJ did not err in granting summary disposition to the Commissioner. The ALJ correctly concluded that there were no material facts in dispute and that the Commissioner was entitled to relief as a matter of law.

A prima facie showing of a failure to abate is established upon a showing that (1) an original citation has become a final order and (2) the condition or hazard found upon reinspection is identical to one for which a respondent was originally cited. *See Secretary v. Braswell*, 5 BNA OSHC 1469, 1977 WL 7533, at *1 (O.S.H.R.C. May 19, 1977); *see also Secretary v. Schmitt Tree Experts*, 25 BNA OSHC 1019, 2014 WL 3360826 at *5 (O.S.H.R.C. May 27, 2014) (same). An employer can rebut this prima facie case by showing that the condition or hazard has been corrected. *Braswell*, 1977 WL at *1. Such a rebuttal showing by an employer is an affirmative defense that the employer bears the burden of establishing. *See* Minn. R. 1400.7300, subp. 5 (2013) (“A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence.”). The burden of producing evidence to establish an affirmative defense in order to defeat a motion for

⁴ The Board conclusively decided the applicability of the Indoor Heating Standard to the Facility in the Decision, which became a final order of the Commissioner after UPS failed to perfect its appeal. *Peterson*, 2014 WL 4672393 at *6. Principles of collateral estoppel bar UPS from challenging the Decision in the present administrative appeal. Accordingly, the Board concludes that the ALJ did not err in refusing to revisit and rule upon the applicability of the Indoor Heating Standard to the Facility in the present matter. The Board agrees with the ALJ’s conclusion that all six issues of material fact identified by UPS do not relate to the FTA or FTC Citations and, are instead, procedurally improper challenges to the Decision, which were “waived as a result of UPS’s failure to timely appeal the final decision of the Board.” ALJ Order at 8.

summary disposition rests upon the party asserting the defense. *See, e.g., MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008) (noting that on summary judgment “the party asserting [an affirmative defense] has the burden of establishing each of its elements”).

The ALJ did not err in determining that the Commissioner’s prima facie case was established upon a showing that the original January 2010 citation issued to UPS for violation of the Indoor Heating Standard had become a final order of the Commissioner and that upon re-inspection of the Facility the identical violating condition was found again. The ALJ did not err in concluding that the evidence before him established that the original January 2010 citation to UPS for violating the Indoor Heating Standard had become final and that upon re-inspection of the Facility the identical violating condition was found again. The ALJ did not err in determining that non-continuity of a violation of the Indoor Heating Standard was an affirmative defense to the FTA Citation for which UPS bore the burden of proof. The ALJ did not err in concluding that the record evidence before him did not establish UPS’s affirmative defense.⁵ The ALJ did not err in concluding that UPS had failed to make a showing that it had undertaken efforts to abate the violation for which it had originally been cited sufficient to defeat the Commissioner’s motion for summary disposition. The Board agrees with the ALJ’s

⁵ *See, e.g., Jackson Aff. Ex. T* at 4 (“Since at least December, 2012 (and, actually, as early as 2009), [UPS] has refused to set the temperatures at its facilities at the level required by [the Indoor Heating Standard].”); at 5 (noting that UPS admitted its failure to comply with the Decision).

determination that no genuine issues of material fact preclude a grant of summary disposition to the Commissioner.⁶

The Board concludes that the ALJ properly found that UPS failed to abate the original citation for violation of the Indoor Heating Standard and that UPS failed to certify to abatement as required by Minn. R. 5210.0532, subp. 2 (2013). Other than amending the FTC citation to non-serious, there is no basis for the Board to revise or reverse the ALJ Order under Minn. R. 5215.5210, subp. 2 (2013). All arguments raised by UPS, in its briefing to the Board and to the ALJ, not specifically addressed herein are hereby expressly rejected by the Board as providing no basis for the Board to revise or reverse the ALJ Order.⁷

⁶ The Board specifically agrees with the ALJ's determination that UPS's arguments and identification of what it claims to be disputed facts relating to the potential health effects of compliance, feasibility of compliance, existence of alternative means of compliance, claimed ambiguity of the Indoor Heating Standard, and whether process requirements prohibit compliance with the Indoor Heating Standard all go to the question of the applicability of the Indoor Heating Standard to the Facility, which was conclusively ruled upon by the Board in the Decision. UPS's challenges to the original citation and arguments regarding the applicability of the Indoor Heating Standard to the Facility do not create a genuine issue of material fact in the present proceeding. *See also Peterson*, 2014 WL 4672393 at *7 ("None of these facts are material to the summary judgment motion because none of them relate to whether UPS has complied with the final order. Instead they relate to whether UPS is required to comply. That ship has sailed. UPS waived the argument that compliance is not required when it failed to perfect its certiorari appeal.").

⁷ UPS also seeks to challenge Minn. R. 5205.0110 as invalidly promulgated in this proceeding. *See Resp.'s Br.* at 15 n. 12. As UPS notes, such a challenge does not lie within the Board's review authority. *Id.* Furthermore, the Board notes that the evidence submitted by UPS in its challenge to the promulgation of the Minnesota Indoor Heating Standard was not submitted to the ALJ before the evidentiary record closed on March 6, 2014. UPS's challenge the validity of the promulgation of the Indoor Heating Standard provides no basis for the Board to reverse the ALJ Order under review in this proceeding. *See Minn. R. 5215.5210, subp. 1 (2013)* (restricting Board's review to matters preserved in the record).

AFFIDAVIT OF SERVICE BY U.S. MAIL

Re: In the Matter of Ken Peterson, Commissioner, Department of Labor and Industry, State of Minnesota v. United Parcel Service, Inc.
OAH Docket No. 60-1901-31010

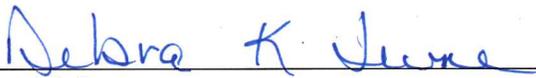
STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

DEBRA K. JEVNE, being first duly sworn upon oath, hereby deposes and says:

That at the City of St. Paul, County of Ramsey, and State of Minnesota on the 6th day of March, 2014, she served the attached DECISION by regular first class mail by depositing in the United States mail true and correct copies thereof, properly enveloped, with postage prepaid, and addressed to:

Carla J. Gunin
Jackson Lewis, P.C.
1155 Peachtree Street, Suite 1000
Atlanta, Georgia 30309-3600

Eric J. Beecher
Assistant Attorney General
Office of Attorney General
445 Minnesota Street, Suite 800
St. Paul, MN 55101

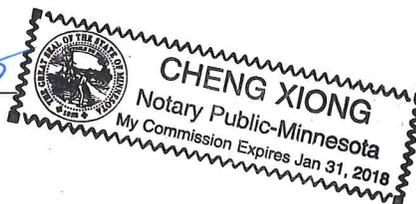


Debra K. Jevne

Subscribed and sworn to before me
this 6th day of March, 2015,



Notary Public



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St. Paul, Minnesota 55155
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MINNESOTA DEPARTMENT OF
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March 6, 2015

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RE: Ken Peterson, Commissioner, Department of Labor and Industry,
State of Minnesota v. United Parcel Service, Inc.
OAH Docket No. 60-1901-31010

Dear Ms. Gunin:

Enclosed herewith, and served upon you by United States Mail and Certified United States Mail, is a copy of the Decision concerning 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

Enclosure

cc: Eric Johnson, Asst. Attorney General