

STATE OF MICHIGAN
COURT OF APPEALS

ASPLUNDH CONSTRUCTION COMPANY,

Petitioner-Appellant,

v

MICHIGAN OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,

Respondent-Appellee.

UNPUBLISHED

April 25, 2024

No. 361211

Wayne Circuit Court

LC No. 21-005944-AA

Before: SWARTZLE, P.J., and SERVITTO and GARRETT, JJ.

PER CURIAM.

In this administrative law case, petitioner, Asplundh Construction Company (“Asplundh”), challenges citations issued by respondent, the Michigan Occupational Safety and Health Administration (MIOSHA), after a work-related death of one of Asplundh’s employees. Asplundh first challenged the citations before an administrative law judge (ALJ), who, after conducting extensive evidentiary hearings, vacated nine out of ten citations issued by MIOSHA. MIOSHA filed exceptions with the Board of Health and Safety Compliance and Appeals (“the Board”), which overturned most of the ALJ’s conclusions and reinstated eight citations. Asplundh appealed the Board’s decision to the Wayne Circuit Court, which reversed three of the Board’s determinations and affirmed the remaining five.

On appeal, Asplundh claims that the circuit court committed a legal error by affirming the five citations because the Board’s decision did not provide any factual, evidentiary, or legal basis for its determinations, contrary to the requirements of MCL 24.285. Asplundh also contends that the circuit court erred by affirming the citations because the Board’s conclusions were unsupported by competent, material, and substantial evidence. Because the Board’s determinations did not conform with the requirements of MCL 24.285, the circuit court necessarily erred by affirming the citations. Accordingly, we vacate in part the circuit court’s order and remand to the Board to make the necessary factual findings and legal conclusions required by the statute.

I. BACKGROUND

This case arises from the death of Asplundh employee, Samuel Lerch. Between July 18 and 19, 2017, a three-man Asplundh crew, including Lerch, was tasked with installing and framing a new electrical pole. Because the job had the potential to expose the crew members to live electrical lines, they had to wear personal protective equipment (PPE) when they were working within the minimum approach distance (MAD)¹ of the live electrical lines. Asplundh provided the crew with the required PPE. On July 19, Lerch ascended in a bucket truck,² past the live electrical wires, to pin a wire onto the new electrical pole. Despite having the required PPE with him in the bucket, Lerch did not put on his PPE before ascending with a conductive wire. While in the air, Lerch entered the MAD, contacted the live electrical wires, was electrocuted, and later died. As a result of an investigation into Lerch's death, MIOSHA issued ten citations to Asplundh for violating rules under the Michigan Administrative Code and the Code of Federal Regulations. The citations were labeled as Citation 1, Items 1, 2, 3, 4, 5, 6, 7a, 7b, 8, and 9, respectively.

Asplundh challenged MIOSHA's citations before the ALJ, who reviewed exhibits and heard testimony from several witnesses. In its closing arguments, MIOSHA contended that it proved, by a preponderance of the evidence, that Asplundh violated the safety standards in the citations. MIOSHA also claimed that the unpreventable employee misconduct defense failed to relieve Asplundh of liability. By contrast, Asplundh argued that the citations should be vacated because MIOSHA failed to meet its evidentiary burden and the unpreventable employee misconduct defense applied to bar enforcement of the violations.³ Based on the evidence offered by the parties, the ALJ issued an extensive decision detailing his factual findings, the evidence in support of his findings, and his legal conclusions. The ALJ affirmed Item 7a but vacated Items 1-6, 7b, 8, and 9 because MIOSHA either failed to establish the latter violations by a preponderance of the evidence or the unpreventable employee misconduct defense applied.

MIOSHA filed exceptions to the ALJ's proposed decision,⁴ claiming that Items 1-6, 7b, 8, and 9 should be affirmed because the ALJ "overlooked critical evidence and misapplied several of the cited MIOSHA construction safety standards," and because Asplundh failed to demonstrate

¹ The MAD is the calculated safe working distance designed to protect the worker when working on or in the vicinity of energized lines and equipment. Per MIOSHA rules, the MAD is established by the employer—in this case, Asplundh. See 29 CFR 1926.959(d)(1).

² A bucket truck is a utility truck fitted with a hydraulic pole, also known as a "boom," that has a man-carrying bucket at its end. The bucket is insulated to protect the worker from electrical exposure and allows a worker to bring up any necessary gear or tools needed to complete a job.

³ The unpreventable employee misconduct defense applies when an employer "has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered." *Secretary of Labor v Jenson Const Co*, 7 OSH Cas (BNA) 1477 (1979) (1979 WL 8461).

⁴ The ALJ's decision was not a final agency order. The Board had the authority to review the ALJ's decision and dismiss, modify, or sustain citations. See MCL 408.1044.

that the unpreventable employee misconduct defense applied to relieve it of liability. After the Board held a meeting to discuss MIOSHA's exceptions, it issued its ruling, upholding the ALJ's decision to vacate Item 1 and to affirm Item 7a, but overturning the ALJ's decision to vacate Items 2-6, 7b, 8, and 9. The Board stated in its decision that it reviewed the ALJ's decision and MIOSHA's exceptions when making its findings. The Board's decision also contained a heading titled "**FINDINGS OF FACT AND CONCLUSIONS OF LAW**," but nowhere in this section did the Board cite any evidence or make any findings of fact. Instead, for each citation, the Board recited the applicable rules, MIOSHA's allegations, and the ALJ's conclusions, and then made conclusory legal determinations unsupported by any rationale or analysis. For Items 1 and 7a, the Board simply stated: "The Board agrees with the ALJ's conclusion." For Items 2-6, 7b, 8, and 9, the Board concluded that the proposed penalties should be imposed because MIOSHA proved the violations by a preponderance of the evidence. The Board also stated, without explanation, that the unpreventable employee misconduct defense did not apply to Items 3, 4, 5, 6, 8, and 9.

Asplundh appealed the Board's decision to the circuit court, claiming that the Board should have given deference to the ALJ's decision but instead it "disregarded . . . extensive evidence provided during the hearing before the ALJ," and issued a decision that lacked "reasoning and analysis," and "was not supported by competent, material and substantial evidence on the whole record."⁵ During a hearing, the circuit court agreed with Asplundh that Items 3, 4, and 7b were unsupported by competent, material, and substantial evidence. The circuit court also conceded that the Board did not do "an exhaustive analysis" like the ALJ, but ultimately concluded that the Board "did enough to sustain [its decision]" on Items 2, 5, 6, 8, and 9. After the hearing, the circuit court entered an order reversing the Board's determination on Items 3, 4, and 7b, and affirming Items 2, 5, 6, 8, and 9. This appeal followed by leave granted.⁶

II. REQUIREMENTS OF MCL 24.285

Asplundh argues that the circuit court erred by affirming, in part, the decision of the Board because the Board failed to comport with the requirements of MCL 24.285 and its decision was unsupported by competent, material, and substantial evidence.

A. STANDARDS OF REVIEW

Our review of "a circuit court's ruling on an appeal from an administrative decision is limited." *Buckley v Prof Plaza Clinic Corp*, 281 Mich App 224, 231; 761 NW2d 284 (2008). First, the circuit court's review of the Board's decision is itself "limited to determining whether

⁵ Asplundh did not challenge the Board's decision on Item 7a, and MIOSHA did not challenge the Board's decision on Item 1.

⁶ This Court initially denied Asplundh's application for leave to appeal. *Asplundh Constr Co v MIOSHA*, unpublished order of the Court of Appeals, entered September 20, 2022 (Docket No. 361211). Asplundh then applied for leave to appeal with our Supreme Court, who, in lieu of granting leave, remanded the case to this Court "for consideration as on leave granted." *Asplundh Constr Co v MIOSHA*, 511 Mich 902 (2023). MIOSHA has not cross-appealed the circuit court's decision to reverse the citations for Items 3, 4, and 7b.

the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law.” *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). An administrative decision is not authorized by law if it is in violation of a statute. *Northwestern Nat’l Cas Co v Comm’r of Ins*, 231 Mich App 483, 488-489, 586 NW2d 563 (1998); see also MCL 24.306(1)(a). We then review the circuit court’s decision to determine whether it “applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency’s factual findings.” *Dignan*, 253 Mich App at 575 (cleaned up). “This standard is synonymous with the clear-error standard of review. Under this standard, this Court will only overturn the circuit court’s decision if, on review of the whole record, it is left with a definite and firm conviction that a mistake has been made.” *Buckley*, 281 Mich App at 231 (cleaned up).

B. ANALYSIS

Asplundh argues that because the Board’s decision does not adhere to the requirements of MCL 24.285, the circuit court necessarily erred by affirming, in part, the decision.

The Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq.*, “confers a right to appeal, after exhaustion of all administrative remedies, upon a person aggrieved by a final decision or order in a contested case.” *J & P Market, Inc v Liquor Control Comm*, 199 Mich App 646, 649; 502 NW2d 374 (1993) (cleaned up); see also MCL 24.301. A “contested case” is a proceeding “in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing.” MCL 24.203(3). There is no dispute that this appeal arises from a contested case.

Section 85 of the APA states:

A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and *shall include findings of fact and conclusions of law* separated into sections captioned or entitled “findings of fact” and “conclusions of law”, respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. *Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them.* If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding. *Each conclusion of law shall be supported by authority or reasoned opinion.* A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and *as supported by and in accordance with the competent, material, and substantial evidence.* [MCL 24.285 (emphasis added).]

Any decision must set forth the support for its conclusions in a manner sufficient to facilitate appellate review. See *Great Lakes Div of Nat’l Steel Corp v City of Ecorse*, 227 Mich App 379,

402; 576 NW2d 667 (1998); *First City Corp v Lansing*, 153 Mich App 106, 113; 395 NW2d 26 (1986).⁷

In *First City Corp*, 153 Mich App at 108-109, the petitioner challenged the Michigan Tax Tribunal's (MTT) determination of the true cash value of an apartment building that it owned. After discussing the requirements of MCL 24.285, this Court held that the MTT's opinion was inadequate because "the tribunal did not even go so far as to state what evidence it had reviewed," and therefore "fail[ed] to set forth the basis for its conclusions of law" *Id.* at 113-114. Because the opinion was deficient, this Court was "unable to determine under the substantial evidence standard whether the tribunal adopted wrong principles in affirming" the tax assessor's valuation conclusion. *Id.* at 114.

In this case, in accordance with MCL 24.285, the Board's decision contains a section titled "**FINDINGS OF FACT AND CONCLUSIONS OF LAW.**" Although the statute provides that findings of fact and conclusions of law should be separated into two distinct sections, this error alone is not a sufficient basis to grant Asplundh relief. See *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 337 n 3; 802 NW2d 328 (2010); *President Inn Props LLC v Grand Rapids*, 291 Mich App 625, 642-643; 806 NW2d 342 (2011). A closer reading of the Board's decision, however, shows that the Board failed to include *any* factual findings or explain what evidence it relied on in support of its determinations. Put differently, the Board failed to provide a "concise and explicit statement of the underlying facts supporting" its decision. MCL 24.285. The Board simply concluded that it either: (1) agreed with the ALJ's conclusion; (2) found that MIOSHA established the violation by a preponderance of the evidence; or (3) held that the unpreventable employee misconduct defense did not apply. These conclusions were unsupported by any "authority or reasoned opinion." MCL 24.285. This failure is not inconsequential. The Board's departure from the ALJ's conclusions as to Items 2, 5, 6, 8, and 9 reveals that it did not agree with the ALJ's decision, but this Court is left to speculate as to *why*. Because the Board did not provide any explanation or support for its departure, its decision prevented the circuit court from determining whether the Board's conclusions were supported by competent, material, and substantial evidence. See *First City Corp*, 152 Mich App at 114; *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 402. Violating MCL 24.285 in this manner rendered the Board's decision contrary to law. See *Dignan*, 253 Mich App at 576; MCL 24.306(1)(a). Accordingly, the circuit court erred in its application of legal principles by concluding that the Board "did enough to sustain [its decision]."

MIOSHA, relying on *Hanlon v Civil Serv Comm*, 253 Mich App 710, 726-727; 660 NW2d 74 (2002), and *Viculin v Dep't of Civil Serv*, 386 Mich 375, 404-406; 192 NW2d 449 (1971), contends that the Board's decision did not require additional analysis because the administrative record contains sufficient facts for this Court to discern the Board's reasoning. *Hanlon* and *Viculin*

⁷ We recognize that "under MCR 7.215(J)(1), this Court is not required to follow as precedential opinions from this Court issued before November 1, 1990. Nonetheless, under traditional principles of stare decisis, published opinions of this Court issued before that date have precedential effect, and therefore are entitled to deference." *Schaumann-Beltran v Gemmete*, 335 Mich App 41, 50; 966 NW2d 172 (2020) (cleaned up).

are inapplicable, however, because those cases involved the Civil Service Commission, which is expressly not governed by the APA. See *Hanlon*, 253 Mich App at 725; MCL 24.203(2). Because the Board's decision came in a contested case governed by the APA, the Board was required to adhere to the requirements of MCL 24.285. Without a sufficient explanation of the facts, evidence, and legal analysis supporting its decision, the Board improperly placed the reviewing courts in the position of having to speculate on its reasoning, contrary to the statute.

Because the Board's opinion cites no evidence and provides no analysis in support of its legal conclusions, we cannot properly address the merits of Asplundh's additional contention that the Board's decision was unsupported by competent, material, and substantial evidence. As such, we decline to address this argument. Instead, we vacate the portion of the circuit court's order affirming the citations and remand to the Board to make sufficient findings and conclusions of law, in accordance with MCL 24.285, to facilitate appellate review. Because Asplundh's appeal is limited to the citations for Items 2, 5, 6, 8, and 9, the Board need only make factual findings and legal conclusions to support its decision on those citations.

Vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Deborah A. Servitto
/s/ Kristina Robinson Garrett