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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A16-1919**

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

vs.

Building Restoration Corporation,  
Relator,

Minnesota Occupational Safety and  
Health Review Board,  
Respondent.

**Filed May 30, 2017  
Affirmed  
Johnson, Judge**

Minnesota Occupational Safety and  
Health Review Board  
OAH Docket No. 82-1901-31044

Lori Swanson, Attorney General, Jonathan D. Moler, Assistant Attorney General, St. Paul,  
Minnesota (for Department of Labor and Industry)

Brian T. Benkstein, Jackson Lewis P.C., Minneapolis, Minnesota (for relator)

Erik M. Johnson, Assistant Attorney General, St. Paul, Minnesota (for Occupational Safety  
and Health Review Board)

Considered and decided by Johnson, Presiding Judge; Stauber, Judge; and Toussaint, Judge.\*

## **UNPUBLISHED OPINION**

**JOHNSON**, Judge

Building Restoration Corporation (BRC) was cited for two violations of occupational safety and health rules. After a contested-case hearing before an administrative-law judge (ALJ), the citations were affirmed by the Minnesota Occupational Safety and Health Administration (MOSHA) and, in additional agency proceedings, by the Minnesota Occupational Safety and Health Review Board (the board). We conclude that the board did not err and, therefore, affirm.

### **FACTS**

BRC repairs and restores the exteriors of buildings. In September 2012, an investigator for MOSHA recommended an inspection of a BRC worksite because she determined that exposure to silica, a suspected carcinogen, was likely. On September 25, Kelly Smeltzer, an industrial hygienist for MOSHA, arrived at the worksite to begin the inspection. But BRC employees were finishing their work for the day, so Smeltzer made arrangements to return to the worksite on another date to conduct silica testing.

On October 2, 2012, Smeltzer returned to the worksite to take silica samples and to continue the inspection. The silica testing revealed that exposure levels exceeded MOSHA's permissible limits. Smeltzer asked BRC to provide her with its written program

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\*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

on respiratory protection and its written Employee Right-to-Know (ERTK) program as well as its training records concerning ERTK training. BRC promptly provided Smeltzer with its written program on respiratory protection. BRC provided Smeltzer with its ERTK training records on October 31, 2012. The training records showed that BRC provided ERTK training on October 29, 2012. Smeltzer interviewed BRC employees but believed that they were not forthcoming with respect to the training they had received.

On November 13, 2012, MOSHA issued BRC four citations, two of which are at issue on appeal. One citation states, “The employer’s written respiratory protection program did not contain adequate procedures for selecting respiratory protection in the workplace,” in violation of 29 C.F.R. § 1910.134(c)(1)(i) (2011). Another citation states that BRC’s “Right-to-Know training was not conducted at the required frequency,” in violation of Minn. R. 5206.0700, subp. 1(G) (2011). Smeltzer reduced the severity level of the second citation from level F to level E based on an indication that BRC had conducted some ERTK training in the past.

BRC requested a contested-case hearing, which was conducted by an ALJ on November 22, 2015. Smeltzer and her supervisor, Clayton Handt, testified. BRC’s president, Dale Zoerb, and two other BRC employees also testified. The ALJ issued an order upholding the citations on January 4, 2016, and issued an amended order with substantially the same result later in the same month.

BRC pursued an administrative appeal. On November 10, 2016, the board issued an order in which it concluded that the ALJ’s decision was supported by substantial

evidence. BRC appeals the board's order by way of a petition for writ of certiorari. *See* Minn. Stat. §§ 14.63, 182.665 (2016).

## D E C I S I O N

BRC argues that the board erred by affirming MOSHA's decision, which is reflected in the ALJ's decision. In reviewing the board's decision, this court may reverse or modify if

substantial rights of the petitioners have been prejudiced by administrative findings, inferences, conclusions or decisions that are unsupported by substantial evidence in view of the entire record, or arbitrary and capricious, but the court must also recognize the need for exercising judicial restraint and for restricting judicial functions to a narrow area of responsibility lest [the court] substitute its judgment for that of the agency.

*In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (alteration in original) (quotation and citation omitted). An administrative agency's decision enjoys a presumption of correctness; an appellate court defers to the agency's expertise and special knowledge in its field. *In re Cities of Annandale & Maple Lake*, 731 N.W.2d 502, 513-14 (Minn. 2007). "If an administrative agency engages in reasoned decisionmaking, the court will affirm, even though it may have reached a different conclusion had it been the factfinder." *Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 669 (Minn. 1984). Reversal or modification is warranted only if there is a "combination of danger signals which suggest the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings." *Id.* (quotation omitted).

## I. Written Respiratory Program

BRC argues that the board erred by affirming MOSHA's decision concerning its written respiratory program.

“In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures.” 29 C.F.R. § 1910.134(c)(1). In the written program, the employer must include certain provisions that are set forth in the code, including “[p]rocedures for selecting respirators for use in the workplace.” 29 C.F.R. § 1910.134(c)(1)(i). The ALJ concluded that BRC did not comply with section 1910.134(c)(1) because BRC did not provide MOSHA with documentation concerning its estimation of worksite-specific hazards. The ALJ also concluded that BRC did not implement its written respiratory-protection standards. The board determined that the ALJ's conclusion was supported by substantial evidence in the agency record.

BRC argues that the board erred for four reasons. First, BRC contends that MOSHA failed to satisfy its burden of proof. At the hearing, MOSHA introduced BRC's written respiratory program as an exhibit. The written program differentiates between respirators for gases and vapors and respirators for particulates. But the written program contains no references to jobsite-specific guidelines for selecting a respirator, such as a statement about the types of hazards that are likely to be encountered at the particular jobsite at issue, an estimate of the level of employee exposure at that jobsite, or guidance as to how jobsite-specific factors should affect the selection of a respirator. In addition, BRC's president

conceded in his testimony that BRC did not follow certain aspects of its written program. This evidence satisfies MOSHA's burden of proof.

Second, BRC contends that the board erred by striking a paragraph of the ALJ's memorandum, thereby removing it from consideration. In the memorandum that was attached to her order, the ALJ noted that another provision in the federal regulations, 29 C.F.R. § 1910.134(d), also may be relevant to the issues raised by the parties. After BRC challenged that part of the ALJ's memorandum, the board revised the ALJ's memorandum by deleting the paragraph. That statement indicates that the board either agreed with BRC's argument or decided that the discussion of section 1910.134(d) was extraneous to the question whether BRC violated section 1910.134(c). BRC has not demonstrated that it was prejudiced in any way by the board's decision to not rely on the ALJ's consideration of an extraneous issue.

Third, BRC contends that the board erred by not concluding that BRC had established the affirmative defense of infeasibility. Under federal regulations, "an employer who raises the affirmative defense of infeasibility must prove that (1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) *either* an alternative method of protection was used or no alternative means of protection was feasible." *State Sheet Metal Co.*, 16 BNA OSHC 1155 (Nos. 90-1620, 90-2894, 1993), 1993 WL 132972, at \*7. It appears that BRC did not introduce evidence capable of proving either the first or second requirement of this test. BRC did not introduce any evidence that compliance was infeasible or any evidence that it used an alternative method of protection.

Fourth, BRC contends that the board's decision violates its constitutional right to due process. BRC asserts that the ALJ expanded the scope of the citation in its order, thereby denying BRC notice of the alleged violation. "[Q]uasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings. The due-process rights required are simply reasonable notice of a hearing and a reasonable opportunity to be heard." *In re North Metro Harness, Inc.*, 711 N.W.2d 129, 136 (Minn. App. 2006) (quotation omitted). The record shows that BRC received notice of the alleged violation when it received the citation. The violations ultimately found by the board are within the scope of the original citation. BRC's due process rights were not violated.

Thus, the board did not err by affirming the ALJ's recommendation with respect to BRC's written respiratory program.

## **II. Employee Right-to-Know Training**

BRC argues that the board erred by affirming MOSHA's decision concerning the ERTK citation. Specifically, BRC argues that it provided ERTK training and, in the alternative, that the citation should be downgraded from a serious violation to a non-serious violation.

BRC is required to provide ERTK training programs to employees concerning "hazardous substances, harmful physical agents, and infectious agents." Minn. R. 5206.0700, subp. 1 (2013). BRC also is required to "develop and implement a written Employee Right-to-Know program which, at a minimum, describes how the training, availability of information, and labeling provisions of this chapter will be met for hazardous substances, harmful physical agents, and infectious agents." *Id.*, subp. 1(b). The

ALJ concluded that BRC violated rule 5206.0700. The ALJ reached this conclusion in substantial part because BRC did not produce any documentation indicating that it had conducted ERTK training before beginning work at the jobsite or within the prior three years. BRC employees testified that they had received safety training, but the ALJ found their testimony to be not credible, based in part on Smeltzer's testimony that they were not forthcoming when she interviewed them. We perceive no error in this part of the board's decision. Witness credibility is a question of fact, and "[w]e defer to an agency's conclusions regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony." *Blue Cross & Blue Shield*, 624 N.W.2d at 278; *see also First Trust Co. of St. Paul v. McLean*, 254 Minn. 75, 78, 93 N.W.2d 517, 519-20 (1958).

We also perceive no error in the board's decision to not reduce the violation from a serious violation to a non-serious violation. Smeltzer actually reduced the severity of the violation on the ground that BRC likely had conducted some ERTK training in the past. The ALJ considered BRC's argument that the violation should be further reduced on the ground that it was merely a recordkeeping error. But the ALJ found, based on inference, that the required training had not been provided, which is a serious violation. *See Complete Gen. Constr. Co.*, 19 BNA OSHC 1622 (Nos. 00-1902, 00-1903, 2001) (ALJ), 2001 WL 856242, at \*5-6. The board upheld the ALJ's decision with respect to that issue. Both the ALJ's decision and the board's decision are consistent with the law. *See id.*



Thus, the board did not err by affirming the ALJ's recommendation with respect to ERTK training.

**Affirmed.**