

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1272**

Nicole Blissenbach, Commissioner, Department of Labor
and Industry, State of Minnesota,
Respondent,

vs.

Mindak Commercial Construction, LLC,
Relator.

**Filed July 7, 2025
Affirmed
Bentley, Judge**

Occupational Safety and Health Review Board
File No. 82-1901-37716

Keith Ellison, Attorney General, Bradley D. Simon, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Aaron A. Dean, Madeline E. Davis, Spencer Fane LLP, Minneapolis, Minnesota (for
relator)

Considered and decided by Larson, Presiding Judge; Bentley, Judge; and Kirk,
Judge.*

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

NONPRECEDENTIAL OPINION

BENTLEY, Judge

Relator Mindak Commercial Construction LLC challenges a citation it received for violating regulations requiring employees to use fall protection at a construction site. An administrative-law judge (ALJ) upheld the citation, and the Minnesota Occupational Safety and Health Review Board (the board) affirmed the ALJ's decision. On a petition for a writ of certiorari to this court, Mindak maintains that (1) substantial evidence does not support the board's determination that Mindak had constructive knowledge of the violation; (2) substantial evidence does not support the board's determination that Mindak did not establish an employee misconduct defense; and (3) the board erred in concluding that the two "citation items" included in the citation are not duplicative citations. We affirm.

FACTS

Mindak is a framing contractor that manufactures and installs panels for multi-family residential construction projects. In January 2021, Mindak was working as a subcontractor on a project in Woodbury (the Woodbury Project), which involved the construction of two new apartment buildings on a 40-acre site. Mindak had about 25 employees working at the site.

The Minnesota Department of Labor and Industry (MnOSHA)¹ received an anonymous complaint regarding fall protection concerns at the Woodbury Project site. In response to the complaint, MnOSHA assigned a safety investigator to initiate an inspection.

¹ The respondent on appeal is the commissioner of labor and industry. We refer to the respondent as MnOSHA throughout the opinion for the sake of clarity.

At the inspection on January 8, 2021, the investigator photographed Mindak employees working on the roof of a five-story building. The roof had a partial guardrail that did not surround the entire working area. One photograph showed that a Mindak employee, identified as Contact 3 in the inspection report, was not using a personal fall arrest system (i.e., a harness), nor any other fall protection, near an unprotected edge of the roof.

During the inspection, the investigator spoke with Contact 3 and two Mindak supervisors, identified as Contact 2 and Contact 6. Contact 3 spoke only Spanish, so Contact 2, who spoke both Spanish and English, translated between Contact 3 and the investigator. According to the inspection report, Contact 3 stated that he had been on the roof for seven hours that day and he “did not wear fall protection due to the railings being up.” Contact 2 and Contact 6 told the investigator that they believed that Contact 3 was not required to wear fall protection because the railings sufficed. Contact 6 also stated that he was on the roof an hour prior to the investigator’s arrival and that the railing system had not changed in that time.

MnOSHA issued a citation to Mindak on February 5, 2021. The citation contained two items—items 001a and 001b—both of which were classified as a “serious” violation. Item 001a was issued for a violation of a regulation which provides that “[e]ach employee on a walking/working surface . . . with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.” 29 C.F.R. § 1926.501(b)(1) (2024). Item 001b was issued for a violation of a regulation which provides that “[e]ach employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels

shall be protected by guardrail systems, safety net system, or personal fall arrest system[.]” 29 C.F.R. § 1926.501(b)(13) (2024). The citation calculated a \$1,400 penalty for item 001a, which was later corrected to \$700.² There was no penalty for item 001b. Neither citation item required abatement.

The parties appeared for a hearing on the citation before an ALJ. MnOSHA’s exhibits included the inspection report and the investigator’s handwritten notes from the inspection. MnOSHA also called its compliance supervisor to testify to the investigator’s inspection and the bases for the citation issued to Mindak. Neither the safety investigator who performed the inspection nor the employees he interviewed testified at the hearing.

Mindak presented evidence on its training and safety initiatives. Mindak called its head of human resources, who is also tasked with overseeing safety at Mindak. She testified to Mindak’s extensive safety training, including new-hire training, site-specific training at the Woodbury Project, a weeklong campaign focused on fall protection, weekly “toolbox talks,” annual safety meetings, surprise audits of job sites, and a Workplace Accident and Injury Reduction Program. She also testified that Mindak achieved Level 2 status in the ABC/MnOSHA Partnership Program.

² The ALJ determined that Mindak should have received good-faith credit because of its status as a Level 2 ABC/MnOSHA partner, and both parties agreed the penalty should be corrected to \$700. Through the ABC/MnOSHA Partnership, businesses can earn incentives if they demonstrate “implementation of effective safety and health programs.” To become a member, a business must first be reviewed by MnOSHA to ensure that they meet certain safety requirements. A Level 2 partner has good-faith credits that may be applied to reduce any penalties it receives from MnOSHA.

Following the hearing, the ALJ issued its findings of fact, conclusions of law, and order. The ALJ concluded that MnOSHA proved, by a preponderance of the evidence, all the elements to establish that Mindak violated an OSHA standard.³ The ALJ also concluded that Mindak had not proven its affirmative defense that the violation was the result of unpreventable employee misconduct. The ALJ affirmed the citation.

Mindak appealed the ALJ's decision to the board. In its appeal, Mindak challenged the ALJ's findings and conclusions that Mindak had constructive knowledge of the violative condition, that Mindak failed to prove an employee-misconduct defense, and that the citation items were not duplicative. The board, in a 14-page decision containing its own findings of fact and conclusions of law, affirmed the decision of the ALJ.

This certiorari appeal follows.

DECISION

When reviewing agency decisions before this court on a writ of certiorari, we will reverse “only when they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence.” *Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 668 (Minn. 1984); *see also* Minn. Stat. §§ 14.63, .69 (2024) (describing our review on certiorari appeal from a decision in a contested case). “[T]he party challenging the agency’s decision has the burden of proof on appeal.” *West McDonald Lake Ass’n v. Minn. Dep’t of Nat. Res.*, 899 N.W.2d 832, 837 (Minn. App. 2017) (quotation omitted), *rev. denied* (Minn. Sep. 19, 2017).

³ MnOSHA has incorporated and adopted by reference the federal OSHA standards. *See* Minn. R. 5205.0010, subp. 1 (2023).

Minnesota caselaw has defined substantial evidence as: “(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; or (5) the evidence considered in its entirety.” *Cannon v. Minneapolis Police Dep’t*, 783 N.W.2d 182, 189 (Minn. App. 2010) (quotation omitted). We examine the entire record when reviewing whether an agency decision is supported by substantial evidence. *Nor-West Cable*, 365 N.W.2d at 668-69. “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.” *Id.* at 669.

The Minnesota Occupational Safety and Health Act of 1973 (the Act) is contained in Minnesota Statutes section 182.65 to 182.678 (2024). The purpose of the Act is “to assure so far as possible every worker in the state of Minnesota safe and healthful working conditions and to preserve our human resources.” Minn. Stat. § 182.65, subd. 2(b). Under the Act, the commissioner of labor and industry is authorized to “promulgate and enforce mandatory occupational safety and health standards applicable to employers and employees in the state of Minnesota.” *Id.*, subd. 2(b)(1). Minnesota’s rules are “amended by incorporating and adopting by reference, and thereby making a part thereof, Title 29 of the Code of Federal Regulations as listed in subparts 1a to 7.” Minn. R. 5205.0010, subp. 1 (2023).

Both the board and the parties rely on nonprecedential administrative decisions that are not binding on this court to establish the legal standards applicable to this case. Because

neither party challenges the legal standards set forth by the board, we apply those standards on appeal.

I

Mindak first argues that the board's decision that Mindak had constructive knowledge of the violative condition is unsupported by substantial evidence.

The board explained in its order that,

“[t]o establish that an employer has violated an OSHA standard, the Department must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the requirements of the cited standard were not met; (3) an employee had access to or was exposed to the violative condition; and (4) the employer [a] knew, or [b] with the exercise of reasonable diligence, could have known of the violative condition.”

(Quoting *Dirt Merch., Inc.*, OAH Docket No. 68-1901-32482, 2016 WL 1399599, at *10 (Mar. 3, 2016)). The parties do not dispute that the first three elements are supported by substantial evidence. On appeal, Mindak challenges only the fourth element—Mindak's knowledge of the violative condition.

The board further explained that “whether an employer with the exercise of reasonable diligence could have known of the violative condition, is known as ‘constructive knowledge.’” And one way that “constructive knowledge can be established” is by showing that the violative condition was “readily apparent to anyone who looked.”

The board determined that Mindak had constructive knowledge of the violative condition because the failure to use appropriate fall protection was “readily apparent.” This determination is supported by the record. The inspection report noted that Contact 3 stated

he was on the roof for seven hours by the time the investigator arrived at the Woodbury Project site and that he did not wear fall protection. Contact 3's supervisor, Contact 6, stated that he had also been on the roof an hour prior to the investigator's arrival. The board reasoned that this meant the supervisor was on the roof with Contact 3 while he was not wearing fall protection and could have noticed. Additionally, the inspector took several photos of Contact 3 on the roof without adequate fall protection, showing that the violation could be seen by anyone looking up on the roof. A Mindak witness testified that she could see by viewing the photos that Contact 3 was not wearing adequate fall protection while on the roof. MnOSHA's compliance supervisor also testified that the inspection was prompted by an anonymous complaint about fall protection concerns at the Woodbury Project site.

Mindak argues that the board should not have relied on the statements contained in the MnOSHA inspection report in making its decision because they are hearsay. We note that Mindak did not object to the admissibility of hearsay evidence at the hearing before the ALJ. But in any event, hearsay is not per se inadmissible in a hearing before an ALJ. "The [ALJ] 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." Minn. R. 1400.7300, subp. 1 (2023) (emphasis added).

Mindak argues that, even if they are admissible, the employee statements are unreliable because they constitute two levels of hearsay, and the board should not have based its decision solely on hearsay. "The general rule is that in the absence of a special statute, an administrative agency cannot, at least over objection, rest its findings of fact

solely upon hearsay evidence which is inadmissible in a judicial proceeding.” *See State ex rel. Indep. Sch. Dist. No. 276 v. Dep’t of Ed.*, 256 N.W.2d 619, 627 (Minn. 1977) (emphasis added) (quotation omitted). With respect to the readily apparent inquiry, however, the board did not solely rely on the challenged hearsay statements in the inspection report. It also relied on the photographs taken during the inspection and the anonymous complaint. These pieces of evidence corroborate the employees’ statements. Together, they are sufficient to satisfy us that substantial evidence supports the board’s decision that the violation was readily apparent. We discern no basis to disturb the board’s decision that Mindak had constructive knowledge of the violative condition.⁴

II

Mindak next argues that the board’s decision on the employee-misconduct defense is unsupported by substantial evidence. We disagree.

The board explained that the “unpreventable employee misconduct defense” shields an employer from liability for workplace safety violations “if the employer: (a) established a work rule to prevent the reckless behavior or unsafe condition from occurring; (b) adequately communicated the rule to its employees; (c) took steps to discover incidents

⁴ The board also explained in its order that constructive knowledge can be established by showing that an employer did not “implement an adequate safety program.” The board found that Mindak’s safety program was inadequate as it relates to the fall protection rules violated in this case and thus identified a second ground for constructive knowledge here. Because we conclude that Mindak had constructive knowledge on the basis that the violative condition was readily apparent, we do not consider whether the board’s safety-program conclusion is supported by substantial evidence.

of noncompliance; and (d) effectively enforced the rules whenever employees transgressed them.”

The board determined that Mindak failed to establish its employee-misconduct defense because the record did not show Mindak satisfied the second element—that it adequately communicated the violated rule to its employees. The violated rules in this case require each employee working on “an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level” to be “protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.” 29 C.F.R. § 1926.501(b)(1); *see also* 29 C.F.R. § 1926.501(b)(13). Contact 3 was more than six feet above the ground without a harness or other personal arrest system and, although the roof had a partial guardrail, Contact 3 was in an area without a guardrail covering the edge.

Mindak points to the extensive record evidence of training materials on these rules to support its argument that it adequately communicated the rules to its employees. But Mindak does not point us to any evidence of training materials that addressed situations, like this one, where guardrails only partially protect employees from falls, such that the employees must also wear a harness. Our search of the record revealed none. Instead, Mindak’s training materials largely describe fall protection as guardrails *or* harnesses. We therefore conclude that Mindak’s argument is not supported by the record.

Additionally, the record supports the ALJ’s finding, as adopted by the board, that the high volume of training materials supports the conclusion that Mindak did not adequately communicate the violated rules to its employees. The Mindak employee handbook requires employees to report any violations they see and provides that employees

will be disciplined if they fail to do so. The record does not contain evidence that any employee reported Contact 3's violation. The board found that the trainings on the reporting requirement support the conclusion that the employees were not adequately trained on the violated rule because, if they were, they likely would have reported Contact 3 for not wearing adequate fall protection. Moreover, two Mindak supervisors told the investigator that Contact 3 was not required to wear fall protection because they thought the guardrails were sufficient. That further supports the board's conclusion that the training materials did not adequately communicate the violated rules to Mindak employees, including supervisors.

Because substantial evidence in the record supports the board's determination that Mindak did not establish that it adequately communicated the violated rule to its employees, Mindak's challenge to the board's determination on this issue fails.

III

Finally, Mindak challenges the board's determination that citation items 001a and 001b are not duplicative.

The parties agree that MnOSHA violations may be found to be duplicative where they "require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well," and that this may result in a vacation of the duplicative citation in some cases. Mindak cites no legal authority for the position that vacation of a second citation item is required where there is no abatement ordered on either citation item and where no penalty was imposed on the second citation item. We therefore construe Mindak's argument as a substantial-evidence challenge. "[A]

substantial-evidence analysis requires us to determine whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record.” *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 749 (Minn. 2021).

Here, MnOSHA issued one citation to Mindak, which was made up of two citation items grouped together. The first item, 001a, cited Mindak for an employee working on a surface with an unprotected edge six or more feet above the ground without fall protection. *See* 29 C.F.R. § 1926.501(b)(1). The second item, 001b, related to a similar requirement that is specific to residential construction. *See id.* (b)(13). The board explained that “[i]tem 001b is not itself a citation, but rather merely identifies that the violation for item 001a occurred on residential construction.” The record supports the board’s explanation. Although it may logically follow that abatement of item 001a would necessarily result in abatement of item 001b, neither of the grouped citation items issued to Mindak in this case required abatement, and MnOSHA did not impose a separate penalty for citation item 001b.

Because the board explained its reasons for determining that the citations were not duplicative, and that explanation is “reasonable on the basis of the record,” *see In re NorthMet*, 959 N.W.2d at 749, we see no grounds for reversal.

Affirmed.