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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project, St. Louis County, Hoyt Lakes and Babbitt, Minnesota

Court File No. 62-CV-19-4626
Judge John H. Guthmann

DECLARATION OF EVAN A. NELSON IN SUPPORT OF RELATORS' RESPONSES TO RESPONDENTS' MOTIONS *IN LIMINE*, RESPONSE TO MINNESOTA POLLUTION CONTROL AGENCY'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND PRE-TRIAL BRIEF

I, Evan A. Nelson, hereby declare under penalty of perjury as follows:

1. I am an attorney licensed in Minnesota and am employed by Maslon LLP as an attorney. I make this declaration in support of Relators' Response to Minnesota Pollution Control Agency and PolyMet Mining Inc's Motions *in Limine* to Exclude Certain Witnesses and Evidence Based on Relevance and Foundation ("Relators' Response to Motions to Exclude Witnesses and Evidence"), Response To Respondent Poly Met Mining Inc.' Motion *in Limine* to Exclude Evidence of Alleged Irregularities that Exceed the Scope of the Matter ("Relators' Response to PolyMet's Motion to Exclude Evidence"), Response to Respondent Minnesota Pollution Control Agency's Motion For Partial Summary Judgment ("Relators' Opposition to Summary Judgment"), and Relators' Pre-trial Brief. I have personal knowledge of the matters asserted herein. If called as a witness I could and would testify competently testify to the matters stated herein.

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2. Attached as Exhibit A is a true and correct copy of *Roa, Inc. v. Nicholson*, No. 62-CV-10-1734, 2012 WL 7659116 (Minn. Dist. Ct. Feb. 13, 2012), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

3. Attached as Exhibit B is a true and correct copy of *Sinner v. E. Cent. Sch. Dist. #2580*, No. 4-3100-17253-2, 2006 WL 3488835 (OAH Sept. 21, 2006), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence, Relators' Response to PolyMet's Motion to Exclude Evidence, and Relators' Opposition to Summary Judgment.

4. Attached as Exhibit C is a true and correct copy of *Legacy Rests., Inc. v. Minn. Nights, Inc.*, No. A11-1730, 2012 WL 3023397 (Minn. App. July 23, 2012), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence and Relators' Response to PolyMet's Motion to Exclude Evidence.

5. Attached as Exhibit D is a true and correct copy of *In re Denial of the Foster Care License of Downwind*, No. 8-1800-9466-2, 1995 WL 937546 (OAH Apr. 25, 1995), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

6. Attached as Exhibit E is a true and correct copy of *In re Matter of Hibbing Taconite Mine*, No. 11-2004-31655, 2015 WL 3922873 (OAH June 19, 2015), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

7. Attached as Exhibit F is a true and correct copy of *In re Further Investigation of Envtl. & Socioeconomic Costs Under Minn. Stat. 216B.2422, Subdiv. 3*, No. 80-2500-31888, 2015 WL 6456257 (OAH Sept. 15, 2015), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

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8. Attached as Exhibit G is a true and correct copy of *In re Ball*, No. A10-359, 2011 WL 977606 (Minn. App. Mar. 22, 2011), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

9. Attached as Exhibit H is a true and correct copy of *In re Grain Buyer's Bond No. MTC 182*, No. CX-95-298, 1995 WL 365400 (Minn. App. June 20, 1995), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

10. Attached as Exhibit I is a true and correct copy of *In re Resident Agency License of Nw. Title Agency, Inc.*, No. A13-1643, 2014 WL 2013436 (Minn. App. May 19, 2014), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

11. Attached as Exhibit J is a true and correct copy of *Matter of Abu-Gyamfi*, No. A17–1425, 2018 WL 2470353 (Minn. App. June 4, 2018), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

12. Attached as Exhibit K is a true and correct copy of *Schmutte v. Resort Condominiums Intern., LLC*, No. 1:05-cv-0311-LJM-WTL, 2006 WL 3462656 (S.D. Ind. Nov. 29, 2006), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

13. Attached as Exhibit L is a true and correct copy of *Portfolio Recovery Assocs., LLC v. Staeheli*, Nos. A13-1793, A13-1795, 2014 WL 1408082 (Minn. App. 2014), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

14. Attached as Exhibit M is a true and correct copy of *Janice Kaunas Samsing Revocable Trust v. Walsh*, No. A14-1529, 2015 WL 4523580 (Minn. App. June 29, 2015), which is cited in Relators' Response to Motions to Exclude Witnesses and Evidence.

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15. Attached as Exhibit N is a true and correct copy of *Mille Lacs Power Sports, Inc. v Langerman*, No. 48-CR-11-1657, 2013 WL 10154648 (Minn. Dist. Ct. Nov. 13, 2013), which is cited in Relators' Response to PolyMet's Motion to Exclude Evidence.

16. Attached as Exhibit O is a true and correct copy of the *In re Welfare of A.A.M.*, No. A04-1296, 2005 WL 757873 (Minn. App. Apr. 5, 2005), which is cited in Relators' Response to PolyMet's Motion to Exclude Evidence.

17. Attached as Exhibit P is a true and correct copy of *In re Wash. Aqueduct Water Supply Sys*., NPDES Appeal No. 03-06, 11 E.A.D. 565, 2004 WL 3214486 (EPA Envtl. App. Bd., July 29, 2004), which is cited in Relators' Pre-trial Brief.

18. Attached as Exhibit Q is a true and correct copy of *In re Admin. Penalty Issued to Erickson Enterprise*, No. 7-2200-14389-2, 2001 WL 35926172 (Minn. OAH Sept. 28, 2001), which is cited in Relators' Pre-trial Brief.

19. Attached as Exhibit R is a true and correct copy of *In re Risk Level Determination of Morri*s, No. 1-1100-11701-2, 1998 WL 879166 (OAH Sept. 1998), cited in Relators' Response to Motions to Exclude Witnesses and Evidence and Relators' Opposition to Summary Judgment.

I declare under penalty of perjury that everything that I have stated in this document is true and correct.

Signed at Minneapolis, Hennepin County, Minnesota on January 10, 2020

s/Evan A. Nelson
EVAN A. NELSON

2012 WL 7659116 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota,
Second Judicial District.
Ramsey County

ROA, INC. and Daniel Ashbach, Plaintiffs,
v.
Timothy J. NICHOLSON; Separate Solutions, Inc.; Peter W. Duddleston; Separate Solutions, Ltd.; Michael Doolan; Douglas Lundberg; North Star Processing, LLC; and NSH Group LLC, Defendants.

No. 62-CV-10-1734.
February 13, 2012.

Order on Motions in Limine

Vincent D. Louwagie, Judge.

CASE TYPE: Contract, Shareholder Fiduciary Duty

Consensual Special Magistrate Vincent D. Louwagie

The undersigned held a hearing on February 10, 2012 on the parties' motions *in limine* Michael Schwartz and Brandon Schwartz appeared on behalf of ROA, Inc. and Daniel Ashbach. Gregory Spalj appeared on behalf of Timothy J. Nicholson, Separate Solutions, Inc., Separate Solutions, Ltd., Peter W. Duddleston, Michael Doolan, Douglas Lundberg, and NSH Group LLC (hereinafter the "Individual Defendants"). Adam Huhta appeared on behalf of North Star Processing (hereinafter "NSP").

The undersigned, having reviewed the motions, supporting memoranda, and affidavits, and based upon the arguments of counsel, orders as follows:
1. ROA's motion to preclude evidence that NSP was never going to consummate the warehouse and/or second dryer is DENIED. Judge Higgs' Order on that issue is not the law of the case.

2. ROA's motion to exclude evidence that the warehouse and second dryer were not NSP corporate opportunities is DENIED. Judge Higgs' Order on that issue is not the law of the case.

3. ROA's motion to exclude evidence that ROA lacks standing to bring a derivative claim is DENIED. Judge Higgs' Order on that matter is not the law of the case. The denial of a motion for summary judgment establishes only that there is a fact issue in dispute on the issue that is the subject of the summary judgment motion. Notably, under Rule 56.03 of the Minnesota Rules of Civil Procedure, the court has authority to issue summary judgment in favor of either party when the record establishes that there is no genuine issue as to any material fact and that *either* party is entitled to a judgment as a matter of law. Judge Higgs did not grant judgment as a matter of law in favor of the Plaintiffs; by inference Judge Higgs determined that there are genuine issues of material fact in dispute.

4. ROA's motion to exclude evidence that ROA has not establish demand futility as required by 6 Del. C. § 18-1003 is DENIED on the basis argued by ROA.

5. ROA's motion to exclude evidence that ROA and/or Daniel Ashbach breached the NSP Noncompetition and Nonsolicitation Agreement is DENIED.

6. ROA's motion *in limine* Nos. 6 through 14 are not directed toward specific evidence and are DENIED on that basis.

7. The Individual Defendants' motion *in limine* No. 1 to exclude the evidence of the indictment of Michael J. Murry is GRANTED. The undersigned will reconsider this ruling if there is evidence that would establish the relevance of an indictment (as opposed to a conviction) filed on August 17, 2011, which appears to be years after the events about which the Plaintiffs complain. Plaintiffs' arguments and submissions do not establish any relevance at this time.

8. The Individual Defendants' motions *in limime* Nos. 2-4 are GRANTED, IN PART, and DENIED, IN PART, as follows:

(a) Christopher Ashbach's opinion with respect to the appropriate remedy in this case is not admissible, and the motion is GRANTED to exclude that evidence;

(b) Edward Nuebel's testimony with respect to whether he would purchase NSP in its current state and what he and his business partner would have done under certain facts, that a disinterested member of NSP would never agree to execute the Real Estate Lease Agreement, and that a disinterested member of NSP would never agree to execute the Equipment Lease are not admissible, and the motion is GRANTED to exclude that evidence;

(c) The testimony of Peter Balbo that he would never purchase NSP in its current state, what he would have done under the facts he assumes, that a disinterested member of NSP would never agree to execute the Real Estate Lease Agreement, and that a disinterested member of NSP would never agree to execute the Equipment Lease Agreement, are not admissible, and the motion is GRANTED to exclude that evidence; and

(d) The remainder of the Individual Defendants' motions *in limine* Nos. 2-4 is DENIED.

9. The Individual Defendants' motion *in limine* No. 5 to exclude the expert testimony of Daniel S. Kleinberger is GRANTED, IN PART, and DENIED, IN PART, as follows:

(a) Mr. Kleinberger's testimony interpreting the law is inadmissible; and

(b) The remainder of the Individual Defendants' motion to exclude the expert testimony of Daniel S. Kleinberger is DENIED.

10. The Individual Defendants' motion *in limine* No. 6 to exclude evidence barred by the statute of limitations is DENIED. Events occurring before November 7, 2006 may be admissible as they relate to events that took place on or after November 7, 2006. In addition, equitable claims remain in this case, and the statute of limitations is only instructive, not determinative, as to the application of the doctrine of laches.

11. The Individual Defendants' motion *in limine* No. 7 to exclude the expert testimony of Craig Bollum is reserved by the undersigned and shall be addressed if Defendants testify that Park Midway Bank's alleged complicity in the Individual Defendants' alleged breaches of fiduciary duties and alleged usurpation of NSP corporate opportunities supports the legality of these actions.

12. North Star Processing LLC's motion *in limine* to exclude evidence of any breach of fiduciary duty until Plaintiffs establish standing is DENIED. In order to prevail in these claims, Plaintiffs have the burden of proving they have standing to bring the claims.

IT IS SO ORDERED.

<<signature>>

Vincent D. Louwagie

Consensual Special Magistrate

Dated: February 13, 2012.

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2006 WL 3488835 (Minn.Off.Admin.Hrgs.)

Office of Administrative Hearings

State of Minnesota

MONTY R. SINNER, PETITIONER
v.
EAST CENTRAL SCHOOL DISTRICT (ISD) #2580, RESPONDENT

***1 Department Of Veterans Affairs**
4-3100-17253-2
September 21, 2006

ORDER ON MOTION IN LIMINE

On September 18, 2006, the Petitioner filed Petitioner's Motion in Limine seeking to exclude any hearsay statements made by Ms. Brink to other witnesses whose testimony may be elicited at the hearing by the School District. On September 20, 2006, the School District filed a response to that motion. The Petitioner's Motion in Limine is therefore now before the undersigned Administrative Law Judge.

Margaret A. Skelton, Ratwik, Roszak & Maloney, P.A., 300 U.S. Trust Building, 730 Second Ave South, Minneapolis, MN 55402, represents the Respondent, (Respondent). Tammy P. Friederichs, Friederichs & Thompson, P.A., 1120 East 80th Street Suite 106, Bloomington, MN 55420, represents Monty R. Sinner (Petitioner).

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompany Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED**,** that the Petitioner's Motion in Limine is DENIED, without prejudice to the Petitioner's right to reassert the objections set forth therein as objections to testimony presented by the School District at the hearing.

Dated: September 21, 2006

Bruce H. Johnson
Assistant Chief Administrative Law Judge

MEMORANDUM

On September 18, 2006, the Petitioner filed a motion *in limine* to exclude testimony at the hearing regarding: (1) statements allegedly made by Mr. Sinner to Ms. Brink and then relayed to others by Ms. Brink; and (2) conclusions drawn by Ms. Brink and then stated by her to others. As grounds supporting the motion, the Petitioner argues that such testimony is excludable under Minn. R. Evid. 803 and 804. The Petitioner further argues that even if that evidence is admissible under those rules, it should nevertheless be excluded under Minn. R. Evid. 403 because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury." In response, the School District argues that the evidence that the Petitioner seeks to exclude is admissible under the more relaxed standards of admissibility that govern contested case

proceedings. The School District also argues that the admissibility of evidence in question is more properly addressed in rulings on objections raised in the hearing rather than in an anticipatory motion *in limine*.

I. Admissibility of Evidence in Administrative Contested Case Hearings.

In effect, the Petitioner argues for strict application of the standards for admitting evidence in the Minnesota Rules of Evidence. On the other hand, the School District argues that the standard for admitting expert opinion evidence in administrative hearings is much more relaxed than the relatively rigid standards under the rules of evidence, relying on the following language in Minn. R. 1400.7300, subp. 1:

***2** The judge 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. The judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded. [1]

In the ALJ's view, neither party's view on the evidentiary standards that apply to the admission of expert opinion evidence in this case is entirely correct. On the one hand, the Minnesota Rules of Evidence do not actually govern administrative contested case hearings. On the other hand, the standards for admitting expert opinion evidence in administrative contested case proceedings may not be quite as relaxed as the School District suggests. For example, Minn. R. 1400.7300, subp. 1, provides that "*[e]vidence which is incompetent, irrelevant, immaterial,* or unduly repetitious *shall be excluded* evidence." [Emphasis supplied.] In order to determine whether evidence is "incompetent, irrelevant, or immaterial" an administrative law judge must necessarily look to some external legal authority, such as the Minnesota Rules of Evidence or court decisions, to determine what is "incompetent, irrelevant, or immaterial" evidence and what is not. In other words, although the admission of expert opinion evidence in this proceeding may not expressly be governed by pertinent provisions of the Minnesota Rules of Evidence and appellate court decisions construing them, it is appropriate for the ALJ to at least seek guidance from those rules and decisions.

Minn. R. 1400.7300, subp. 1, creates a somewhat more specific standard where it addresses hearsay. It provides that an ALJ may admit hearsay evidence "if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." In this regard, the rule's treatment of hearsay is in accord with the more general statutory standard for admissibility in contested case proceedings that the Legislature enacted in Minn. Stat. § 14.60, subd. 1:

In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs.

What is clear in both the rule and the statute is that an ALJ's decision about whether a particular hearsay statement is probative and reliable often involves assessment of other evidence that may shed light on the statement's reliability or unreliability. Put another way, whether the evidence being offered is "the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs" is essentially a question of fact that must be resolved bythe ALJ. This task is best done in a hearing where both the proponent and the objecting parties are accorded opportunities to present and rely on other evidence in the hearing record that on the reliability of the hearsay statements in question.

***3** For the reasons stated above, the ALJ denies the Petitioner's Motion in Limine, without prejudice to the Petitioner's right to reassert the objections set forth therein as objections to testimony presented by the School District at the hearing.

B.H.J.

1 The rule reflects Minn. Stat. § 14.60, subd. 1, which provides:

In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.

2006 WL 3488835 (Minn.Off.Admin.Hrgs.)

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2012 WL 3023397
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

LEGACY RESTAURANTS, INC., Appellant,
v.
MINNESOTA NIGHTS, INC., Respondent.

No. A11–1730.
|
July 23, 2012.

St. Louis County District Court, File No. 69DU–CV–09–3313.

Attorneys and Law Firms

Nicholas Ostapenko, Paul W. Wojciak, Johnson, Killen & Seiler, P.A., Duluth, MN, for appellant.

Jerome D. Feriancek, Jr., Thibodeau, Johnson & Feriancek, PLLP, Duluth, MN, for respondent.

Considered and decided by SCHELLHAS, Presiding Judge, KALITOWSKI, Judge, and CHUTICH, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

***1** In this commercial landlord-tenant dispute, appellant challenges the following orders of the district court: (1) denying appellant's motion to amend its complaint to add a claim of punitive damages; (2) granting respondent's motion to amend its answer to include the affirmative defense of release and motion in limine to exclude evidence of appellant's damages, based on a sublease exculpatory clause; (3) denying appellant's motion to amend its complaint to include the claims of gross negligence and willful and wanton conduct; and (4) denying appellant's motion for reconsideration and granting summary judgment for respondent. We affirm.

FACTS

Appellant Legacy Restaurants Inc. leased space on two floors of a building in Duluth. The Duluth Athletic Club restaurant (DAC), owned and operated by Legacy, occupied the lower floor; and, commencing in March 2007, Legacy subleased the upper floor to The Tap Room, a nightclub, owned and operated by respondent Minnesota Nights. In May 2009, Legacy sued Minnesota Nights, alleging that, in September 2007, DAC sustained damage to its premises in excess of $50,000 as a direct result of sewage effluent backup caused by The Tap Room. Legacy asserted claims of negligence, breach of lease, nuisance, and trespass. Legacy attached to its complaint the sublease agreement between it and Minnesota Nights. The sublease contains the following exculpatory clause, in relevant part:

> Landlord [Legacy] and Tenant [Minnesota Nights] each hereby release the other from any and all liability or responsibility to the other ... for any loss or damage to property caused by fire or any of the extended coverage causalities covered by the insurance maintained hereunder[.]

Minnesota Nights denied Legacy's claims.

In January 2010, the district court issued a scheduling order, setting a discovery deadline of August 1, 2010; a dispositive-hearing deadline of August 31, 2010; and a jury trial date of November 9, 2010.

Legacy moved to amend the pleadings to assert a claim for punitive damages, and, on September 17, 2010, the district court denied the motion. On October 5, Minnesota Nights filed a notice of substitution of counsel and subsequently moved for a trial continuance to allow its substitute counsel to prepare. Among other things, Minnesota Nights also moved in limine for an order excluding evidence of Legacy's alleged damages on the basis of the exculpatory clause in the sublease. Legacy moved in limine for an order excluding evidence of its receipt of an insurance payment from its insurer.[1] On November 2, the court granted Minnesota Nights's motion for a trial continuance, denied Legacy's motion to exclude

evidence of the insurance payment, and denied Minnesota Nights's motion to exclude evidence of Legacy's damages. As to Minnesota Nights's motion in limine to exclude evidence of damages, the court stated:

> The sublease provision unambiguously and mutually releases [Legacy] and [Minnesota Nights] from all liability for damages, including damages resulting from negligence. However, such a release is an affirmative defense under Minn. R. Civ. P. 8.03. [Minnesota Nights] waived the defense by not specifically asserting it in a responsive pleading.

***2** On November 9, Minnesota Nights moved the district court for leave to amend its answer to include the affirmative defense of release and, on January 18, 2011, the court granted the motion. Additionally, based on the exculpatory clause in the sublease, the court vacated and reversed its previous order denying Minnesota Nights's motion in limine to exclude evidence of Legacy's damages. Thereafter, Legacy moved to amend its complaint to include claims of gross negligence and willful and wanton conduct, and the court denied Legacy's motion on February 25. Legacy then moved for reconsideration of its motion to amend its complaint to include claims of gross negligence and willful and wanton conduct, and Minnesota Nights moved for summary judgment on Legacy's negligence claim. On June 27, the district court denied Legacy's motion for reconsideration and granted summary judgment to Minnesota Nights.

This appeal by Legacy follows.

DECISION

As an initial matter, we note that the same district court judge presided over all of the proceedings in this case from the denial of Legacy's motion to amend its complaint to include a claim for punitive damages in September 2010 through the summary-judgment dismissal.

Denial of Legacy's Motion to Amend to Add Claim of Punitive Damages

Legacy argues that the district court erred by denying its motion to amend its complaint to include a claim for punitive damages.

> Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others. Punitive damages are an extraordinary remedy to be allowed with caution and within narrow limits. If a party seeks punitive damages, then a district court must first determine whether the evidence is sufficient to submit the issue to the jury.

J.W. ex rel. B.R.W. v. 287 Intermediate Dist., 761 N.W.2d 896, 904 (Minn.App.2009) (quotation and citation omitted). "This court may not reverse a district court's denial of a motion to add a claim for punitive damages absent an abuse of discretion." *Id.* (quotation omitted).

A motion to amend for a claim of punitive damages is properly granted only when the moving party presents a prima facie case that will reasonably allow the conclusion that clear and convincing evidence will establish that the defendant deliberately disregarded the rights or safety of others. Minn.Stat. §§ 549.191, .20, subd. 1 (2010); *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn.App.2007), *aff'd*, 742 N.W.2d 660 (Minn.2007). A prima facie case is established when evidence is presented, which if unrebutted, supports a judgment. *McKenzie v. N. States Power Co.*, 440 N.W.2d 183, 184 (Minn.App.1989). Neither negligence nor gross negligence is sufficient to satisfy the deliberate-indifference standard required for punitive damages. *See Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 268 (Minn.1992) (stating that to properly demonstrate an entitlement to allege punitive damages, "[a] mere showing of negligence is not sufficient"); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (Minn.1990) (stating that employer's conduct constituted gross negligence but not negligence rising to the level of willful indifference so as to warrant punitive-damages claim); *Utecht v. Shopko Dept Store*, 324 N.W.2d 652, 654 (Minn.1982) (stating that negligent conduct was insufficient to establish punitive-damages claim). In determining whether punitive damages are allowed, a court should "focus on the wrongdoer's conduct rather than ... focus on the type of damage that results from the conduct." *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn.2001).

***3** Here, Legacy argued to the district court that Minnesota Nights deliberately disregarded Legacy's rights when The Tap Room caused sewage effluent to backup into the DAC and The Tap Room's owner, Andrew Gamache, refused to shut off its water and close after receiving multiple requests to do so. Legacy claimed that The Tap Room caused the sewer pipe to become clogged with paper towels by allowing its patrons to use paper towels in place of toilet paper after the toilet paper ran out. Legacy claimed that Gamache "knew the importance of keeping bathrooms properly supplied with toilet paper because, if there is no toilet paper, patrons will use paper towels."

The district court determined that Legacy failed to allege a prima facie case of clear-and-convincing evidence that The Tap Room knew that its water usage was causing the sewage backup and that The Tap Room deliberately disregarded or acted with indifference toward Legacy's rights. The court reasoned that, although Gamache's conduct might be negligence, "there is, by no stretch of the imagination, anything willful, or malicious, or knowingly wrongful in these alleged actions. The failure to stock adequate toilet paper, if proven, is negligence, nothing more." We agree that Legacy did not allege a prima facie case of clear-and-convincing evidence that The Tap Room knew that its patrons' use of paper towels would create a high probability of risk of clogging the sewer pipe and causing damage to the DAC and that The Tap Room deliberately disregarded or acted with indifference towards that risk. *See J.W. ex rel. B.R.W.,* 761 N.W.2d at 904 (concluding that appellant failed to assert punitive-damages claim because appellant presented no evidence of "specific knowledge" that an individual "would create a high probability of injury" to another person).

We therefore conclude that the district court did not abuse its discretion by denying Legacy's motion to amend its complaint to add a claim for punitive damages.

Grant of Minnesota Nights's Motion to Amend Answer

Legacy argues that the district court abused its discretion by granting Minnesota Nights leave to amend its answer to include the affirmative defense of release, based on the sublease exculpatory clause. After a party has served its responsive pleadings, the opposing party may amend its pleading only by the district court's leave or by the opposing party's consent. Minn. R. Civ. P. 15.01. "[A] motion to amend pursuant to Minn. R. Civ. P. 15.01 should be freely granted, except where to do so would result in prejudice to the other party." *Marlow Timberland, LLC v. Cnty. of Lake,* 800 N.W.2d 637, 640 (Minn.2011) (quotation omitted). But a district "court should deny a motion to amend a complaint where the proposed claim could not withstand summary judgment." *Rosenberg v. Heritage Renovations, LLC,* 685 N.W.2d 320, 332 (Minn.2004). "In addition, the liberality to be shown in the allowance of amendments to pleadings depends in part upon the stage of the action and in a great measure upon the facts and circumstance of the particular case ." *Bebo v. Delander,* 632 N.W.2d 732, 741 (Minn.App.2001), *review denied* (Minn. Oct. 16, 2001). "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *Bridgewater Tel. Co. v. City of Monticello,* 765 N .W.2d 905, 915 (Minn.App.2009) (quotation omitted).

***4** Legacy argues that the district court erred by allowing Minnesota Nights leave to amend its answer because Minnesota Nights waived the affirmative defense and could not reclaim it. Legacy cites three cases in support of its argument: *State ex rel. Johnson v. Indep. Sch. Dist. No. 810,* 260 Minn. 237, 246, 109 N.W.2d 596, 602 (1961) (involving an express voluntary waiver of a statutory right); *Anderson v. Twin City Rapid Transit Co.,* 250 Minn. 167, 180, 84 N.W.2d 593, 602 (1957) (noting that because the parties litigated in court for more than one year, their conduct "constitutes an abandonment or waiver of the right to arbitration and a consent to the submission of the controversy to the courts"); *Engstrom v. Farmers & Bankers Life Ins. Co.,* 230 Minn. 308, 310–11, 313, 41 N.W.2d 422, 423–25 (1950) (intentional waiver of contractual right by conduct).

But Legacy's reliance on these cases is misplaced because Minnesota Nights did not expressly, voluntarily, or intentionally waive its affirmative defense of release; it failed to plead it prior to substituting its new counsel. And unlike the affirmative defense of arbitration, the affirmative defense of release does not affect the jurisdiction of the district court. Although Minnesota Rule of Civil Procedure 8.03 lists both arbitration and release as affirmative defenses, waiver of the right to arbitration involves consideration of jurisdictional and efficiency issues, issues that are not evident in the context of a waiver of a release. *See Ill. Farmers Ins. Co. v. Glass Serv. Co.,* 683 N.W.2d 792, 799–800 (Minn .2004) (discussing waiver of a contractual right to arbitration when cases have been litigated in court on their merits for over one year); *Brothers Jurewicz, Inc. v. Atari, Inc.,* 296 N.W.2d 422, 428 (Minn.1980) ("We have held consistently that a party to a contract containing an arbitration provision will be deemed

to have waived any right to arbitration if judicial proceedings based on that contract have been initiated and have not been expeditiously challenged on the grounds that disputes under the contract are to be arbitrated."). Moreover, although "[a]n affirmative defense must be pleaded specifically and the failure to do so results in a waiver of the defense[, p]leadings may be amended to assert an affirmative defense." *Rhee v. Golden Home Builders, Inc.,* 617 N.W.2d 618, 621 (Minn.App.2000) (citation omitted); *see Beutz v. A.O. Smith Harvestore Prods., Inc.,* 431 N.W.2d 528, 532 n. 3 (Minn.1988) (noting that while an affirmative defense must be set forth in the pleadings, "it may only be waived by failure to plead it if there is no later amendment of the pleadings").

Legacy complains that it was unfair for Minnesota Nights to raise an affirmative defense so late in the litigation when it could have asserted the affirmative defense at the beginning of the litigation. But Legacy drafted the sublease that contains the exculpatory clause, so its argument about unfairness is hollow. Furthermore, in opposing Minnesota Nights's motion to amend its answer, Legacy made no argument that Minnesota Nights's amendment would prejudice it; Legacy argued only that Minnesota Nights waived the defense of release. *See Marlow Timberland,* 800 N.W.2d at 640 (noting that a motion to amend "should be freely granted" except where a party would be prejudiced); *Colstad v. Levine,* 243 Minn. 279, 284–85, 67 N.W.2d 648, 653 (1954) (noting that in the absence of prejudice to the nonmoving party, district courts have "wide discretionary powers ... for the liberal granting of an amendment to the pleadings when justice in the particular case so requires, even though the proposed amendment may change the legal theory of the action" (footnote omitted)).

***5** Legacy also argues, citing *Hebrink v. Farm Bureau Life Ins. Co.,* 664 N.W.2d 414 (Minn.App.2003), that the district court erred by granting Minnesota Nights's motions to amend its answer and to exclude evidence of Legacy's damages on the basis that the motions were "untimely disguised Motions for Summary Judgment" because the final effect of the motions was the dismissal of Legacy's case. Minnesota Nights argues that Legacy did not raise this issue in the district court. Our review of the record reveals that Legacy did raise the issue before the district court in its memorandum of law opposing Minnesota Nights's motion in limine to exclude evidence of Legacy's damages, but Legacy did not raise the issue in opposition to Minnesota Nights's motion to amend its answer. We therefore do not consider the argument in connection with the district court's grant to Minnesota Nights of leave to amend its answer. *See Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn.1988) (noting that generally appellate courts do not consider matters not argued to and considered by the district court).

We conclude that the district court did not abuse its discretion by granting Minnesota Nights's motion to amend its answer to include the affirmative defense of release.

Grant of Minnesota Nights's Motion in Limine to Exclude Evidence of Damages

As noted above in the facts summary, before Minnesota Nights moved to amend its answer to assert the affirmative defense of release, the district court denied its motion in limine to exclude evidence of damages on the basis of the exculpatory clause in the sublease. But, after allowing Minnesota Nights to amend its answer to affirmatively allege release, the court vacated and reversed its denial of Minnesota Nights's motion in limine. We address Legacy's argument that the district court's grant of Minnesota Nights's motion in limine to exclude evidence of damages was an untimely disguised motion for summary judgment because Legacy raised this issue in its memorandum of law opposing Minnesota Nights's motion in limine.

Citing *Hebrink,* Legacy argues that Minnesota Nights's motion in limine to exclude evidence was a functional summary-judgment motion because the motion had the "ultimate effect" of dismissal of Legacy's claims since an essential element of Legacy's claims—damages—was excluded. But, in *Hebrink,* this court focused on the *nature* of the motion, not the *effect.* In *Hebrink,* the defendant—insurance company denied the plaintiff's disability-insurance claim. 664 N.W.2d at 417. When the case was nearing trial, the defendant moved in limine to exclude evidence of the plaintiff's total disability because, under the undisputed facts, the plaintiff could not prove that he satisfied the policy's definition of "total disability." *Id.* The district court granted the defendant's motion in limine and granted summary judgment sua sponte. *Id.* On appeal, this court determined that the defendant's motion in limine was a functional summary-judgment motion, stating:

> ***6** The purpose of a motion in limine is to prevent "injection into trial of matters which are irrelevant, inadmissible and prejudicial." *Black's Law Dictionary* 1013 (6th ed.1991). Here, there is no reference in either the motion in limine or the memorandum in support of the motion to any rules of evidence or other authority

> that would make the evidence regarding "total disability" inadmissible. Nor did Farm Bureau argue that the evidence would be irrelevant or prejudicial. Instead, the gist of Farm Bureau's motion was that the evidence regarding "total disability" should be excluded because appellant could not prove that he met the policy condition by relying on evidence then in the record. This was not a proper motion in limine but, rather, was tantamount to a motion for summary judgment.

Id. at 418. We concluded that "[b]ecause Farm Bureau's motion in limine functioned as a motion for summary judgment," it had to comply with the summary-judgment notice requirements and, because the motion was "improperly noticed," the district court should not have considered it. *Id.* at 419.

Here, the district court granted the motion in limine to exclude damages evidence only after it granted Minnesota Nights's motion to amend its answer to affirmatively assert release. Legacy's release in this case, based on the exculpatory clause that it drafted and included in the sublease, rendered irrelevant the issue of damages allegedly caused by Minnesota Nights.

Although the district court did not specifically address Legacy's argument that Minnesota Nights's motion in limine was the functional equivalent of an untimely motion for summary judgment, we consider the court's vacation and reversal of its order denying the motion in limine to be an implicit rejection of Legacy's argument. *See Loth v. Loth,* 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) ("[O]n appeal error is never presumed." (quotation omitted)); *Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006–OA1,* 775 N.W.2d 168, 177–78 (Minn.App.2009) ("Appellate courts cannot assume a district court erred by failing to address a motion, and silence on a motion is therefore treated as an implicit denial of the motion."), *review denied* (Minn. Jan. 27, 2010).

We conclude that the district court did not abuse its discretion by granting Minnesota Nights's motion in limine to exclude evidence of damages.

Denial of Amendment to Complaint

After the district court allowed Minnesota Nights to amend its answer, Legacy moved to amend its complaint to assert claims of gross negligence and willful and wanton conduct. The district court denied Legacy's motion to amend its complaint, reasoning that the amendment would prejudice Minnesota Nights because of its need for additional discovery, the amendment therefore would require that the scheduling order be amended and Legacy failed to demonstrate good cause to modify the scheduling order as required by Minn. R. Civ. P. 16.02, and Legacy's proposed claims would not survive summary judgment. The district court also denied Legacy's motion for reconsideration, noting that Legacy drafted the sublease agreement with the exculpatory clause and "reasonably could have anticipated that the release would be pled by [Minnesota Nights]" and could have asserted its proposed new claims of gross negligence and willful and wanton conduct "in its original Complaint, but instead chose to wait until [Minnesota Nights] asserted the clause as a defense." The court concluded that Legacy's actions tended "to show [Legacy] failed to move with reasonable diligence" and that its motion therefore was untimely. The court also reiterated that Legacy's claims of gross negligence and willful and wanton conduct would not survive summary judgment.

***7** "[P]arties seeking to amend a pleading must move with reasonable diligence." *Willmar Gas Co. v. Duininck,* 239 Minn. 173, 176, 58 N.W.2d 197, 199 (1953). Legacy argues that it had no reason to amend its complaint until Minnesota Nights raised the affirmative defense of release based on the exculpatory clause in the sublease. We reject Legacy's argument and conclude that the district court did not abuse its discretion by denying Legacy's motion to amend its complaint. Legacy should have anticipated that the exculpatory clause that it drafted and included in the sublease would be a material issue in the litigation. In fact, in the district court's September 2010 order, when it denied Legacy's motion to amend its complaint to include a claim of punitive damages, the court advised Legacy that its complaint was based only on "traditional theories of liability," such as negligence, and, again in the court's November 2010 order initially denying Minnesota Nights's motion in limine to exclude evidence of damages, the court stated that the exculpatory clause would act as a complete bar to Legacy's recovery.

Based on the procedural history in this case and its particular facts with which the district court was acutely familiar, we will not second-guess the district court's reasoning and decision to deny Legacy's motion to amend its complaint on the eve of trial. A district court "has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of discretion." *Hempel v. Creek House Trust,* 743 N .W.2d 305, 313 (Minn.App.2007), *review denied* (Minn. Sept. 29, 2009). We conclude that the district

court did not clearly abuse its discretion by denying Legacy's motion to amend.

Grant of Summary Judgment to Minnesota Nights

"On an appeal from summary judgment we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court [ ] erred in [its] application of the law ." *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn.1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.,* 644 N.W.2d 72, 77 (Minn.2002). This court "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn.1993).

Legacy appeals from the district court's grant of summary judgment to Minnesota Nights but, in its brief, Legacy focuses its argument on the district court's rulings leading up to the grant of summary judgment. Legacy's arguments seem to recognize that if this court does not reverse the district court's rulings allowing Minnesota Nights to amend its answer to assert the affirmative defense of release, granting Minnesota Nights's motion in limine to exclude evidence of damages, and denying Legacy's motion to amend its complaint to assert gross negligence and willful and wanton conduct, no basis exists for this court to reverse the district court's summary judgment to Minnesota Nights.

***8** Because we affirm all of the district court's orders leading up to its summary-judgment dismissal in favor of Minnesota Nights, we conclude that no genuine issue of material fact existed and that the district court did not err by granting summary judgment to Minnesota Nights.

Affirmed.

All Citations

Not Reported in N.W.2d, 2012 WL 3023397

End of Document

1995 WL 937546 (Minn.Off.Admin.Hrgs.)

Office of Administrative Hearings

State of Minnesota

IN THE MATTER OF THE DENIAL OF THE FOSTER
CARE LICENSE APPLICATION OF KEVIN DOWNWIND

***1 Minnesota Department of Human Services**
8-1800-9466-2
April 25, 1995

RECOMMENDED ORDER DISMISSING APPEAL

The above-entitled matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of and Order for Hearing and Prehearing Conference dated February 13, 1995.

Catherine Margaret Meek, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, has appeared on behalf of the Minnesota Department of Human Services (Department). Kevin Downwind, the Applicant, 5733 Sander Drive, Minneapolis, Minnesota 55417-2812, has appeared on his own behalf.

On July 17, 1995, Administrative Law Judge Jon L. Lunde issued an Order cancelling the hearing scheduled for July 21, 1995 and requiring the Applicant to file answers to directing order; Department filed a motion to admit the out-of-court statements a four-year-old child made to a licensed social worker. The Applicant did not file a written response to the Motion within the ten-working-day period set forth in Minn. Rules pt. 1400.6600 (1993).

NOW, THEREFORE, based upon all the filed, records, and proceeding herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED: That the Department's Motion to admit the out-of-court statements of a child to a licensed social worker be and the same hereby is GRANTED.

Dated this 25th day of April, 1995.

Jon L. Lunde
Administrative Law Judge

MEMORANDUM

The Department seeks an order admitting a four-year-old child's statement that he was spanked with a belt by the Applicant. The Department argues that the social worker's case notes containing the child's statements are admissible under Minn.R.Evid. 803(6) and (24).

Rule 803(6), which relates to business records, states that even if the declarant is available as a witness, business records may be received in evidence as an exception to a hearsay rule. The rule states:
(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or a diagnoses, made at or near the time by, or from information transmitted by a person

with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * * *

As a general rule, the admissibility of hearsay evidence in contested case proceedings is governed by Minn. Stat. § 14.60, subd. 1 and not by the Minnesota Rules of Evidence. The statute states that an administrative law judge "may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs." Even though the Minnesota Rules of Evidence are not binding in a contested case proceeding, evidence which is admissible under the Minnesota Rules of Evidence is admissible under Minn. Stat. § 14.60, subd. 1.

***2** The out-of-court statements the Department intends to offer into evidence are admissible under the business records exception in Rule 803. The statements were made to a licensed social worker who was working for Minnesota Human Services Associates. Her employer was the Department's agent and responsible, on the Department's behalf, for licensing foster parents. While performing her duties, a four-year-old child, B.P., voluntarily and spontaneously informed the social worker that he had been spanked with a belt by the Applicant. The case notes containing the child's statements are admissible under the Rule because they are based on information transmitted by a person with knowledge (i.e. the child), the social worker's record of the child's statement was kept in the course of her employer's regularly conducted business activity, and it was the regular practice of the social worker's employer to make the record or report containing the child's statements.

The courts have consistently held that a social worker's notes and reports are admissible under Rule 803(6). See, In Re Brown, 296 N.W.2d 430, 435 (Minn. 1980); In Re Welfare of W.R., 379 N.W.2d 544, 550 (Minn. Ct. App. 1985); In Re Welfare of R.T., 364 N.W.2d 884, 886 (Minn. Ct. App. 1985). Furthermore, the statements made are admissible under Minn. Stat. § 245A.08. The statute pertains to the licensure of foster parents, day care providers, and others. When the suspension, immediate suspension or revocation of a foster care license is proposed by the Commissioner, the Commissioner may demonstrate reasonable cause for the proposed action by submitting "statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule." Once the Commissioner demonstrates that reasonable cause existed, "the burden of proof in hearings involving suspension, immediate suspension, or revocation of a family day care or foster care license shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated. . . ." The statute also states that at a hearing on the denial of an application, the "applicant bears the burden of proof to demonstrate by a preponderance of the evidence that the applicant has complied fully with sections 245A.01 to 245A.15 and other applicable law or rule and that the application should be approved and a license granted."

Although the statute on hearings regarding the denial of an application does not mention the admissibility of statements, reports, or affidavits, they should be admissible in a hearing on the denial of a day care license to the same extent that they would be admissible in a hearing on the proposed suspension or revocation of a license. Consequently, the Department's Motion should be granted. The Administrative Law Judge will not, therefore, consider other possible bases for the admissibility of the evidence such as Rule 803(24) (pertaining to other exceptions) and Rule 803(2) (pertaining to excited utterances).

***3** JLL

1995 WL 937546 (Minn.Off.Admin.Hrgs.)

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2015 WL 3922873 (Minn.Off.Admin.Hrgs.)

Office of Administrative Hearings

State of Minnesota

IN THE MATTER OF HIBBING TACONITE MINE AND STOCKPILE PROGRESSION AND WILLIAMS CREEK PROJECT SPECIFIC WETLAND MITIGATION

***1 Department of Natural Resources**
OAH 11-2004-31655
June 19, 2015

RULING ON CLIFFS' MOTION TO QUASH SUBPOENAS

On May 14, 2015, Northern Conservation, LLC, and Cliffs Mining Company (jointly, Cliffs) filed a Motion to Deny Respondents' Requests for Subpoenas. [1] On May 28, 2015, Respondents Lake of the Woods County; Lake of the Woods Soil and Water Conservation District; Mike Hirst, in his capacity as a member of the Lake of the Woods Soil and Water Conservation District Technical Evaluation Panel; and Josh Stromlund, in his capacity as Land & Water Planning Director for Lake of the Woods County (collectively, County) filed a Response to Cliffs' Motion. On June 1, 2015, Cliffs filed a Reply Memorandum in Support of its Motion.

John C. Kolb, Rinke Noonan, appeared on behalf of the County. Fiona B. Ruthven, Assistant Attorney General, and Sherry Enzler, General Counsel, appeared on behalf of the Department of Natural Resources (Department). Susan K. Wiens and William P. Hefner, Environmental Law Group, appeared on behalf of Cliffs.

Based upon the record in this matter, and for the reasons set forth in the Memorandum below,

IT IS HEREBY ORDERED as follows:
1. Cliffs' Motion to Quash the BWSR employee subpoenas is **DENIED**.

2. Cliffs shall be afforded an opportunity to take the depositions of Board of Water and Soil Resources (BWSR) employees Ken Powell, Les Lemm and Dale Krystosek prior to the hearing in this matter.

3. As noted in the June 18, 2015, Ruling on the County's Motion to Compel Discovery, a prehearing conference shall be held by telephone conference call in this matter on **Tuesday, June 23, 2015, at 3:30 p.m**., to discuss whether any adjustments to the schedule in this matter are necessary. To participate, parties must call **1-888-742-5095** at that time and, when prompted, enter conference code **371 152 3559#**. If that time is inconvenient, parties should notify Kendra McCausland, Legal Assistant, immediately.

Dated: June 19, 2015

Barbara L. Neilson
Administrative Law Judge

MEMORANDUM

This contested case proceeding involves wetland-mitigation plans submitted by Cliffs for a project located on property in Lake of the Woods County known as the Williams Creek site. The plans include a proposal to use approximately 13 acres of the Williams Creek Site as replacement wetlands for wetland impacts at Cliffs' Hibbing Taconite Mine and Stockpile Progression. [2]

On April 24, 2015, the County requested that subpoenas be issued for the appearance of three employees of the BWSR to serve as witnesses in this contested case hearing. [3] The three subpoenaed BWSR employees are Ken Powell, Wetland Banking Coordinator; Les Lemm, Wetland Conservation Act Coordinator; and Dale Krystosek, Wetland Special Project Lead. In its subpoena request, the County indicated that the proposed testimony of these individuals would relate to the following issues:
***2** 1. Ken Powell: Mr. Powell is familiar with the Williams Creek Wetland Mitigation restoration site and project and will provide testimony relevant to the suitability and viability of the restoration site for the development of replacement wetlands and the characteristics of wetlands that naturally occur in the landscape area. Mr. Powell will also provide testimony relevant to the wetland banking procedures under the Wetland Conservation Act.

2. Les Lemm: Mr. Lemm is familiar with the Williams Creek Wetland Mitigation restoration site and project and will provide testimony relevant to the suitability and viability of the restoration site for the development of replacement wetlands and the characteristics of wetlands that naturally occur in the landscape area. Mr. Lemm will also provide testimony relevant to the wetland banking procedures, the principles and standards for replacing wetlands, and the construction certification and monitoring procedures under the Wetland Conservation Act.

3. Dale Krystosek: Mr. Krystosek is familiar with the Williams Creek Wetland Mitigation restoration site and project and will provide testimony relevant to the suitability and viability of the restoration site for the development of replacement wetlands that naturally occur in the landscape area, and the impacts of drainage adjacent to Williams Creek site. Mr. Krystosek will also provide testimony relevant to the principles and standards for replacing wetlands and the construction certification and monitoring procedures under the Wetland Conservation Act. [4]

On April 28, 2015, Chief Administrative Law Judge Tammy Pust issued the requested subpoenas compelling the appearance of Messrs. Powell, Lemm and Krystosek at the contested case hearing in this matter.

Cliffs' Objections

Cliffs objects to the issuance of the subpoenas for the three BWSR employees. Cliffs contends that the testimony to be provided by these three witnesses is outside the realm of common knowledge and, as such, must be obtained from a qualified expert with sufficient experience, skill, knowledge, and education. Cliffs maintains that the County is essentially seeking to elicit expert witness testimony from lay witnesses without complying with the expert witness disclosure requirements of the Second Prehearing Order (Order) in this matter. [5] The Order required the County to "identify expert witnesses and serve expert witness statements for experts it intends to call in its case-in-chief, or for matters for which it has the burden of proof." [6] Cliffs points out that both it and the Department have filed timely expert witness disclosures in compliance with the Order. The County, on the other hand, did not file any expert witness disclosures despite indicating in its responses to Cliffs' interrogatories that it intends to elicit "expert opinion testimony" through the BWSR employees. [7]

Cliffs asserts that the proposed testimony from the three BWSR employees at issue concerns scientific and technical standards for wetland development, drainage and natural hydrology of the Williams Creek site, and related issues concerning the suitability and viability of the site to support restored wetlands. Cliffs contends that the testimony is clearly outside the realm of common knowledge and that the County is attempting to disguise expert witnesses as lay witnesses in order to avoid the written expert witness disclosure requirements. Cliffs argues that it is prejudicial to permit the County to provide expert testimony through the BWSR employees when Cliffs has not received a written report of the proposed export testimony and has not had the opportunity to depose the witnesses.

***3** Accordingly, Cliffs maintains that the subpoenas should be quashed or, in the alternative, the County should be compelled to file the appropriate written expert disclosures for the three employees and Cliffs should be provided the opportunity to depose the employees without delaying the current hearing schedule.

Cliffs also argues that the subpoenas should be quashed because the County seeks to introduce expert witness testimony not previously disclosed in discovery. According to Cliffs, the County indicated for the first time in the subpoena requests that Messrs. Powell, Lemm and Krystosek will testify to the ""characteristics of wetlands that naturally occur in the landscape area" and that Mr. Krystosek will testify to the "principles and standards for replacing wetlands and the construction certification and monitoring procedures under the Wetland Conservation Act." Cliffs contends that the County did not disclose any of this information during the discovery period, and thereby deprived Cliffs of the opportunity to depose these witnesses regarding their intended testimony.

County's Response

The County argues that Cliffs' motion to quash the subpoena is without merit and should be denied. The County asserts that it did not retain the BWSR employees to provide expert testimony within the meaning of Rule 702 of Minnesota Rules of Evidence. Instead, according to the County, the employees are "lay expert witnesses" who will testify based on facts they perceived in the course of their employment with BWSR. [8]

The County maintains that the BWSR employees are personally familiar with the Williams Creek Wetland Mitigation site and project, and that their opinions are based on facts to which they have each been exposed as a result of their employment with BWSR. The County asserts that each of the BWSR employees played a part in the review of the Williams Creek Wetland Mitigation Project approved by the DNR. As a result, each employee is being subpoenaed to testify about his first-hand knowledge and perception of the project. While these employees do have expertise, the County states that they are not witnesses who were ""retained" to give opinions on hypothetical questions, nor do they regularly provide testimony as part of their employment duties. Instead, the BWSR employees are fact witnesses. The County argues further that Cliffs was properly notified of its intent to elicit their testimony as fact witnesses and that any request on the part of Cliffs to depose these individuals now after discovery has closed should be denied.

Rules of Evidence

Rule 702 of the Minnesota Rules of Evidence states:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community. [9]

***4** Expert witness testimony is required where the subject matter of the testimony is outside the realm of common knowledge so that expert testimony can assist the trier of fact in reaching its decision. [10] However, the mere fact that a witness is capable of being qualified as an expert by virtue of his education, training, or experience does not serve as a valid objection to his expression of lay opinion testimony. [11] A written report is required of all witnesses who intend to provide expert testimony if the witness is "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." [12]

In contrast, Rule 701 of the Minnesota Rules of Evidence states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. [13]

The Committee Comment following Rule 701 notes:
The rule is consistent with existing practice in Minnesota. The rule permits testimony by means of opinion and inference when it is based on firsthand knowledge and will be helpful to an effective presentation of the issues. Because the distinction between fact and opinion is frequently impossible to delineate, the rule is stated in the nature of a general principle, leaving specific application to the discretion of the trial court. [14]

Under Minnesota case law, lay witness testimony is generally limited to inferences and opinions drawn from first-hand knowledge. [15]

Analysis

Under Rule 702 of the Minnesota Rules of Evidence, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify ""in the form of an opinion or otherwise" regarding scientific, technical, or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue. The basis for expert opinions ""acquired or developed in anticipation of litigation or for trial" must be disclosed under the Minnesota Rules of Civil Procedure. [16] An expert consulted prior to the time the party could anticipate litigation or before preparation for trial is not subject to the expert disclosure requirements but rather is covered by the discovery rules relating to non-expert witnesses. [17] Pursuant to Rule 701 of the Minnesota Rules of Evidence, non-expert lay witnesses may also provide opinion testimony if the testimony is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." [18]

The essential difference between a qualified expert witness and an ordinary witness who may also have expert credentials is that a qualified expert may testify not only as to first-hand knowledge, but may answer hypothetical questions based on facts made known to the expert at or before the hearing. [19] As noted previously, the mere fact that a witness could be qualified as an expert based on education, training or experience does not preclude that witness from expressing lay opinion testimony. [20] Similarly, the fact that the present hearing concerns highly technical and scientific wetland mitigation issues does not necessarily require a finding that the BWSR employees are expert witnesses within the scope of Rule 702.

***5** The record indicates that the County did not retain the three BWSR employees to provide expert testimony in this matter and it does not appear that their testimony will be based on information that was acquired or developed in anticipation of litigation or for this hearing. Rather, the three are employed by BWSR and are personally familiar with the Williams Creek Wetland Mitigation project. Based on the County's subpoena requests and its answers to interrogatories, their proffered testimony regarding the suitability and viability of the Williams Creek restoration site for the development of replacement wetlands appears to be primarily factual, based on the witnesses' first- hand knowledge, and thus is exempt from the disclosure requirements of Minn. R. Civ. P. 26.02(e). Testimony confined to these general matters does not run afoul of the rules governing expert disclosure. Cliffs' motion to quash the subpoenas based on the County's alleged violations of the expert witness disclosure requirements is denied.

The Administrative Law Judge also is not persuaded by Cliffs' argument that the subpoenas should be quashed because the County is seeking to introduce expert witness testimony not previously disclosed in discovery. Cliffs asserts that the County's April 24, 2015, subpoena requests were the first time the County indicated that Messrs. Powell, Lemm and Krystosek will testify to the ""characteristics of wetlands that naturally occur in the landscape area" and that Mr. Krystosek will testify to

the "principles and standards for replacing wetlands and the construction certification and monitoring procedures under the Wetland Conservation Act." However the record demonstrates that the County did, in fact, disclose in its March 30, 2015, Response to Interrogatory No. 5 that these witnesses would testify generally to the "suitability and viability" of the Williams Creek restoration site and the replacement standards under the Wetland Conservation Act. [21]

The deadline for the completion of discovery in this matter was April 1, 2015, just a few days after the County disclosed its intent to elicit "expert opinion testimony" from the BWSR employees. To avoid any possibility of prejudice, the Administrative Law Judge will allow Cliffs the opportunity to take the depositions of Messrs. Powell, Lemm and Krystosek prior to the hearing in this matter.

B. L. N.

1 Cliffs filed its Motion to Deny Respondents' Requests for Subpoenas two weeks after the subpoenas were issued. During the May 22, 2015, oral argument on the Department's Motion for Partial Summary Disposition and the County's Motion to Compel, the Administrative Law Judge indicated that Cliffs' motion would be treated as a Motion to Quash the Subpoenas.

2 Notice and Order for Hearing (June 27, 2014) at ¶¶ 23-32.

3 County's Subpoena Requests (filed April 24, 2015).

4 *Id. See also* Affidavit of Susan Wiens, Exhibit A (County's Response to Cliffs Interrogatory Requests), Response to Interrogatory Request 5.

5 SECOND PREHEARING ORDER (January 20, 2015).

6 *Id.*

7 *See* Aff. of S. Wiens, Ex. A (County's Response to Cliffs Interrogatory Requests), Response to Interrogatory Requests 4 and 5.

8 County's Memorandum in Opposition to Motion at 6 (May 28, 2015).

9 MINN. R. EVID. 702.

10 *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998).

11 *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg., Co., Inc.*, 199 F.R.D. 320, 323 (D. Minn. 2000).

12 MINN. R. CIV. P. 26.01(b)(2).

13 MINN. R. EVID. 701.

14 *Id.*, Committee Comment - 1977.

15 *See, e.g., ADT Sec. Servs., Inc. v. Swenson*, 276 F.R.D. 278, 320 (D. Minn. 2011) (if a witness is not testifying as an expert, then testimony expressing opinions or inferences is limited to those rationally based on the witness's own perception).

16 MINN. R. CIV. P. 26.02(e).

17 *Id.*, Advisory Committee Note - 1975.

18 MINN. R. EVID. 701.

19 *See Hartzell Manufacturing, Inc., v. American Chemical Technologies, Inc.*, 899 F. Supp. 405, 409 (D. Minn. 1995) (chemist employed by a third party with personal knowledge of the development of water glycol hydraulic fluids used in operating the plaintiff's machinery is not an expert witness).

20 *Id.* at 408 (*citing Farner v. Paccar, Inc.*, 562 F.2d 518, 529 (8th Cir. 1977)); *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg., Co., Inc.*, 199 F.R.D. 320, 323 (D. Minn. 2000).

21 Aff. of S. Wiens, Exhibit A (County's Response to Cliffs Interrogatory Requests), Response to Interrogatory Request No. 5.

2015 WL 3922873 (Minn.Off.Admin.Hrgs.)

End of Document

2015 WL 6456257 (Minn.Off.Admin.Hrgs.)

Office of Administrative Hearings

State of Minnesota

IN THE MATTER OF THE FURTHER INVESTIGATION IN TO ENVIRONMENTAL AND SOCIOECONOMIC COSTS UNDER MINNESOTA STATUTE 216B.2422, SUBDIVISION 3

***1 Public Utilities Commission**
OAH 80-2500-31888
MPUC E-999/CI-14-643
September 15, 2015

ORDER ON MOTIONS BY MINNESOTA LARGE INDUSTRIAL GROUP AND PEABODY ENERGY CORPORATION TO EXCLUDE AND STRIKE TESTIMONY

An evidentiary hearing is scheduled to be held in this matter on the issue of the cost of carbon dioxide before Administrative Law Judges LauraSue Schlatter and J. Jeffery Oxley on September 24-25 and 28-30, 2015, in the Large Hearing Room at the Public Utilities Commission, 350 Metro Square Building, 121 Seventh Place East, St. Paul, Minnesota.

Appearances:

Kevin Reuther, Leigh Currie and Kingston Hudson, Minnesota Center for Environmental Advocacy, represents The Izaak Walton League of America - Midwest Office, Fresh Energy and Sierra Club (Clean Energy Organizations or CEO).

Tristan L. Duncan, Shook, Hardy & Bacon, LLP, Kansas City, Missouri, represents Peabody Energy Corporation (Peabody).

Linda Jensen, Assistant Attorney General, represents the Minnesota Department of Commerce, Division of Energy Resources and the Minnesota Pollution Control Agency (Agencies).

Eric F. Swanson, Winthrop & Weinstine, PA, represents the Lignite Energy Council.

B. Andrew Brown and Hugh Brown, Dorsey & Whitney, LLP, represents Great River Energy (GRE), Minnesota Power and Otter Tail Power Company (OTP).

David Moeller, Minnesota Power, represents Minnesota Power Company.

James R. Denniston, Assistant General Counsel, represents Northern States Power Company, d/b/a Xcel Energy (Xcel).

Marc Al, and Andrew Moratzka, Stoel Rives, LLP, represent the Minnesota Large Industrial Group (MLIG).

Benjamin L. Gerber, Attorney at Law, represents the Minnesota Chamber of Commerce (Chamber).

Kevin P. Lee, Attorney at Law, represents Doctors for a Healthy Environment (Doctors).

Bradley Klein, Environmental Law & Policy Center, represents the Clean Energy Business Coalition (CEB).

On Thursday, September 3, 2015, the MLIG filed a Motion to strike the testimony of Dr. Michael Hanemann, Dr. Stephen Polasky and parts of the testimony of Nicholas Martin. On the same date, Peabody also filed a Motion to exclude the direct and rebuttal testimony of Drs. Hanemann and Polasky in their entirety, and certain parts of Mr. Martin's testimony.

On Friday, September 11, 2015, the Agencies, the CEOs and Xcel filed Response(s) to MLIG's and Peabody's Motions.

Based upon the all of the records and the proceedings in this matter, and for the reasons discussed in the Memorandum that follows, the undersigned Administrative Law Judge makes the following:

ORDER:

1. The motions brought by MLIG and Peabody to exclude the testimony of Drs. Hanemann and Polasky are DENIED.

2. The motions brought by MLIG and Peabody to exclude certain parts of Mr. Martin's testimony are DENIED.

***2** 3. The following changes have been made to the schedule for the proceedings in this matter: All unaffected provisions of the earlier Prehearing Orders remain in effect.

Dated: September 15, 2015

LauraSue Schlatter
Administrative Law Judge

MEMORANDUM

Introduction

In its October 15, 2014 Notice and Order for Hearing, the Commission ordered the parties to specifically and thoroughly address "whether the Federal Social Cost of Carbon is reasonable and the best available measure to determine the environmental cost of CO_2 under Minn. Stat. § 216B.2422 and, if not, what measure is better supported by the evidence." [1] The Commission also directed the parties to address the appropriate values for particulate matter, sodium dioxide and nitrogen oxides (collectively, the Criteria Pollutants). The evidentiary hearing scheduled to start on September 24, 2015 will focus solely on questions relating to CO_2, with a separate evidentiary hearing to address the Criteria Pollutants.

Peabody and MLIG Arguments

The MLIG and Peabody seek to completely exclude the economists whose testimonies are offered by the parties urging the Commission adoption of the Federal Social Cost of Carbon (SCC) as the cost of CO_2 pursuant to Minn. Stat. § 216B.2422, subd. 3 (2014). Dr. Hanemann is the Agencies' witness and Dr. Polasky is testifying on behalf of the CEOs. In addition, Peabody and the MLIG seek to exclude those portions of Xcel's witness Nicholas Martin which are related to his alternative statistical approach to determining the SCC. [2]

Evidentiary Standards

The MLIG and Peabody argue that the testimony of Drs. Hanemann and Polasky should be excluded because, as experts, their opinions rest on the work and conclusions of other experts whose testimony is not available in this proceeding. This, the MLIG and Peabody insist, violates the standards for admissibility in administrative hearings under Minn. Stat. § 14.60, subd. 1 (2014) and of Minn. R. Evid. 702 regarding expert witness testimony. [3]

Peabody and the MLIG cite cases for the propositions that: a) the requirements of Minn. R. Evid. 702 have been applied in the context of administrative hearings,[4] although the Minnesota rules of evidence are not mandated to apply directly in administrative proceedings;[5] b) expert testimony that simply adopts double hearsay should be excluded;[6] c) claims fail when supporting evidence does not identify an author;[7] and d) testimony can be overcome by contrary testimony offered in court and subject to cross-examination.[8] Based on this case law, and because the challenged testimony falls outside the witnesses' areas of expertise, relies on opinions of other experts who are not themselves witnesses in this proceeding, and relies on data that is not the type of evidence on which reasonable, prudent persons are accustomed to relying in the conduct of their serious affairs, Peabody and the MLIG assert that the testimony does not meet the required evidentiary standards for a contested case proceeding.

Testimony of Drs. Hanemann and Polasky and Mr. Martin

***3** Peabody asserts that the federal Interagency Working Group (IWG) that developed the SCC "made numerous subjective judgments that directly influence how the numbers come out" in a process that suffered from a lack of transparency.[9] Peabody quotes from a Government Accounting Office (GAO) audit of the SCC development which stated that "[m]any participants told [the GAO] that the working group spent most of its meeting time reviewing and discussing academic literature to help decide on values for three key modeling inputs to run in each model" which were ultimately decided by the IWG's subjective judgments.[10] Peabody notes that, according to the GAO Audit, the use of those inputs in running the models for calculating the SCC estimates was supervised by EPA officials.[11] Peabody characterizes the IWG as "a black box out of which the Federal SCC values were drawn."[12] Peabody insists that testimony from witnesses "who simply claim 'the IWG got it right' should be excluded as unreliable double hearsay."[13]

Peabody and the MLIG argue that Drs. Hanemann and Polasky, and Mr. Martin lack the requisite experience, personal knowledge and expert background to be permitted to testify because they have no first-hand experience operating the integrated assessment models (IAMs) which are the basis for the SCC numbers, they did not participate in the IWG or participate in the scientific work involved in the IPCC's underlying calculations on which the cost of carbon is based. Peabody and the MLIG insist these witnesses are asking the Administrative Law Judge to "take it on faith that the IWG is correct" but ""fail to produce probative affirmative evidence that would guide the Commission in rendering its decision."[14]

Peabody specifically challenges the ways in which Drs. Hanemann and Polasky and Mr. Martin accept and then use the work product of the IWG.[15] To allow the challenged testimony, argues Peabody, is to effectively reverse the burden of proof by assuming the correctness of the IWG's SCC.[16] Peabody contends that this problem is compounded because the IWG relied on the IPCC's scientific findings. The challenged testimony's reliance on the IWG's conclusions without analysis of the IPCC's science amounts to double hearsay, according to Peabody.[17] Peabody makes a number of arguments challenging the credibility of the IPCC and its role "as an engine for scientific consensus,"[18] ultimately concluding that the reliability of the IPCC's work product is a contested issue.[19]

Peabody separately attacks Mr. Martin's statistical testimony, claiming he failed to use reliable statistical methods in his analysis.[20] Peabody also attacks the analysis because it was performed by a third party, the Brattle Group, whose testimony Xcel has not proffered in this docket.[21]

Responsive Arguments

Evidentiary Standards

All three parties whose witnesses are challenged in these two motions dispute the MLIG and Peabody's characterization of the applicable legal standard involved. The Agencies, CEOs and Xcel all focus initially on the discretion of the Administrative Law Judge to "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." [22]

***4** The Agencies also note that, to the extent the contested case proceeding rules are silent, when ruling on a motion, the Administrative Law Judge shall apply the Minnesota Rules of Civil Procedure for the District Courts "to the extent it is determined appropriate in order to provide a fair and expeditious proceeding." [23] The Agencies point out the language in Minn. R. Evid. 702 which provides "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." [24] In addition, the Agencies note Minn. R. Evid. 703(a) which permits experts, in forming opinions or inferences, to rely upon facts or data that need themselves not be admissible in evidence "[i] of a type reasonably relied upon by experts in the particular field ...." [25]

The Agencies quote *Chang v. Alliant Techsystems*, [26] one of the cases cited by the MLIG and Peabody, asserting that the Administrative Law Judge in that case largely incorporated the standards in Rules 702 and 703 when she found that expert testimony is "generally admissible if: (1) it assists the trier of fact, (2) it has a reasonable basis, (3) it is relevant, and (4) its probative value outweighs its potential for unfair prejudice." [27]

The CEOs and Xcel both emphasize that, even where technical questions are involved, the Administrative Law Judge need not look to the evidentiary rules governing expert testimony because the evidentiary standards are designed for jury trials but that a skilled trier of fact reviews the evidence in contested cases. [28] Xcel argues that it is not necessary to comply with formal evidentiary rules "to ensure the probative value of the prefiled testimony" which is proposed as evidence in a proceeding such as this. [29] In addition, Xcel asserts that a witness can adopt the testimony of another witness if the person's training and experience "appears to qualify the person to adopt the objective portions of the testimony," while still allowing the depth of the witness' knowledge to be the subject of cross-examination at the hearing. [30]

The CEOs note that Administrative Law Judge Klein came to the same conclusion in *In the Matter of the Quantification of Environmental Costs Pursuant to Laws of Minnesota 1993, Ch. 356, Section 3.* [31] In that docket, argue the CEOs, Judge Klein stated "it must always be kept in mind that the strict Rules of Evidence, designed to keep evidence away from juries, do not apply to this proceeding" and that "[i]t is neither necessary nor appropriate to use stricter evidentiary standards, many of which were devised to protect parties from juries who were thought to be unable to deal with complex matters." [32] Furthermore, the CEOs maintain, Judge Klein found that it was better to err on the side of admitting evidence in order to create as complete a record as possible to allow both the Administrative Law Judge and the Commission to make accurate, reliable decisions. Both the Administrative Law Judge and the Commission could weigh the admitted evidence at the end of the proceeding rather than excluding it before the hearing began. [33] The CEOs observe that Judge Klein's reasoning and results were affirmed by the Commission as well as the Court of Appeals. [34]

Dr. Hanemann

***5** The Agencies argue that Dr. Hanemann's knowledge, skill, experience and education qualify him as an expert on the topics on which he testifies. [35] Moreover, the Agencies contend that Dr. Hanemann's lack of personal experience ""running" the IAMs and the fact that he did not personally participate in the IWG process do not disqualify him from testifying as an expert on the topics on which he testifies. [36] The Agencies review Dr. Hanemann's qualifications in general, as well as his specific familiarity

with IAMs, the social cost of carbon, and damages caused by climate change. [37] There is no special skill required, the Agencies contend, to running an integrated assessment model. The Agencies assert that expertise and skill are essential to interpret and assess the underlying equations, and that they have demonstrated Dr. Hanemann possesses the requisite expertise and skills as well as experience to perform that interpretation and assessment. [38]

The Agencies maintain that the fact that there are no witnesses who personally participated in the IWG process is immaterial to the issues in this docket, and to Dr. Hanemann's ability to testify. [39] The Agencies dispute Peabody's characterization of the IWG as a "black box," pointing out that the IWG issued technical support documents in 2010 and 2013, and that the Electric Power Research Institute issued its own report on the IWG's procedures. The Agencies cite to the prefiled testimony where all of these reports can be found in the prehearing record in this proceeding. [40] In addition, the Agencies note, Dr. Hanemann stated in his direct prefiled testimony that three people who participated in the IWG published a peer-reviewed journal article in which they described the process of developing the SCC. [41] The Agencies strongly dispute Peabody's assertion that Dr. Hanemann is unable to explain why certain IAM parameters were chosen or changed by the IWG, and provide brief summaries of Dr. Hanemann's explanations. [42] The Agencies assert that Dr. Hanemann is very familiar with the most recent IPCC Report, released in four parts between September 2013 and November 2014, because he was instrumental in preparing it. [43]

Overall, the Agencies assert that Dr. Hanemann's testimony is relevant and reasonable, and that its probative value outweighs its potential for unfair prejudice. The Agencies insist Dr. Hanemann is well-qualified and that his testimony will assist the Administrative Law Judge in this proceeding.

Dr. Polasky

The CEOs contend that Dr. Polasky is well-qualified to provide expert testimony on the central question at issue in the CO_2 portion of this docket. [44] The CEOs maintain that his lack of expertise as a scientist does not disqualify him as an expert economist. The CEOs observe that they have two other witnesses who are experts in the field of climate sensitivity and who have offered rebuttal and surrebuttal testimony. [45] Furthermore, the CEOs assert, Dr. Polasky's reliance on the underlying data from the IPCC does not diminish his competence or the admissibility of his testimony. [46] The CEOs submit that Dr. Polasky's testimony is probative evidence because it analyzes the SCC values developed by the IWG, including the process by which they were developed, to determine whether they are reasonable. [47]

***6** The CEOs also defend Dr. Polasky's reliance on the IWG process, and the information provided from that process, even given his personal lack of participation in the process. The CEOs point out that independent, expert review of the IWG process and decisions is probative, helpful evidence to answer the question asked by the Commission: whether the IWG's SCC is reasonable. [48] The CEOs refute Peabody's characterization of the GAO's audit of the IWG process, and claim that the process was one on which a reasonably prudent person could rely. [49]

Mr. Martin

Xcel maintains that Mr. Martin's testimony meets the legal standards for admissibility because it has "probative value ... commonly accepted by reasonable prudent persons in the conduct of their affairs" based on Mr. Martin's understanding of the process by which the SCC was derived, ability to explain that process and to discuss its strengths and weaknesses as demonstrated in his direct testimony. Furthermore, Xcel contends that the value of Mr. Martin's testimony is demonstrated by his descriptions of how Xcel used the IWG data to derive its recommended costs range. [50] Xcel asserts that Mr. Martin's competence is demonstrated both through his testimony and his resume; and that his testimony is relevant and material to the

issues in the CO_2 portion of this proceeding. Xcel notes that Mr. Martin's testimony cannot be considered repetitious because Xcel's recommended approach to the question of the SCC is unique among the parties. [51]

Xcel offers Mr. Martin as a policy witness, not as a climate scientist or a statistician. [52] Xcel reviews Mr. Martin's qualifications to testify as a policy witness and explains that the issues confronting the Administrative Law Judge and the Commission "requires balancing multiple criteria" making this proceeding "inherently a public policy matter," and, thus, "a policy witness's testimony relevant." [53] Furthermore, Xcel asserts, "[m]ost of the decisions with the greatest impact [on] the value of the SCC are in fact policy judgments rather than matters of objective scientific fact." [54]

Xcel reiterates the decision criteria Mr. Martin proposed in his direct testimony, asserting that he is the witness in this proceeding who has offered detailed standards the Administrative Law Judge and the Commission can apply to differentiate the various proposals on the environmental cost of CO_2. [55] Xcel maintains that Mr. Martin has explicitly declined to comment on questions outside his areas of expertise. [56]

Xcel does not claim that Mr. Martin is either a climate scientist or a statistician. [57] However, Xcel argues that Mr. Martin is able to offer probative, competent and relevant testimony regarding the work of the IWG, its strengths and weaknesses, and to support Xcel's approach to calculating the external cost of CO_2 without such expertise, by applying the policy criteria he proposed in his direct testimony. [58]

***7** Xcel points out that the calculations underlying Xcel's proposal were performed by principals at the Brattle Group (Brattle) and their qualifications were part of Mr. Martin's prefiled testimony. [59] In addition, Xcel states Mr. Martin provided all parties with the raw data Brattle used to perform the relevant statistical calculations, as well as the software code and a live Excel file detailing Brattle's results, so that any party could validate, replicate or revise Xcel's methods, "or create their own range using percentiles, discount rates, or subjective policy judgments they prefer." [60] Xcel contends that no party has challenged any of the calculations in Mr. Martin's testimony. While some have argued that different techniques should be used, none have applied different techniques to the IGW raw data. Xcel claims that, given this level of transparency, and the indicia of the accuracy of the statistical calculations supporting Mr. Martin's testimony, the probative value of his testimony is established. [61]

To the extent that Peabody and the MLIG connect Mr. Martin with Dr. Hanemann and Dr. Polasky as a witness who supports adoption of the Federal SCC, or accepts the IWG's work without criticism, Xcel rejects this characterization, pointing out that Mr. Martin explicitly opposes adoption of the Federal SCC and that, like Xcel, the MLIG uses the data underlying the IWG's SCC values. [62] Xcel points out that, if participation in the IWG is a requirement to qualify a witness, then none of Peabody's or the MLIG's witnesses would qualify. [63] Xcel similarly argues that the requirement that a witness have personal experience running IAMs would disqualify most of Peabody's witnesses, and that this is not an appropriate standard for determining whether Mr. Martin's testimony has probative value. [64] Xcel concludes that Mr. Martin's testimony meets the legal standard for admissible testimony.

IPCC Evidence

The Agencies disputed Peabody's challenge to the credibility and authority of the IPCC Assessment Reports (IPCC Reports), arguing that the IPCC Reports are internationally regarded as authoritative. The Agencies quoted the IPCC's website describing the organization:
The assessment reports involve thousands of scientists with expertise in climate science.

....

The IPCC is a scientific body under the auspices of the United Nations (UN). It reviews and assesses the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change. It does not conduct any research nor does it monitor climate related data or parameters.

Thousands of scientists from all over the world contribute to the work of the IPCC on a voluntary basis. Review is an essential part of the IPCC process, to ensure an objective and complete assessment of current information. IPCC aims to reflect a range of views and expertise.

....

The IPCC is an intergovernmental body. It is open to all member countries of the United Nations (UN) and [World Meteorological Organization] WMO. Currently 195 countries are members of the IPCC. Governments participate in the review process and the plenary Sessions, where main decisions about the IPCC work programme are taken and reports are accepted, adopted and approved. The IPCC Bureau Members, including the Chair, are also elected during the plenary Sessions.

***8** Because of its scientific and intergovernmental nature, the IPCC embodies a unique opportunity to provide rigorous and balanced scientific information to decision makers. By endorsing the IPCC reports, governments acknowledge the authority of their scientific content. The work of the organization is therefore policy-relevant and yet policy-neutral, never policy-prescriptive. [65]

The Agencies quote from the Norwegian Nobel Committee, which awarded the 2007 Nobel Peace Prize to the IPCC, stating, "Through the scientific reports it has issued over the past two decades, the IPCC has created an ever-broader informed consensus about the connection between human activities and global warming." [66]

The Agencies dispute Peabody's assertion that a recent comprehensive poll of climate scientists found that only 43 percent of those polled agreed with the entire keystone statement written in the most recent IPCC report, written by Working Group 1. [67] The Agencies' state that they are unable to find the source of the quoted statement and their own expert cites to a peer-reviewed paper based on the cited survey that came to the conclusions that "90% of respondents with more than 10 climate-related peer-reviewed publications (about half of all respondents), explicitly agreed with anthropogenic greenhouse gases (GHGs) being the dominant driver of recent global warming." [68]

The CEOs contend that the Commission has already determined the IPCC reports are competent evidence. The CEOs quote the Commission's comments in the 1993 Externalities Docket regarding IPCC reports: "IPCC reports are the most authoritative sources available for information on climate change issues. Before publication, IPCC research reports are developed by technical committees composed of experts throughout the international scientific community and are subject to a rigorous multi-level peer-review process." [69]

Analysis

Evidentiary Standards

The Administrative Law Judge finds that the contested case rules do not require her to apply the stricter rules of evidence in this proceeding. Minn. R.1400.7300 (2015) sets forth the standards for admissible evidence in a contested case proceeding. While Minn. R. 1400.6600 directs the Administrative Law Judge to turn to the Rules of Civil Procedure for the District Court to the extent the administrative rules are silent, that direction only applies if "it is determined appropriate in order to promote a fair and expeditious proceeding."

In this case, there is no reason to impose the requirements of the Minnesota Rules of Evidence. The contested case process does not involve a jury. An Administrative Law Judge is always the trier of fact. [70] As an experienced trier of fact, the Administrative Law Judge can rely on the process of cross-examination to highlight challenges to the credibility of all witnesses, including expert witnesses. In addition, as this case dramatically demonstrates, it serves the Administrative Law Judge as well as the Commission's purposes to admit evidence into the record in order to create a complete record for thorough review and accurate, reliable decisions. Were the Administrative Law Judge to exclude the testimony of Drs. Hanemann and Polasky, one of the central questions of the Commission's investigation would not be able to be answered. That would not promote a fair and expeditious proceeding.

***9** Even if Rule 702 were to apply to Drs. Hanemann and Polasky, they would qualify as experts. They are qualified by their knowledge, skill and experience as well as their education to testify regarding the reasonableness of the Federal SCC and their testimony will likely assist the Administrative Law Judge to understand the evidence as well as to determine facts in issue.

While the MLIG and Peabody challenge the reliability of the foundations of their opinions, those are questions that are properly raised on cross-examination in this proceeding. The Advisory Committee Comment to the 2006 Amendments to Rule 702 stated: "The required foundation will vary depending on the context of the opinion, but must lead to an opinion *that will assist the trier of fact*." [71]

The Agencies and the CEOs have demonstrated that Dr. Hanemann's testimony and Dr. Polasky's testimony would qualify under Minn. R. Evid. 702. They have demonstrated that the IWG process was reasonably transparent, that the witnesses are familiar with the process and that they have a sufficient knowledge of the IAMs to provide testimony regarding them. Similarly, they have provided ample evidence to demonstrate that the IPCC Reports are more than sufficiently reliable for the witnesses to rely on to form the foundations for their opinions. Their knowledge and opinions are central to a crucial issue in this matter and thus will assist the trier of fact.

More importantly, the Agencies and the CEOs have demonstrated that these witnesses' testimony has probative value, that their testimony is competent, relevant and material and thus admissible under Minn. R. 1400.7300. The Administrative Law Judge finds that exclusion of their testimony would not promote a fair and expeditious proceeding.

Xcel has also demonstrated that Mr. Martin's testimony should be admitted in its entirety. While clarifying that it does not seek to qualify Mr. Martin as an expert statistician, Xcel has shown that Mr. Martin's testimony is probative, competent, relevant and material. The fact that Mr. Martin relies in part on calculations made by Brattle does not make his testimony based on those calculations inadmissible. Xcel provided documentation establishing Brattle's qualifications, the underlying data, applicable software and even a live Excel spreadsheet so the other parties can manipulate the data if they choose. Given this extensive documentation, Brattle's calculations are admitted.

The Administrative Law Judge notes that this Order and Memorandum only go to the admissibility of the testimony, not to its weight. The purpose of the evidentiary hearing is for parties who have questions about any testimony to ask those questions. To the extent that parties wish to continue to challenge any of the testimony, including the foundational elements that are allowed by this Order, those challenges are properly made in the process of cross-examination. Such cross-examination, appropriately executed, is helpful to the trier of fact in ultimately determining the weight to give testimony, including opinion testimony.

***10** L. S.

1 *In the Matter of the Further Investigation into Environmental and Socioeconomic Costs Under Minn. Stat. § 216B.2422, Subd. 3*, Docket No. E-999/CI-14-643 (CI-14-643), NOTICE AND ORDER FOR HEARING (October 15, 2014) (ORDER FOR HEARING).

2 According to the MLIG Motion, the challenged portions of Mr. Martin's testimony are at pages 51-70 of his June 1, 2015 Direct Testimony and "the related portions" of his Rebuttal Testimony are at pages 50:18-51:3 and 54:3-56:5. MINNESOTA LARGE INDUSTRIAL GROUP'S MOTION TO STRIKE at 4 (September 3, 2015) (MLIG Motion).

3 PEABODY ENERGY CORPORATION MOTION TO EXCLUDE DR. MICHAEL HANEMANN AND DR. STEPHEN POLASKY AND CERTAIN OPINIONS OF NICHOLAS F. MARTIN at 4 (September 3, 2015) (Peabody Motion 1) and MLIG Motion at 2.

4 *Chang v. Alliant Techsystems, Inc.*, 2000 WL 33321188 at *2 (Minn. Off. Admin. Hrgs.) (June 2000).

5 *In re Dairy Dozens-Thief River Falls, LLP*, 2010 WL 2161781 at *17 (Minn. Ct. App.) (June 1, 2010).

6 *In re Saint Cloud Wastewater Treatment Plant NPDES Permit*, 2004 WL 5138987 at *5-6 (Minn. Pol. Control Agency) (Dec. 17, 2003); *In re Order to Forfeit a Fine Against the Child Foster Care License of Delmar and Manila Wiebe*, 2010 WL 71077 at *5 (Minn. Off. Admin. Hearings) (Feb. 3, 2010).

7 *In re Teaching License of Julia O. Lund*, 2009 WL 1219459 at *9-10 (Minn. Off. Admin. Hrgs.) (April 9, 2009).

8 *In re Resident Agency License of Northwest Title Agency, Inc.*, 2013 WL 1781053 at *13 (Minn. Off. Admin. Hrgs.) (Apr. 16, 2013).

9 Peabody Motion 1 at 2.

10 *Id.* at 2-3 *quoting* GAO, *Regulatory Impact Analysis: Development of Social Cost of Carbon Estimates* at 13-14 (July 2014) (GAO Audit).

11 Peabody Motion 1 at 3, GAO Audit at 15.

12 Peabody Motion 1 at 3.

13 *Id.* at 3 (no internal citation provided).

14 Peabody Motion 1 at 6-7.

15 *Id.* at 8-9.

16 *Id.* at 9.

17 *Id.* at 10.

18 *Id.* at 13.

19 *Id.* at 16.

20 *Id.* at 16.

21 *Id.* at 17; *see* MLIG Motion at 3-4.

22 Minn. R.1400.7300, subp. 1 (2015). *See* Minn. Stat. § 14.60, subd. 1. RESPONSE OF AGENCIES TO PEABODY AND MLIG MOTIONS IN LIMINE TO EXCLUDE EXPERT WITNESS DIRECT AND REBUTTAL TESTIMONY at 2 (September 11, 2015) (Agencies' Response); CLEAN ENERGY ORGANIZATIONS' RESPONSE TO MLIG'S MOTION TO STRIKE THE TESTIMONY OF DR. STEPHEN POLASKY at 2 (September 11, 2015) (CEO's Response to MLIG); CLEAN ENERGY ORGANIZATIONS' RESPONSE TO PEABODY ENERGY'S MOTION TO STRIKE THE TESTIMONY OF DR. STEPHEN POLASKY at 2 (September 11, 2015) (CEO's Response to Peabody); XCEL ENERGY'S RESPONSE TO MOTIONS FILED BY PEABODY ENERGY AND MLIG TO STRIKE CERTAIN DIRECT AND REBUTTAL TESTIMONY OF NICHOLAS MARTIN at 1-2 (September 11, 2015) (Xcel's Response).

23 Minn. R. 1400.6600 (2015). Agencies' Response at 2.

24 *See* Agencies' Response at 2.

25 Minn. R. Evid. 703(a). Agencies' Response at 2.

26 *Chang v. Alliant Techsystems, Inc.*, 2000 WL 33321188 at *2 (Minn. Off. Admin. Hrgs.) (June 2000).

27 *Chang* at *3, *citing State v. Jensen*, 482 N.W.2d 238, 239 (Minn. Ct. App. 1992), *rev. denied* (Minn. May 15, 1992), *citing State v. Schwartz*, 447 N.W.2d 422, 424 (Minn. 1989).

28 *See Padilla v. Minn. State Bd. of Med. Exam'rs.*, 382 N.W. 2d 876, 882 (Minn. Ct. App. 1986); *Lee v. Lee*, 459 N.W. 2d 365, 369 (Minn. Ct. App. 1990).

29 Xcel's Response at 2, *citing In the Matter of US West Communications to Grandparent CENTRON Services*, PUC Docket No. P-421/EM-96-471, FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER at 5 (December 23, 1996).

30 Xcel's Response at 2, *citing In re Saint Cloud Wastewater Treatment Plant NPDES Permit*, 2004 WL 5138987 at *6 (Minn. Pol. Control Agency) (Feb. 2004);

31 *In the Matter of the Quantification of Environmental Costs Pursuant to Laws of Minnesota 1993, Ch. 356, Section 3*, POST-HEARING RULING ON EVIDENTIARY MOTIONS (Nov. 16, 1995).

32 *Id.* at 4 and 6. CEOs Response to MLIG at 3.

33 CEOs Response to MLIG at 3-4, *citing* EVIDENTIARY ORDER at 5.

34 CEO's Response to MLIG at 4, *citing In the Matter of the Quantification of Environmental Costs Pursuant to Laws of Minnesota 1993, Ch. 356, Section 3*, 1997 WL 34658085 (Minn. P.U.C. 1997) (Environmental Costs 1997) and *In the Matter of the Quantification of Environmental Costs*, 578, N.W.2d 794, 800-01 (Minn. Ct. App. 1998).

35 Agencies' Response at 3.

36 *Id.* at 9.

37 *Id.* at 4-7.

38 *Id.* at 7-8.

39 *Id.* at 10.

40 *Id.* at 10-11; *See* f.n. 15, *citing* Agencies Ex. ___ at WMH-2 (Hanemann Direct) (IWG Report 2010); Agencies Ex. at WMH-3 (Hanemann Direct) (IWG Report 2013); Agencies Ex. ___ at WMH-5 (EPRI Report).

41 Agencies' Response at 11, *citing* Agencies Ex. at 5 and WMH-4 (Hanemann Direct).

42 Agencies' Response at 11.

43 *Id.* at 16.

44 CEOs' Response to MLIG at 5.

45 CEOs' Response to Peabody at 5.

46 *Id.* at 5.

47 CEOs' Response to MLIG at 6.

48 CEOs' Response to Peabody at 5.

49 CEOs' Response to MLIG at 6.

50 Xcel's Response at 3.

51 *Id.* at 3.

52 *Id.* at 4.

53 *Id.* at 4.

54 *Id.* at 4.

55 *Id.* at 5-6.

56 *Id.* at 6, *citing* Ex. ___ at 34-35 (Martin Rebuttal).

57 Xcel's Response at 6-7.

58 *Id.* at 6-7.

59 *Id.* at 7, *citing* Ex. ___ at 54 and Schedule 9 (Martin Direct).

60 Xcel's Response at 7-8, *citing* Ex. _ Schedules 10 and 11 (Martin Direct); Ex. _ Schedule 4 (Martin Rebuttal).

61 Xcel's Response at 8.

62 Xcel's Response at 9, *citing* Ex. _ at 3-4, 50 (Martin Direct) at 3-4, 50; Ex. _ at 5 (Martin Rebuttal); Ex. _ at 3 (Martin Surrebuttal).

63 Xcel's Response at 10.

64 *Id.* at 10-11.

65 Agencies' Response at 14-15, *citing* http://www.ipcc.ch/organization/organization.shtml

66 Agencies' Response at 16, *citing* http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/press.html

67 Agencies' Response at 17.

68 *Id.* at 16, *citing* Agencies Ex. at 9-10 (Gurney Surrebuttal), *citing* Verheggen et al., *Env. Sci. & Tech.*, 48 at 8963-8971 (2014).

69 CEOs' Response to Peabody at 5, *citing* Environmental Costs 1997 at 19.

70 Environmental Costs 1997 at 5; *Padilla v. Minn. State Bd. of Med. Exam'rs.*, 382 N.W.2d 876, 882 (Minn. Ct. App. 1986); *Lee v. Lee*, 459 N.W.2d 365, 369 (Minn. Ct. App. 1990).

71 Minn. R. Evid. 702 (2015), Advisory Committee Comment - 2006 Amendments.

2015 WL 6456257 (Minn.Off.Admin.Hrgs.)

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Court of Appeals of Minnesota.

In the Matter of the Revocation of the Family Child Care License of Jeannie BALL.

No. A10–359.
|
March 22, 2011.

West KeySummary

1 Infants
Background checks
211 Infants
211VIII Child Care
211k1390 Providers and Staff
211k1393 Background checks
(Formerly 211k17.5)
Substantial evidence supported the finding that childcare licensee failed to seek necessary background checks on employees, thereby supporting the revocation of her license. Evidence indicated that licensee hire employee and did not seek a background check. Evidence further indicated that employee had direct contact with children on two occasions and was paid for her services. In addition, a 13-year-old "helper" had direct contact with children without continuous, direct supervision by licensee. Minn.Stat. § 245C.03(1)(a)(3)-(4).

Minnesota Department of Human Services, File No. 4–1800–20310–2.

Attorneys and Law Firms

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Lori Swanson, Attorney General, St. Paul, MN, Joseph M. Fischer, Assistant St. Louis County Attorney, Duluth, MN, for respondent commissioner of human services.

Considered and decided by ROSS, Presiding Judge; CONNOLLY, Judge; and CRIPPEN, Judge. *

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

UNPUBLISHED OPINION

ROSS, Judge.

***1** The Minnesota Department of Human Services Commissioner revoked Jeannie Ball's childcare license for failing to conduct background checks on childcare workers, failing to remove a disqualified caregiver, and failing to provide information during the investigation of these things. In this certiorari appeal, Ball challenges the revocation, claiming that new evidence, the violation of her due process rights, and the acceptance of inadmissible evidence requires reversal. She also disputes the commissioner's findings of fact and the degree of the sanction. Because we conclude that there were no factual or procedural errors or constitutional violations, and because the commissioner acted within his discretion by revoking Ball's license, we affirm.

FACTS

Until the February 2009 revocation of her childcare license, Jeannie Ball had been providing twenty-four-hour childcare service for 19 years out of her Duluth home. Ball held her license under Minnesota Statutes chapter 245A (2010). A series of events constituted statutory violations and led to the revocation.

In December 2007, Ball responded to nursing student Amber Griffith's Craigslist.com nannying-job posting. Ball interviewed Griffith for a position at her childcare facility but she did not obtain a statutorily required background check. Ball left Griffith alone to watch children on two occasions. Griffith reported Ball's failure to request the background check. She also reported that a 13–year–old boy, T.D., was assisting at the childcare facility by changing diapers and helping children get their shoes on. St. Louis

County investigated and issued Ball a correction order for not conducting background studies on Griffith and T.D. The Department of Human Services then issued Ball a two-year conditional license requiring her to strictly comply with the statutory requirements.

In March 2008, Ball requested a background study for a new substitute caregiver, Margaret Markey. Based on the study, the county determined that Markey was disqualified from directly caring for children. It notified both Markey and Ball that Markey could not be present in Ball's facility unless Markey requested reconsideration within 15 days. Neither the county nor the department received a timely request for reconsideration. But Markey continued working for Ball.

In July, the county received a complaint about a hungry child and improper disciplinary techniques at Ball's facility. County officials sought an appointment with Ball to investigate. They left telephonic voice messages, sent certified letters, and made an unannounced visit. Ball responded with a telephone message of her own asking for a copy of the complaint. Because Ball did not offer to make herself available for an interview as required by section 245A.07, subdivision 3, the county issued Ball another correction order for withholding relevant information during an investigation.

Also in July, Ball took the children to a playground where a two-year-old boy cut his face on a metal bracket on a slide. Ball immediately cleaned the cuts and applied adhesive bandages. She called the boy's mother and informed her that he need not be picked up immediately or see a doctor. When the mother arrived hours later, she was surprised by the severity of her son's cuts. She took him to the hospital, where he received 23 stitches. The mother complained to the county. The county temporarily suspended Ball's license, instigated a maltreatment investigation, and concluded that Ball had committed medical neglect.

***2** In February 2009, the department revoked Ball's childcare license. The revocation was based on medical neglect and her failure to comply with terms of her conditional license, to remove a disqualified caregiver, to provide adequate supervision, to ensure playground equipment was appropriate, and to cooperate with the county's investigation. Ball appealed to an Administrative Law Judge (ALJ).

The ALJ heard the matter and concluded that Ball had violated Minnesota Statutes sections 245C.05, subdivision 2, 245C.18(1), and 245A.07, subdivision 3(a), by not requesting background studies for Griffith and T.D., failing to remove a disqualified caregiver, and knowingly withholding information from the complaint investigation. He recommended that the commissioner revoke Ball's license. The commissioner adopted the ALJ's findings and concluded that the violations warranted the license revocation. The commissioner denied Ball's request for reconsideration. This certiorari appeal follows.

DECISION

Ball contends that the commissioner improperly revoked her childcare license. We afford administrative agency decisions a presumption of correctness and reverse them only when they exceed the agency's statutory authority or jurisdiction, are made upon unlawful procedure, are arbitrary and capricious, reflect an error of law, or are unsupported by substantial evidence. Minn.Stat. § 14.69 (2010); *In re Revocation of the Family Child Care License of Burke,* 666 N.W.2d 724, 726 (Minn.App.2003). We will defer to the agency's fact finding. *Dokmo v. Indep. Sch. Dist. No. 11,* 459 N.W.2d 671, 675 (Minn.1990).

I

Ball first asks us to remand with leave under Minnesota Statutes section 14.67 (2010) to present additional evidence to the commissioner. She claims she has new evidence related to Markey's disqualification that she did not have access to until after the administrative proceeding. A licensee can request leave to augment the agency's record with additional evidence if the court of appeals decides the new evidence is material and that good reasons excuse the licensee's failure to have presented it to the agency. Minn.Stat. § 14.67. But the record reflects that all three documents that Ball suggests are new were admitted and considered by the ALJ. We need not review whether the purportedly new evidence is "material" or whether "good reasons" prevented Ball from presenting it earlier, because it is not new.

II

We next address Ball's assertion that her due process rights were violated because the department did not provide her with notice that it planned to submit exhibits relating to her prior violations record and those exhibits were admitted

by the ALJ. *See* U.S. Const. amend. XIV § 1 (establishing that no state shall "deprive any person of life, liberty, or property without due process of law"). A family-childcare licensee has a protected property interest in retaining her license. *See Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 461 (Minn.App.2000) (holding that nursing licenses issued by the department were protected property interests). Due process requires that the subject of a license-revocation proceeding receive notice and an opportunity to defend against the allegations by confronting witnesses and presenting arguments and evidence. *See Contos v. Herbst,* 278 N.W.2d 732, 742 (Minn.1979) ("At a minimum the due process clause requires that deprivation of property be preceded by notice and an opportunity for a hearing.").

***3** We conclude that Ball's contention that 16 exhibits admitted at her hearing were "last minute disclosure[s]" is factually inaccurate, ending any further due process analysis. The record reflects that Ball received notice that each of her violations would be considered at her hearing when she was mailed copies of the pre-marked exhibits. Ball's former counsel acknowledged that he had received and reviewed the exhibits. Her due process rights were not violated.

III

We next address whether claimed evidentiary errors at Ball's administrative proceeding warrant reversal. Ball challenges the admission of the injured child's mother's testimony. She claims that the ALJ should not have considered this testimony and that he improperly allowed inadmissible reputation, character, and hearsay evidence. We review evidentiary rulings in administrative proceedings for an abuse of discretion. *CUP Foods, Inc. v. City of Minneapolis,* 633 N.W.2d 557, 566 (Minn.App.2001), *review denied* (Minn. Nov. 13, 2001). An ALJ may receive all probative evidence, "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 (2009). The ALJ is in a good position to judge the trustworthiness and reliability of evidence before him. *State ex rel. Indep. Sch. Dist. No. 276 v. Dep't of Educ.,* 256 N.W.2d 619, 627 (Minn.1977).

The ALJ heard the mother's testimony because it was probative of Ball's treatment of the mother's injured child. Contrary to Ball's assertion, the ALJ did not challenge the parties' stipulation that the boy's injury was an accident. The ALJ did not abuse his discretion by allowing the mother to testify. The ALJ also properly exercised his discretion by allowing reliable hearsay testimony. The mother's direct examination testimony discussed a doctor's diagnosis of her child after the accident. The ALJ allowed the witness to testify about what the doctor said but not about what she believed the doctor thought. Ball made no hearsay objection. The mother's testimony was not inherently unreliable and a reasonable fact finder might reasonably rely on it. The ALJ was in the best position to judge the trustworthiness of that evidence, and we conclude that he did not abuse his discretion by allowing it.

The ALJ also did not abuse his discretion by allowing the mother to opine about the quality of care at Ball's childcare center. This testimony is actually encouraged by the rules: before a commissioner revokes a license, he must "consider facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, *[and] available consumer evaluations of the program.*" Minn.Stat. § 245A.04, subd. 6 (emphasis added). The ALJ properly accepted as evidence the mother's "evaluation of the program." And we observe the ALJ's fair treatment of this category of evidence; the ALJ also allowed testimony from a parent who spoke favorably of Ball's facility. Ball directs us to no evidentiary errors.

IV

***4** Ball disputes the ALJ's findings that she failed to perform background checks, used a disqualified caregiver, and withheld information from an investigation. We consider whether the record contains substantial evidence to support a ALJ's findings of fact. *See* Minn.Stat. § 14.69(e). Substantial evidence is "(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." *In re Temp. Immediate Suspension of Family Child Care License of Strecker,* 777 N.W.2d 41, 46 (Minn.App.2010) (quotation omitted).

Substantial evidence supports the finding that Ball failed to seek necessary background checks. Childcare licensees must request background studies for all prospective employees who will provide direct services and all volunteers who will have direct contact unless they are under the continuous, direct supervision of a licensee. Minn.Stat. § 245C.03, subd. 1(a)(3)-(4) (2010). The ALJ concluded that Ball allowed

Griffith to provide unsupervised childcare services without being the subject of a background study and that T.D. was a "helper" who had direct contact with children without "continuous, direct supervision by a[ ] [qualified] individual." *Id.* There is no dispute that Ball failed to request background studies for Griffith and T.D. Griffith reported that she had direct contact with children on two occasions and was paid for her services. She also reported that T.D. aided in childcare tasks without supervision. Ball gave a different account. But we defer to an agency's credibility determinations. *Saif Food Mkt. v. Comm'r of Health,* 664 N.W.2d 428, 431 (Minn.App.2003). And the ALJ expressly credited Griffith's report over Ball's testimony.

Substantial evidence also supports the finding that Ball employed a disqualified provider. A license holder must remove a disqualified childcare provider from direct contact with children on notice of her disqualification unless the individual requests reconsideration within 15 days. Minn.Stat. §§ 245C.18(1), .21, subd. 2(b) (2010). The county notified both Ball and Markey that Markey was disqualified to provide care. It is undisputed that Markey continued to provide care after the disqualification notice. Although Ball and Markey contend that they requested reconsideration, the ALJ did not find Ball's or Markey's testimony to be credible.

The record also supports the finding that Ball withheld information from the investigation. The commissioner can revoke the license of a license holder who knowingly withholds relevant information bearing on legal compliance. Minn.Stat. § 245A.07, subd. 3(a). Following a complaint, officials attempted to contact and interview Ball. The county investigators repeatedly sought Ball's participation, but she never made herself available to be interviewed.

***5** Substantial evidence supports the ALJ's findings of fact.

V

Ball maintains that the sanction is too severe. When selecting a sanction, the commissioner must "consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program." Minn.Stat. § 245A.07, subd. 1(a) (2010). Revocation is appropriate when "the license holder's actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by a program." Minn. R. 9543.0100, subps. 2, 3 (2009). We defer to an agency's choice of sanction absent a clear abuse of discretion. *In re Burke,* 666 N.W.2d at 726.

The commissioner considered each factor of section 245A.07 and concluded reasonably that Ball's violations indicate significant risk to children. The violations were severe. Ball not only failed to obtain background studies, she also failed to adequately respond to a negative study. The commissioner had ample basis for his conclusion that Ball's "chronic and willful violation of background study requirements placed children at risk of serious harm." He observed that Ball also minimized the seriousness of her violations.

We recognize that some parents expressed positive experiences at Ball's facility. But the favorable reports did not require the commissioner to lessen the sanction for the clear violations. The commissioner reasonably exercised his discretion here.

Affirmed.

All Citations

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In the Matter of the Claim Against the
GRAIN BUYER'S BOND No. MTC 182.

No. CX-95-298.
|
June 20, 1995.
|
Review Denied: August 30, 1995.

Attorneys and Law Firms

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Considered and decided by DAVIES, P.J., and TOUSSAINT, C.J., and AMUNDSON, J.

Opinion

DAVIES

***1** Relator Minnesota Trust Company, as surety for grain buyer Michael Wayne Juhl, appeals the Commissioner of Agriculture's decision that Minnesota Trust pay $38,943.18 for the benefit of seven grain producers who sold their grain to Juhl but were not paid. We affirm.

FACTS

On March 23, 1990, Michael Wayne Juhl obtained a grain buyer's license after submitting proof of a grain buyer's bond for $50,000. The bond, issued by relator Minnesota Trust Company to guarantee payment for all cash sales, listed Michael Wayne Juhl d/b/a Delta Commodities of Roseau as principal.

In early 1993, Juhl incorporated his sole proprietorship as Delta Commodities of Roseau, Inc. An administrative law judge (ALJ) found that Juhl's "customers were not aware of this incorporation nor did it affect their business transactions." Minnesota Trust was also unaware of the incorporation.

From April 1993 to November 1993, Juhl entered into several sales transactions with the claimant farmers. At trial, Juhl and two of the farmers described their transactions as "cash versus documents," meaning that payment was due upon Juhl's receipt of documents showing that the grain had been graded and weighed. This delayed payment was necessary because, as the ALJ specifically found:

> During 1993, the wheat and barley crops in northern Minnesota were stressed due to the presence of vomitoxin. The result was that test weights were abnormal and buyers could not pay for the crops [immediately] when they were picked up from the producer. Mr. Juhl would deliver the grain to an elevator where it would be graded and then Mr. Juhl was to immediately pay the grower.

Juhl never tendered payment to any of the producers with the exception of two partial payments and one check returned for insufficient funds. Only one claimant submitted proof of a written sales contract, which lists the terms as a cash versus documents sale.

Most of the farmers filed claims against the bond after Juhl filed for bankruptcy on December 16, 1993. Following a contested case hearing, the ALJ recommended that Minnesota Trust pay the Department of Agriculture $38,943.18 for the benefit of the claimants. On January 6, 1995, the Commissioner of Agriculture adopted the ALJ's recommendations in their entirety. Minnesota Trust filed this appeal.

DECISION

An appellate court may reverse the Commissioner's decision only if the findings or conclusions violate the constitution, exceed the agency's statutory authority, or were
(c) Made upon unlawful procedure; or

(d) Affected by other error of law; or

(e) Unsupported by substantial evidence in view of the entire record as submitted; or

(f) Arbitrary or capricious.

Minn.Stat. § 14.69 (1994); *see also In re St. Otto's Home v. Minnesota Dep't of Human Servs.,* 437 N.W.2d 35, 39 (Minn.1989).

I.

Minnesota Trust argues that it is not liable because Juhl obtained the grain buyer's bond as a sole proprietor but claimants contracted with Juhl after the incorporation of his business.

***2** Minnesota Trust's reliance on *Wheeling Steel Corp. v. Neu,* 90 F.2d 139 (8th Cir.1937), is misplaced. That case did not involve a statutory bond. Here, the bond is required by Minn.Stat. § 223.17, subd. 4 (1994), "for the purpose of indemnifying producers of grain against the breach of a contract by a grain buyer." Minn.Stat. § 223.16, subd. 2 (1994). Releasing Minnesota Trust would thwart the legislature's intent in requiring a grain buyer to obtain a bond. *See* Minn.Stat. § 645.16 (1994) (laws should be construed to "effectuate the intention of the legislature"). We hold, therefore, that the Commissioner did not err in refusing to allow Minnesota Trust to avoid liability solely on the basis of Juhl's incorporation.

II.

Next, Minnesota Trust challenges the Commissioner's ruling that the transactions constituted cash sales; Minnesota Trust argues they were voluntary extensions of credit within the meaning of Minn.Stat. § 223.17, subd. 5 (1994).

"When a decision turns on the meaning of words in a statute or regulation, a legal question is presented." *St. Otto's Home,* 437 N.W.2d at 39. This court need not defer to an agency in reviewing such questions of law. *Id.*

For a sale to qualify as a voluntary extension of credit contract, Minn.Stat. § 223.177, subd. 3, requires that it

> be reduced to writing by the grain buyer and mailed or given to the seller before the close of the next business day after the contract is entered into or, in the case of an oral or phone contract, after the written confirmation is received by the seller.

It is imperative that the contract state
in not less than ten point, all capital type, framed in a box with space provided for the seller's signature: "THIS CONTRACT CONSTITUTES A VOLUNTARY EXTENSION OF CREDIT. THIS CONTRACT IS NOT COVERED BY ANY GRAIN BUYER'S BOND."

Minn.Stat. § 223.175. Juhl never complied with sections 223.175 and 223.177, which would seem to make this a cash sale protected by the bond.

But the transactions also fall short of the technical requirements for a *properly completed* cash sale within the meaning of Minn.Stat. § 223.17, subd. 5, because Juhl neither made payment "before the close of business on the next business day after the sale" nor tendered "80 percent of the value of the grain at the time of delivery."

This court has, however, previously resolved the problem presented when a transaction fails to qualify as either a cash sale or a voluntary extension of credit:

> [I]mplicit in Minn.Stat. § 223.177, subd. 3, is the proposition that all nonqualifying contracts, even if the seller offers credit, are to be treated as cash sales.

In re Grain Buyer's Bond No. 877706-08624237, 486 N.W.2d 466, 469 (Minn.App.1992) (footnote omitted). [1]

In asking the court "to re-examine" this decision, Minnesota Trust ignores the principle of stare decisis:

> [T]he supreme court has made clear an appellate court's obligation to decide

> cases in a manner consistent with existing law when there is nothing "novel or questionable" about the relevant law.

***3** *Greenbush State Bank v. Stephens,* 463 N.W.2d 303, 306 n. 1 (Minn.App.1990), *pet. for rev. denied* (Minn. Feb. 4, 1991) (quoting *State v. Hannuksela,* 452 N.W.2d 668, 673 n. 7 (Minn.1990)). Furthermore, Minnesota Trust fails to recognize that the requirement of a written extension of credit contract is not a mere formality. The ten-point, all-capitals type serves *to warn* the grain seller that by "voluntarily extending credit * * * he loses coverage under the grain buyer's bond." *Grain Buyer's,* 486 N.W.2d at 469.

III.

Minnesota Trust further contends that one of the grain producers, Red River Grain, failed to file a timely claim under Minn.Stat. § 223.17, subd. 7 (1994) (requiring filing within 180 days of breach). Minnesota Trust is not entitled to review of this matter, however, because it failed to raise the issue during the contested case hearing before the ALJ. *See Fredrich v. Independent Sch. Dist. No. 720,* 465 N.W.2d 692, 696 (Minn.App. 1991), *pet. for rev. denied* (Minn. Apr. 29, 1991) (school district precluded from raising issue not raised before hearing officer).

IV.

Minnesota Trust also claims that the Commissioner erred by relying in part on hearsay evidence. The admission of hearsay evidence in an administrative hearing is governed by Minn. R. 1400.7300, subp. 1 (1993):

> The judge 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.

At the hearing, claims were presented through documentary evidence (primarily invoices and receipts), although two of the claimants did testify. We agree with the ALJ's conclusion that the evidence here is of the type appropriately relied upon by reasonable, prudent persons (namely, Department of Agriculture personnel) in the due course of their affairs. We also note that both witnesses corroborated the documentary evidence and addressed the issue of whether the transactions constituted cash sales or extensions of credit.

Furthermore, as the ALJ stated, Minnesota Trust could have subpoenaed the other claimants in order to "examine them about these documents," but chose not to. *See Richardson v. Perales,* 402 U.S. 389, 402, 91 S.Ct. 1420, 1428 (1971) (hearsay evidence admissible in social security claim hearing where claimant failed to exercise right to subpoena for cross-examination purposes).

We hold, therefore, that the Commissioner did not err in relying on this documentary evidence.

Affirmed.

1 We take note of another statute provision providing that a transaction that fails to meet the statutory definition of a cash sale
> constitutes a voluntary extension of credit which is not afforded protection under the grain buyer's bond, and which must comply with [Minn.Stat. § § 223.175 & 223.177 (1994)].

Minn.Stat. § 223.17, subd. 5. This provision does not apply because the transactions here were *designed* to be cash sales; they simply failed in implementation.

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