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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
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May 19, 2011

Mr. Craig Anderson
Agricultural Labor and Safety Services
Michigan Farm Bureau
7373 W. Saginaw
Lansing, MI 48909

Re: Christmas Tree Production Declaratory Ruling

Dear Mr. Anderson:

You have requested a declaratory ruling as to whether Christmas tree production is an agricultural "work activity" within the definition of "agricultural operations" contained in Section 4 of the Michigan Occupational Safety and Health Act, Act 154 of 1974 (MIOSH Act), MCL 408.1004(1). This request for declaratory ruling has been made on behalf of the Michigan Christmas Tree Association, Michigan State University Extension, Christmas Tree Team, Michigan Farm Bureau, and a Safety Program client.

Under Section 63 of the Administrative Procedures Act, Act 306 of 1969, MCL 24.263, an agency may issue a declaratory ruling upon request "as to the applicability to an actual state of facts of a statute or rule administered by the agency." A declaratory ruling is subject to judicial review in the circuit court. MCL 24.264.

According to your request, the question of the applicability of the Michigan Occupational Safety and Health Administration (MIOSHA) standards to the Christmas tree production industry arose following a 2007 MIOSHA fatality investigation of a Michigan Christmas tree farm operated by Donald Spolyar.¹ The MIOSHA investigation resulted in the issuance of citations under several General Industry standards promulgated under the MIOSH Act.² While the citations are no longer in dispute, the citing of these standards has prompted the industry's need for clarification as to MIOSHA's coverage of Christmas tree farming under General Industry standards.

¹ MIOSHA Inspection Number 308835958.

² The employer was cited for violations of Part 33, Personal Protective Equipment; Part 7, Guards for Power Transmission; Part 53, Tree Trimming and Removal; and Part 472, Medical Services and First Aid.

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Given the prior inspection activity concerning the Christmas tree production industry and the volume of Christmas tree production within Michigan, we conclude that you have made a sufficient showing of an actual state of facts to warrant the issuance of a declaratory ruling pertaining to the applicability of MCL 408.1004(1).

As noted in your request, the impact of an industry being defined as an agricultural operation can be significant. With limited exceptions, industries defined as agricultural operations under the MIOSH Act are largely exempt from enforcement action by MIOSHA. It is in light of these enforcement limitations, that MIOSHA takes great care and consideration in ensuring that industries are appropriately defined within the scope of the Act so that Michigan workers receive the protections they are to be afforded by law.

The MIOSH Act defines agricultural operations as:

...the work activity designated in major groups 01 and 02 of the standard industrial classification manual, United States bureau of the budget, 1972 edition. Agricultural operations include any practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations including preparation for market delivery to storage or market or to carriers for transportation to market. MCL 408.1004(1).

Major Group 01 of the 1972 edition of the Standard Industrial Classification Manual (SIC manual) encompasses Agricultural Production Crops which is described as:

Establishments (e.g., farms, orchards, greenhouses, nurseries) primarily engaged in the production of crops, plants, vines, and trees (excluding forestry operations). This major group also includes establishments primarily engaged in the operation of sod farms, and cranberry bogs; in the production of mushrooms, bulbs, flower seeds, and vegetable seeds; and in the growing of hydroponic crops. Seeds of field crops are classified in the same industry as crops grown for other purposes.

Major Group 02 of the 1972 SIC manual encompasses Animal Production Livestock and Animal Specialties. This group is described as:

Establishments (e.g., farms, ranches, dairies, feedlots, egg production facilities, broiler facilities, poultry hatcheries, apiaries) primarily engaged in the keeping, grazing, or feeding of livestock for the sale of livestock or livestock products (including serums), for livestock increase, or for value increase. Livestock, as used here, includes cattle, hogs, sheep, goats, and poultry of all kinds; also included in this major group are animal specialties, such as horses, rabbits, bees, pets, fish in captivity, and fur-bearing animals in captivity.

As your request indicates, the 1972 SIC manual classifies Christmas tree growing under Division A: Agriculture, Forestry, And Fishing, Major Group 08: Forestry, Industry Group 081: Timber Tracts. The SIC designation 081 includes:

Establishments primarily engaged in the operation of timber tracts or tree farms for the purpose of selling standing timber. Establishments holding timber tracts as real property (not for sale of timber) are classified in Real Estate, Industry 6519; and logging establishments are classified in Manufacturing, Industry 2411.

- Christmas tree growing
- Timber tracts
- Tree farms

It is your contention that the definition of agricultural operations contained in MCL 408.1004(1) should be interpreted to look at the work activity being conducted rather than solely the classification given to the industry under the SIC manual. You represent that the work activity conducted in conjunction with Mr. Spolyar's farm, and other modern cultivated Christmas tree production operations in Michigan, is more akin to the work activity of other horticultural and ornamental floriculture industries which are included within Major Group 01 of the SIC manual and hence have been designated as agricultural operations under the MIOASH Act. In support of this contention, you have submitted background information and data expounding upon the current production activity for Christmas trees nationally and locally; an overview and timeline of the work processes for Michigan Christmas tree production; and case law references which discuss Christmas tree production as a horticultural commodity for purposes of coverage under the Fair Labor Standards Act.³

The question of whether a definition under the MIOASH Act which references work activity designated in specific industry classifications limits the scope of the definition to industries within that SIC code, has been previously decided by the Michigan Court of Appeals in *Great Lakes Steel Division v Department of Labor*, 191 Mich App 323; 477 NW2d 124 (1991). There, the court reviewed the definition of "construction operations" under Section 4(4) of the MIOASH Act, which bears similar language to the definition at issue:

"Construction operations" means the work activity designated in major groups 15, 16, and 17 of the standard industrial classification manual, United States bureau of the budget, 1972 edition. MCL 408.1004(4).

In *Great Lakes Steel*, the petitioner, a steel manufacturer, contested being cited by MIOASHA for violating several of Michigan's construction safety standards involving construction activities. The petitioner contended that as a manufacturer which was not classified under major groups 15, 16, or 17 of the SIC manual, it did not fall within the definition of construction operations under the Act and therefore the standards did not apply to its operations.

³ See, Declaratory Ruling Request, dated February 18, 2011.

On appeal, the Court of Appeals summarized the issue as follows: "...did the Legislature intend that the standards be applied according to the activity performed by the employee or the industry under which the employer is classified?" 191 Mich App 323 at 325-327. Ultimately, the court held that the statute "unambiguously applies the construction safety standards to construction activities without regard to the employer's classification." *Id.* In reaching this conclusion, the court clarified the effect of a SIC code reference in a definition:

The fact that the SICM classifies establishments does not affect the plain meaning of the statute. The manual was established to classify businesses for statistical purposes. Subsection 4(4) merely refers to work activity found under certain classifications established in the manual. We refuse to read into the statute an intent that the standards apply to the work activity "of establishments" designated in the applicable major groups. 191 Mich App at 327.

Thus, under the court's holding in *Great Lakes Steel*, the classification of Christmas tree production under Major Group 08 of the SIC manual is not determinative of whether Christmas tree production activities constitute agricultural operations under the Act. Rather, an analysis of the work activity performed in Christmas tree production in comparison to the work activity engaged in by those industries classified in SIC Major Groups 01 and 02 is required.

The work activity found in the industries contained within Major Group 01 of the 1972 SIC manual is characteristic of traditional cultivated crop production and harvesting. These industries involve work related to crop seed sources, crop site selection and preparation, routine vegetation control, horticultural management, irrigation system installations, cultivating, scheduled harvesting, fertilizing, and pesticide control. These activities are also regularly performed in the modern-day production of cultivated Christmas trees.⁴ It is clear that the work activity involved with the production of Christmas trees has transcended beyond the simple cutting of standing trees from an uncultivated forest. This similarity in the work activity now associated with cultivated Christmas tree production and other horticultural and agricultural operations is further evidenced by the reclassification of Christmas tree production under the North American Industry Classification System (NAICS) as crop production rather than forestry.

The NAICS is the current classification system for industries designed to replace the industry classifications from the SIC manual. The Occupational Safety and Health Administration (OSHA) began utilizing the NAICS system for identification of industries on January 1, 2003. Federal OSHA, therefore, cross-references the 0811 Industry Subgroup from the SIC manual,

which contains Christmas tree production, to Sector 11 of the 2007 NAICS manual: Agriculture, Forestry, Fishing and Hunting, Major Group 111: Crop Production, Industry Group: 1114: Greenhouse, Nursery and Floriculture Production, Industry Sub-Group 111421: Nursery and Tree Production. The NAICS defines Industry Subgroup 111421 as:

⁴ Ohio Christmas Tree Producers Manual- Bulletin 670- The Ohio State University Extension. See <http://ohioline.osu.edu/b670/index.html>.

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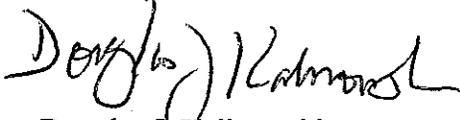
Establishments primarily engaged in (1) growing nursery products, nursery stock, shrubbery, bulbs, fruit stock, sod, and so forth, under cover or in open fields and/or (2) growing short rotation woody trees with a growth and harvest cycle of 10 years or less for pulp or tree stock.

The cross-referencing of the 0811 SIC classification of Christmas tree production under NAICS Major Group 111: Crop Production, reaffirms the work activities engaged in by the present-day cultivated Christmas tree producers and is substantially equivalent to the work activity performed during the production of other agricultural and horticultural crops. Thus, these industries are to be afforded the same treatment as agricultural operations under the MIOSH Act.

This designation of the work activity of cultivated Christmas tree production as an agricultural operation is consistent with the treatment afforded Christmas tree production in other OSHA State plan states with significant Christmas tree production. Oregon, the largest producer of Christmas trees, defines agricultural operations to include all groups within NAICS Major Group 111, which includes the Industry Subgroup 111421. OAR 437-004-0002. In addition, North Carolina, the second largest producer of Christmas trees, defines agricultural operations in accordance with the Fair Labor Standards Act, and has specifically included reference of work activity to Christmas tree production in its definition of agricultural employment. N.C.G. S. A. § 95-223.

In conclusion, based upon the statutory interpretation contained in *Great Lakes Steel*, our evaluation of the work activities for Christmas tree production, the industry SIC-NAICS conversions, and the comparison of federal OSHA and other state plans treatment of Christmas tree production, MIOSHA declares that cultivated Christmas tree production is consistent with work activity designated in Major Groups 01 and 02 of the SIC manual, 1972 edition, and is considered to be an agricultural operation under Section 4(1) of the MIOSH Act.

Sincerely,



Douglas J. Kalinowski
Director

DJK:DCMJ:blb

cc: Steve Arwood
Adrian Rocskay
Dawn C.M. Jack
Thomas D. Warren