

**STATE OF ALASKA
DEPARTMENT OF LABOR**

**OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
P.O. BOX 21149
JUNEAU, AK 99802**

STATE OF ALASKA, DEPARTMENT)	
OF LABOR, DIVISION OF LABOR)	
STANDARDS AND SAFETY,)	
OCCUPATIONAL SAFETY AND)	
HEALTH SECTION,)	
)	
Complainant,)	Docket No. 00-2139
)	Inspection No. 301269239
v.)	
)	
ASBESTOS INSPECTIONS, INC.,)	
)	
Contestant.)	
-----)	

DECISION AND ORDER

This matter arises from a citation and penalty issued by the Alaska Department of Labor (Department) following an Occupational Safety and Health inspection at a workplace under the control of Asbestos Inspections, Inc. (AII) in Anchorage, on December 17-21, 1999. The Department's citation, as amended on June 2, 2000, alleges multiple violations of Occupational Safety and Health Standards and includes monetary penalties in the total amount of \$14,625.00.

Citation 1, Item 1 alleges a violation of 29 C.F.R. 1910.134(e)(6)(i) for not having written medical determinations for two employees concerning their ability to use a

respirator. This item was classified as a Serious violation with a monetary penalty of \$2,250.00.

Citation 1, Item 2 alleges a violation of 29 C.F.R. 1926.34(c) for failure to continually maintain means of egress free of obstructions or impediments for full instant use in the case of fire or other emergency. This item was classified as a Serious violation with a monetary penalty of \$1,575.00.

Citation 1, Item 3 alleges a violation of 29 C.F.R. 1926.405(a)(2)(ii)(I) for failure to adequately protect electrical extension cords passing through doorways to avoid damage. This item was classified as a Serious violation with a monetary penalty of \$1,125.00.

Citation 1, Item 4(a) alleges a violation of 29 C.F.R. 1926.1101(g)(1)(ii) for failure to use wet methods during asbestos removal, cutting and cleanup activities.

Item 4(b) alleges a violation of 29 C.F.R. 1926.1101(g)(3)(iii) for allowing the use of brooms to dry sweep dust and demolition debris containing asbestos.

Item 4(c) alleges a violation of 29 C.F.R. 1926.1101(g)(4)(iv) for failure to use an impermeable drop cloth underneath areas of asbestos removal activity.

Item 4(d) alleges a violation of 29 C.F.R. 1926.1101(g)(5)(i)(A)(3) for failing to produce manometer records as a control method to assure that the Negative Pressure Enclosure (NPE) used for asbestos removal was maintained at a proper pressure.

Item 4(e) alleges a violation of 29 C.F.R. 1926.1101(g)(5)(i)(B)(1) for failing to inspect the Negative Pressure Enclosure for breaches and leaks prior to the beginning of each shift.

Item 4(f) alleges a violation of 29 C.F.R. 1926.1101(k)(8)(i) for failure to properly label all asbestos containing materials at the work site.

Items 4(a) - 4(f) were grouped together into a single a Serious violation with a monetary penalty of \$2,250.00.

Citation 1, Item 5 alleges a violation of 29 C.F.R. 1926.1101(j)(1)(iii)(V) for failure to insure that employees shower prior to entering the clean room. This item was classified as a Serious violation with a monetary penalty of \$2,250.00.

Citation 1, Item 6 alleges a violation of 29 C.F.R. 1926.1101(l)(2) for failure to wrap asbestos containing waste materials in sealed or impermeable bags or containers. This item was classified as a Serious violation with a monetary penalty of \$2,250.00.

Citation 1, Item 7 alleges a violation of 29 C.F.R. 1926.1101(c)(1) for failure to insure that no employee is exposed to an airborne concentration of asbestos in excess of 0.1 fibre per cubic centimeter of air as an 8-hour time waited average. This item was classified as a Serious violation with a monetary penalty of \$2,250.00.

Citation 1, Item 8 alleges a violation of 29 C.F.R. 1926.405(g)(2)(iv) for failure to provide adequate strain relief for electrical extension cords to prevent pull from being directly transmitted to joints or terminal screws. This item was classified as a Serious violation with a monetary penalty of \$675.00.

Citation 2, Item 1 alleges a violation of 29 C.F.R. 1926.1101(i)(4)(ii) to inspect the protective clothing of employees and insure that any rips or tears are immediately repaired. This item was classified as an other than serious violation with no monetary penalty.

Citation 2, Item 2 alleges a violation of 29 C.F.R. 1926.25(a) for failing to keep work areas and walkways clear of demolition debris. This item was classified as an other than serious@ violation with no monetary penalty.

AII contested all of the Department's citations and penalties. A hearing was held before the Board in Anchorage on August 24, 2000. The Department was represented by Assistant Attorney General Toby N. Steinberger. AII did not appear at the hearing and was found to be in default. Under 8 AAC 61.205(m), the Department presented witness testimony and documentary evidence in support of the alleged violations. Upon consideration of the evidence submitted, the Board makes the following findings of fact, conclusions of law, and order in this matter.

FINDINGS OF FACT

1. On December 17, 1999, the Department received an anonymous phone call complaining of Occupational Safety and Health problems at a work site involving the demolition of the old Alaska Native Medical Center (ANMC) at 255 Gambell Street in Anchorage, Alaska. The Department dispatched Health Enforcement Officer Thomas Brudnicki and Safety Enforcement Officer Suelyn Hight to conduct an inspection of the work site.

2. The general contractor for the ANMC demolition project was USA Asbestos Removal Company, Inc., a New Jersey firm. The actual asbestos abatement and

removal work was subcontracted to AII, a company headquartered in Wilmington, North Carolina. AII employed approximately 35 employees to perform asbestos abatement work on the ANMC project. Officer Brudnicki conducted a health inspection of AII's work site beginning on December 17, 1999, and continuing through December 21. Brudnicki had previously inspected the ANMC project in September 1999. Based on the September inspection, AII was cited for Occupational Safety and Health violations, but did not contest that citation.

3. When Brudnicki arrived at the work site on December 17, AII was in the process of shutting down its asbestos abatement work and was preparing to leave the work site. According to Brudnicki, AII had been ordered to leave the job due to problems with its work performance. December 17 was AII's last official day on the project, although several of AII's personnel remained for the rest of the inspection.

4. During his inspection, Brudnicki met with Noel Spivey, AII's president, Don Thaggard, AII's designated Competent Person for the asbestos abatement work, and other AII representatives. Brudnicki also spoke to employee representatives, other contractors, and representatives of the U.S. Environmental Protection Agency (EPA) concerning the project. During his inspection, Brudnicki took notes and photographs documenting safety and health violations at the work site. (Ex. 1.)

5. Regarding Citation 1, Item 1, Brudnicki observed two employees wearing respirators working in the asbestos containment area. When he asked to see the written

medical determinations that the employees were cleared to use a respirator, AII was unable to produce such records.

6. Regarding Citation 1, Item 2, Brudnicki observed that AII did not maintain walkways and means of egress at the work site free of obstructions and impediments. In some areas, power extension cords hung from the ceiling to within five feet of the floor; the negative air machine exhaust trucks impeded the stairways; due to the lack of heat, ice was built up on the floors; and there was demolition debris blocking egress from the work site. (Exs. 1A and 1B.)

7. Regarding Citation 1, Item 3, Brudnicki observed that AII was using multiple power extension cords throughout the facility supplying temporary power, and that these cords passed through doorways without any protection to avoid damage.

8. Regarding Citation 1, Item 4(a), Brudnicki observed that AII did not use wet methods to control employee exposure during asbestos removal, cutting and cleanup activities. The asbestos insulated piping was removed dry, and the surrounding pipe was cut while the asbestos insulation was dry. (Exs. 1(C) and 10(A).)

9. Regarding Citation 1, Item 4(b), Brudnicki determined that AII had permitted employees to use brooms to dry sweep the demolition debris, and some of the debris contained asbestos materials, for example, the pipe insulation. (Ex. 10(C).)

10. Regarding Citation 1, Item 4(c), Brudnicki determined that AII did not require employees to place a drop cloth under the areas where non-wetted (dry) asbestos pipe insulation was being wrapped and cut for removal. The lack of a drop cloth allowed dislodged

pipe insulation to fall to the floor and become part of the demolition waste which was then dry swept by the employees.

11. Regarding Citation 1, Item 4(d), Don Thaggard, AII's designated competent person, admitted to Brudnicki that the Company had failed to use a manometer to assure that negative pressure was being maintained inside the asbestos containment enclosures.

12. Regarding Citation 1, Item 4(e), Brudnicki testified that Thaggard had admitted to him that there were no regular inspections of the negative pressure enclosure for leaks before each work shift.

13. Regarding Citation 1, Item 4(f), Brudnicki observed that AII had stockpiled asbestos-wrapped pipe insulation and other asbestos waste in containers that were not labeled.

14. Regarding Citation 1, Item 5, Brudnicki observed employees exiting the Decontamination area without showering. The employees were wearing street clothes under their personal protective suits while in the negative pressure enclosure; upon exiting the shower area, the employees were dry and were wearing the same street clothes.

15. Regarding Citation 1, Item 6, Brudnicki found sections of improperly wrapped asbestos-containing pipe insulation. The end and edges of the pipe insulation were dry (unwetted), and were not wrapped impermeably. Brudnicki pointed out these examples to AII's supervisors, but the pipes were not rewrapped or sealed by the end of the inspection. (Ex. 1(H).)

16. Regarding Citation 1, Item 7, Brudnicki examined lab results performed by AII's environmental consultant which documented five instances of employee overexposure to airborne concentrations of asbestos in excess of the time-weighted average limit (TWA). Brudnicki also found 41 instances of sample overloads which precluded an accurate determination of overexposure to employees, yet AII did not take any measures to correct or prevent such overloads. (Ex. 3.)

17. Regarding Citation 1, Item 8, Brudnicki found an extension cord strung along the ceiling which had a broken strain relief on the female connection end. (Ex. 1(I).)

18. Regarding Citation 2, Item 1, Brudnicki saw employees in the negative pressure enclosure with ripped or torn protective work suits. The AII supervisors who accompanied him during the inspection, did not require the employees to mend or replace the suits after this deficiency had been pointed out.

19. Regarding Citation 2, Item 2, Brudnicki noted several instances where demolition debris was accumulated in the aisle and walkways at the work site. (Exs. 10(D), 10(E) and 10F.)

20. Brudnicki determined that all of AII's employees at the work site were exposed to one or more of the violations cited by the Department.

21. During the asbestos removal work, there was no heat provided in the building, creating a build-up of ice on the floor of the work area and preventing employees from using water to wet down asbestos containing materials. Thaggard told Brudnicki that he had complained to AII that he didn't have adequate materials to perform the job properly, but

was told by AII's management to make due. According to Brudnicki, Thaggard was responsible for the work site as the competent person, but was not given adequate support by his employer. The Department did not take any licensing action against Thaggard.

22. After AII left the job, another asbestos removal contractor, Alaska Abatement Corporation (AAC), was hired to complete the asbestos abatement work. Prior to beginning work, AAC requested that EPA inspect the work site. EPA Inspector John Pavitt conducted an inspection of the work site on January 26, 2000. During his inspection, Pavitt observed many of the same hazardous conditions and code violations seen by Brudnicki. Pavitt took air samples at the work site, which later tested positive for asbestos. Pavitt also took photographs of the asbestos hazards at the work site. (Ex. 10.)

23. The Department also presented the testimony of David Fujimoto, Superintendent for Central Environmental, Inc., (CEI). CEI had been invited to bid on the completion of the asbestos abatement work after AII left the job. Fujimoto visited the workplace on December 21, 1999, and observed many of the violations cited by the Department. His observations were documented in a letter to the EPA on January 3, 2000. Due to its concern about safety and health hazards at the work site, CEI declined to bid on the remaining asbestos abatement work. If using the Department's penalty calculation worksheet, Brudnicki assessed the severity and probability of each of the violations and calculated the corresponding monetary penalties. (Ex. 4.) Citation 1, Items 1-8 were classified as Serious violations due to the risk of serious bodily harm to employees. With regard to the penalties, AII was given a reduction of 40% based on company size and 15% for good faith, for a total

reduction of 55% from the initial penalty assessment for each violation. AII was not given any penalty credit for history due to the recent prior violations cited after the September 1999 inspection. After applying the penalty reductions, the total penalties assessed against AII, as amended by the Department, total \$14,625 for Citation 1. Citation 2, Items 1 and 2, were considered to be non-serious violations and carried no monetary penalty.

24. The Department's citations and penalties were issued on February 2, 2000, and were sent by certified mail to AII at its business address at 302-C Raleigh Street, Wilmington, North Carolina 28412. AII signed a receipt for the citations on February 8, 2000.

AII contested all the Department's citations and penalties in a letter from Noel Spivey, President, dated February 10, 2000.

25. The Board sent a notice of hearing to AII by certified mail to its business address on July 7, 2000. The hearing notice was also sent to AII by fax and regular mail on August 8, 2000. On August 14, 2000, the certified mail, return-receipt was received by the Board with a notation that the certified mail was unclaimed after three attempted deliveries on July 17, July 26, and August 1, 2000.

26. On August 15, 2000, the Board's hearing officer contacted AII by telephone and spoke to Mrs. Bobbie Spivey, the wife of AII's president. Mrs. Spivey was verbally informed of the scheduled hearing date and was informed of the procedure for requesting a postponement of the hearing. She indicated that there had been no one in AII's office to receive certified mail, and that the company might be going out of business or filing for bankruptcy.

27. On August 21, 2000, the hearing officer again contacted Mrs. Spivey by telephone and informed her that the company could participate in the scheduled hearing by telephone if it so desired. Mrs. Spivey indicated that her husband would not be available on the scheduled hearing date and did not plan to participate in the hearing. AII did not file any request for a postponement of the hearing.

28. At the scheduled hearing on August 24, 2000, AII did not appear and did not file any written statement or explanation for its failure to appear. Pursuant to AS 18.60.093(f), the amount of the Board's reasonable expenses incurred for the hearing is \$_____.

CONCLUSIONS OF LAW

A. Default

AII failed to appear at the scheduled hearing in Anchorage on August 24, 2000. The record reflects that the Board's hearing notice was duly sent to AII's business address by certified mail, regular mail and facsimile transmission. In addition, the Board's hearing officer verbally informed AII of the hearing by telephone. Under these circumstances, we find that every reasonable effort was made to give AII notice of the hearing and an opportunity to participate in the hearing. In addition, we find no good cause has been shown to excuse AII's failure to appear at the hearing. Under AS 18.60.093(f), therefore, we find it appropriate to order AII to pay the Board's reasonable expenses for the hearing.

B. Prima Facie Case

The Department has the burden of proof in contested cases. In the event an employer fails to appear at a hearing, we have required the Department to present sufficient evidence to establish a *prima facie* case with respect to citations and penalties. To establish a *prima facie* case a violation, the Department must demonstrate that: (1) the employer failed to comply with an applicable standard; (2) one or more employees were exposed to the violative conditions; and (3) the employer knew or with the exercise of reasonable diligence, could have known of the violative conditions. See Mark A. Rothstein, *Occupational Safety and Health Law*, 102 at 152 (4th Ed. 1998).

After reviewing the record, we conclude that the Department has presented ample evidence to establish that AII was not in compliance with each of the cited code provisions; that one or more of its employees were exposed to the violative conditions; and that AII knew or could have known with reasonable diligence of the existence of each of the violative conditions. Furthermore, we find no basis to question or modify the Department's classification of the cited violations or the amount of the monetary penalties assessed.

We make one final observation. We believe the Department should have followed up on this inspection with licensing or disciplinary action against AII's competent person at the job site. As recognized by the Department, the competent person is the employer's primary on-site supervisor for asbestos removal activities. Even if the competent person is not receiving adequate support, equipment or materials from his company, this does not justify or excuse the widespread disregard for safety and health compliance that was

demonstrated in this case. Where an asbestos abatement work site contains so many serious and obvious code violations, we believe the competent person should be held accountable in addition to the employer.

ORDER

1. Each of the violations cited by the Department is affirmed as cited.
2. The Department's amended penalty assessment in the total amount of \$14,625 is affirmed.
3. Under AS 18.60.093(f), AII shall pay the Board's reasonable expenses incurred for the hearing in the amount of \$1,525.60.

DATED this 26 day of January, 2001.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

/s/
By: _____
Timothy O. Sharp, Chair

/s/
By: _____
Carla Meek, Member

/s/
By: _____
Cliff Davidson, Member