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

STATE OF ALASKA, DEPARTMENT OF LABOR, Complainant, v. MACOMBER CORPORATION, INC. Contestant.	)

Docket No. 89-780
Inspection No. WI-3924-549-88

DECISION AND ORDER

This matter arises from occupational safety and health citations issued by the State of Alaska, Department of Labor ("Department") to Macomber Corporation, Inc. ("Macomber") following an inspection of a building renovation project at Fort Wainwright, Alaska on December 14, 1988.

As a result of its inspection, the Department issued two citations to Macomber on January 5, 1989. Citation #1 alleges that Macomber violated Alaska Construction Code 05.045(f)(1)(A) by failing to perform air monitoring to determine the airborne concentrations of asbestos and other minerals to which its employees at the worksite may have been exposed. The citation was classified as a "serious" violation and a monetary penalty of $500 was assessed. Citation #2 was not contested by Macomber and

therefore became final by operation of law and is not included in the scope of this decision.

Macomber timely notified the Department of its desire to contest Citation #1. A hearing on the matter was held on November 20, 1989, in Fairbanks, Alaska. Board members Hoff and Weiss were present and thus constituted a quorum; chairman Wingfield recused himself from participation in this case. The hearing officer was Robert W. Landau, Esq. The Department was represented by Assistant Attorney General Mary B. Pinkel. Macomber was represented by its president, Robert Macomber. Each party presented evidence and oral argument. The record was deemed closed at the conclusion of the hearing.

Following are the Board's findings of fact, conclusions of law, and order in this matter.

FINDINGS OF FACT

1. Macomber Corporation is a mechanical contractor with its principal place of business in Fairbanks, Alaska.

2. Macomber was hired as a subcontractor on the Building 1555 renovation project at Fort Wainwright, Alaska. Macomber's primary responsibility on the project was to remove old piping and install new pipe in the building.

3. The renovation project was performed under a contract awarded by the U.S. Army Corps of Engineers. The general contractor was Neal and Company, Inc. Separate subcontractors

were hired to perform asbestos removal, demolition, electrical, and mechanical/piping work.

4. The renovation project was to be accomplished in several phases. First the asbestos contractor (Technic Services) was to examine and remove any asbestos known to be in the building, then the demolition subcontractor (Allied Construction) was to break down the walls, and finally the mechanical contractor (Macomber) was to remove old pipe and replace it with new pipe. Macomber's president, Robert Macomber, asserted that Macomber's subcontract excluded any responsibility for asbestos abatement or removal.

5. Renovation work on Building 1555 began on or about November 1, 1988, under the supervision of Neal and Company, the general contractor and on-site project manager. The asbestos abatement contractor completed the first phase of asbestos abatement in the building but then apparently left the worksite. Macomber asserted that it received a written clearance from the abatement contractor that all the asbestos in the building had been removed.

6. On December 13, 1988, after the asbestos abatement contractor had left the worksite, employees of Allied Construction, in the course of their demolition work, discovered additional material that was suspected to be asbestos on the first floor of the building. At that time Macomber's crew was conducting mechanical demolition on the second floor of the building.

7. Upon learning of the discovery of the additional suspected asbestos, Neal and Company's superintendent ordered that the affected area be roped off and directed the subcontractor crews to continue working in other parts of the building but to avoid entering the roped-off area. The evidence does not indicate that any other precautions were taken, such as erecting barriers or enclosures to contain airborne asbestos fibers; providing employees with appropriate respirators or protective clothing; or removing employees from the worksite altogether until the asbestos abatement contractor could be brought in.

8. On the next day, December 14, 1988, Macomber's crew was working on the basement floor when it was informed that the Allied demolition crew had discovered more suspected asbestos on the first floor. Neal and Company's superintendent again ordered that the affected area be cordoned off and instructed subcontractors to keep their employees out of those areas. The testimony further indicated that Neal and Company made arrangements for an asbestos abatement contractor to come in to examine the building but in the meantime, subcontractors were permitted to continue working outside the roped-off areas.

9. Later on December 14, 1988, Department compliance officer Ferd Wilkins arrived at Building 1555 to conduct a safety and health inspection of the worksite. He contacted representatives of each of the subcontractors working in the building, including Macomber's foreman, who was on the second floor. He also

ascertained that Macomber had one other employee working in the building at the time of the inspection.

10. Wilkins observed the cordoned-off areas where suspected asbestos had been found and noted that no barriers or enclosures had been erected around those areas. Nor did he see any sign that air monitoring was being performed or that employees had been provided with proper respiratory equipment and protective clothing. When he interviewed Macomber's foreman, the foreman stated that Neal and Company's superintendent had advised him of the discovery of the suspected asbestos and had directed him to move his crew to other parts of the building.

11. During his inspection Wilkins noted that there were stairwell openings between the basement, first and second floors of the building. He also observed the use of fan-forced heaters which in his opinion were capable of spreading any airborne asbestos fibers throughout the building. Because he felt that inadequate precautions had been taken to prevent employee asbestos exposure, Wilkins cautioned Neal and Company's superintendent that it was risky to allow employees to continue working in the building, whereupon Neal and Company ordered the removal of all employees on the project until an asbestos abatement contractor could come in and abate the hazard.

12. Wilkins also took four bulk samples of material from different places in the building. The bulk samples were subsequently tested and analyzed by Northern Testing Laborato-

ries. According to the affidavit of environmental analyst Marr Starck, the analysis results on the four samples were as follows:

Sample 1: 30% to 40% chrysotile asbestos.
Sample 2: 10% to 20% chrysotile asbestos.
60% to 70% amosite asbestos.
Sample 3: No asbestos.
Sample 4: 50% to 60% chrysotile asbestos.

Patricia Kohart-Massey, another environmental analyst for Northern Testing Laboratories, testified that all four samples tested were in highly friable condition, that is, quite powdery and susceptible of easy transmission in the air.

13. As a result of his inspection, Wilkins recommended that citations be issued to the general contractor (Neal and Company) and to each of the subcontractors present at the worksite (Allied Construction and Macomber Corporation) for failure to perform asbestos monitoring.

14. Apparently there was no representative of the Corps of Engineers present at the worksite during the inspection. However, there was testimony that after the renovation project had been completed, the Corps of Engineers inspected the building and certified adequate completion of all work performed.

15. Because he felt there was a significant risk of asbestos exposure to employees working in Building 1555, Wilkins classified the monitoring violation as "serious". In addition, he calculated a monetary penalty of $500 using the Department's compliance manual guidelines, giving appropriate credit for company size, good faith and no past history of violations.

16. In its letter of contest and at the hearing, Macomber maintained that it was not involved in the discovery of the suspected asbestos, that it had no contractual responsibility or authority to perform asbestos monitoring or abatement, that the cited monitoring requirement did not apply to its work operation, that it had been given clearance to work by the general contractor, and that it had followed the general contractor's orders to keep its employees away from the cordoned-off areas.

CONCLUSIONS OF LAW

Alaska Construction Code 05.045(f)(1)(A) provides:

> Each employer who has a work place or work operation covered by this section must perform monitoring to determine accurately the airborne concentrations of asbestos, tremolite, anthophyllite, actinolite or a combination of these minerals to which employees may be exposed.

We must first determine whether Macomber had a workplace or work operation covered by the above provision. We refer to Construction Code 05.045(a)(1) which outlines the scope and coverage of the asbestos regulations. Subsections (A) and (C) of 05.045(a)(1) state that the asbestos regulations -- including the above monitoring requirement -- apply to demolition, construc- tion, alteration or renovation of structures where asbestos is present. The evidence establishes that Macomber was engaged in mechanical demolition and alteration work on Building 1555 when material suspected of being asbestos was discovered; that it was later confirmed that high concentrations of asbestos were present at

three locations in the building; that Macomber had two employee in the building who may have been exposed to airborne asbestos fibers; and that Macomber did not perform or arrange for asbestos monitoring. Under these circumstances, we conclude that the monitoring requirement in Construction Code 05.045(f)(1)(A) applies to Macomber's work operation and that the Department has made out a prima facie case of violation.

However, our inquiry does not end here. At construction worksites where there are multiple employers with different or overlapping contractual responsibilities, the federal OSHA review commission and the federal courts have developed special principles that under certain circumstances may limit the liability of a particular contractor on a multi-employer worksite. See generally Rothstein, Occupational Safety and Health Law, §§ 165-169 (2d ed 1983). Since the Alaska OSHA Act is modeled after the virtually identical federal OSHA law, we believe it is appropriate to apply the federal multi-employer worksite principles in this case.

The federal multi-employer worksite principles basically analyze OSHA liability in terms of two key concepts, control and exposure. "Control" generally means control of the hazard, either by creating the hazard or having the ability or responsibility to abate it. "Exposure" refers to whether employees of an employer have access to the zone of danger. See Rothstein, supra, at 180.

In early decisions under the federal OSHA Act, the federal review commission held that employers who neither created nor controlled a hazard were still liable if their employees were

exposed to the hazard. Over time, however, several problems became apparent with this rule, described by one leading commentator as follows:

> First, no effort was being made to prevent the creation of hazards, only to penalize the employers of the exposed employees. The suggestion of removing exposed employees from the worksite was hardly plausible. Second, the cited employers often lacked the means to abate the hazard, either because of a lack of control of the area, contractual bars, the lack of funds or technical expertise, or union jurisdictional problems. Thus, the abatement orders, which are the most important part of a citation, were often meaningless. Finally, specialty subcontractors may not even have been aware of hazards created by another specialty subcontractor.

Rothstein, supra, at 184. In subsequent decisions, the federal review commission and the courts adopted a modified rule, holding that a non-controlling employer at a multi-employer construction worksite was not in violation if (1) it did not know or with the exercise of reasonable diligence could not know of the hazard; and (2) it took "realistic abatement measures" under the circumstances, even if such measures fell short of literal compliance with applicable standards. The theory behind this new approach is that expecting non-controlling employers to abate fully may be unfair or impossible in some cases; at the same time exposed employees should be afforded some protection. Id. at 185-86.

The non-controlling employer's duty to take "realistic abatement measures" has been described as follows:

> In any no control-exposure situation the basic question that must be resolve is: What could the noncontrolling employer of the exposed employees do? This can be answered in

> several ways, such as: (1) cautioning workers to avoid the hazard; (2) contacting the employer that created the hazard or that can abate it; (3) using realistic measures; or (4) using other means. The key is that the employer must do something and it must be adequate and reasonable under the circumstances. This "do something" approach can be expressed to employers in the following way: OSHA prohibits an employer from allowing its employees to work where there are hazards, regardless of who caused them, and requires each employer of exposed employees to take reasonable and appropriate corrective measures.

Rothstein, supra, at 187. Whether or not a non-controlling employer has taken realistic abatement measures usually has been decided on a case-by-case basis, with due regard for such factors as the gravity of the violation, the amount of employee exposure, and the severity of any potential resulting injury or illness. Id. at 185-90.

Moreover, part of the determination whether an employer controls or has the ability to abate a hazard is whether the employer has the "means to rectify" the violation. The federal review commission has looked to three factors: (1) whether the employer has the physical capacity to comply or to order compliance by others; (2) whether any constraints imposed by craft union agreements and practices restrict the employer's ability to abate; and (3) whether "contractual or monetary restraints" prevent abatement. Once an employer establishes that it lacks the means to rectify a violation, the employer will be excused from literal compliance with applicable standards. But the employer will still

be in violation if it did not undertake "realistic" nonliteral abatement measures. Rothstein, supra, at 186.

Applying the foregoing principles to the facts of the present case, we conclude that Macomber's employees were "exposed" to an asbestos hazard but that Macomber lacked sufficient "control" over the hazard to be held accountable for literal compliance with the asbestos monitoring requirement. Relevant facts supporting our conclusion regarding employee exposure are (1) Macomber had at least two employees working in the building at the time of the inspection; (2) there were openings between the floors of the building; (3) fan-forced heaters were in use; (4) the heaters were capable of spreading airborne asbestos fibers throughout the building; (5) laboratory test results showed high concentrations of asbestos in at least three locations in the building; (6) Macomber's employees were not provided with appropriate respiratory equipment or protective clothing; and (7) no other appropriate measures were taken, such as erecting barriers or enclosures, or removing employees from the worksite.

Relevant facts supporting our conclusion regarding Macomber's lack of control over the asbestos hazard are (1) Macomber was the mechanical subcontractor on the project; (2) Macomber did not have supervisory authority or responsibility for the worksite and was following orders from Neal and Company, the general contractor; (3) Macomber was not contractually responsible for asbestos monitoring or abatement; (4) Macomber was not in the business of performing asbestos monitoring or abatement;

(5) Macomber had no employees who were certified to perfor asbestos monitoring or abatement; (6) another subcontractor was specifically responsible for asbestos abatement; and (7) the asbestos abatement contractor had completed the first phase of abatement and the general contractor had instructed the other subcontractors to proceed with their work.

We further conclude that under the particular circumstances of this case, the actions taken by Macomber were reasonable and realistic with respect to the asbestos hazard. Relevant facts supporting this conclusion are (1) Macomber did not have any contractual responsibility or authority to perform asbestos monitoring or abatement; (2) Macomber was not in the business of asbestos abatement nor did it have the expertise to perform asbestos monitoring or abatement on Building 1555; (3) Macombe followed the general contractor's orders to keep its employees away from the roped-off areas where asbestos was suspected; (4) Macomber relied on the general contractor and the Corps of Engineers to provide overall project supervision and ensure compliance with applicable asbestos requirements; and (5) Macomber did not know and was not in a position to know that there were high concentrations of asbestos in the building and that asbestos monitoring was required.

Based on the foregoing factual and legal analysis, we conclude that Macomber should not be held liable for strict compliance with the asbestos monitoring requirement contained in Construction Code 05.045(f)(1)(A). Our conclusion reflects

recognition that on some multi-employer worksites it may be unfair to hold a subcontractor liable where it did not create a hazard and where it lacks the authority, responsibility or means to abate the hazard. In this case, we believe that primary responsibility for asbestos abatement and project supervision rested with the asbestos abatement subcontractor, the general contractor and the Corps of Engineers. While it is well-established in OSHA law that each employer is separately responsible for the safety and health of its own employees who may be exposed to a hazard, we also recognize that little purpose would be served by imposing liability on a subcontractor that as a practical matter lacks the authority and ability to abate the hazard.[1]

For the foregoing reasons, we believe that the Department's citation and penalty should be dismissed.

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[1] We wish to emphasize that our decision is limited to the particular facts of this case and does not necessarily apply to other factual situations. As we have indicated, OSHA liability in multi-employer situations must be evaluated on a case-by-case basis.

ORDER

1. The citation and monetary penalty issued by the Department are hereby dismissed.

DATED this 13th day of April, 1990.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

Donald F. Hoff, Jr., Member

Lawrence D. Weiss, Member

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P.O. BOX 21149
JUNEAU, ALASKA 99802-1149

NOTICE TO ALL PARTIES

A person affected by an Order of the OSH Review Board may obtain review of the Order by filing a Notice of Appeal in Superior Court as provided by the Rules of Appellate Procedure of the State of Alaska. The Notice of Appeal must be filed within 30 days from the date of the issuance of the Order by the OSH Review Board. After 30 days from the date of the issuance of the Order, if no appeal has been filed, the Order becomes final and is not subject to review by any court. AS 18.60.097.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order, Docket No. 89-780, in the matter of the Department of Labor vs. Macomber Corporation, Inc., filed in the office of the OSH Review Board at Juneau, Alaska, this 13th day of April, 1990.

Mary Jean Smith
Administrative Assistant
OSH Review Board

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