

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

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
v.)
)
MOM & POP'S GROCERY #1,)
MOM & POP'S GROCERY #4,)
and MOM & POP'S GROCERY #7,)
)
Contestant.)
)

Docket Nos. 89-784
89-785
89-786
Inspection Nos. KO-1791-1192-89
KO-1791-1193-89
KO-1791-1194-89

DECISION AND ORDER

This matter arises from occupational safety and health inspections conducted by the State of Alaska, Department of Labor ("Department") on January 11, 1989, at three separate grocery stores in Palmer, Alaska, owned and operated by Mom & Pop Grocery ("Contestant"). As a result of the inspections, the Department issued three "failure to abate" citations and assessed monetary penalties in the total amount of \$2,400.

Contestant timely challenged all three failure to abate citations. The three citations were consolidated for a hearing before the full Board in Anchorage on February 21, 1990. The

hearing officer was Robert W. Landau, Esq. The Department was represented by Assistant Attorney General Lisa Fitzpatrick. Contestant was represented by its owner, Randall Frank. Evidence was received in the form of witness testimony and documentary exhibits. The record was deemed closed at the conclusion of the hearing.

At the hearing, Contestant indicated that it would not contest the failure to abate violations and wished to contest only the monetary penalties.

FINDINGS OF FACT

1. On November 30, 1988, Department compliance officer Bill Kober conducted a safety and health inspection of Mom & Pop Grocery #1 at 101 West Arctic, Palmer Alaska. As a result of the inspection, the Department cited Contestant for, among other things, a violation of Occupational and Industrial Structures Code 02.315(k)(2) for having a locked rear exit door which could not be immediately opened in case of emergency. The violation was classified as "other than serious" and no monetary penalty was assessed. In addition, the Department imposed an immediate abatement date for correction of the violation. The Department received no notice of contest regarding this violation.

2. On January 11, 1989, compliance officer Kober conducted a follow-up inspection of Mom & Pop Grocery #1 and determined that the violation concerning the locked rear exit door

had not been corrected. Using the Department's compliance manual guidelines for failure to abate violations, Kober calculated an initial penalty of \$1,000 which was reduced by 40% to \$600 as a result of Contestant's small company size.

3. On December 1, 1988, compliance officer Kober inspected Mom & Pop Grocery #4 at Mile 4.8 Old Glenn Highway, Palmer, Alaska. As a result of the inspection, the Department cited Contestant for, among other things, a violation of General Safety Code 01.0802(a)(5) for unguarded blades on an overhead fan heater and for violation of Electrical Code 03.004(b)(1) for having two electrical outlets that had missing face plates. Both of these violations were classified as "other than serious" and no monetary penalty was assessed. In addition, the Department's citation required that both violations were to be abated immediately. Contestant did not contest either of the two violations.

4. On January 11, 1989, Kober conducted a follow-up inspection of Mom & Pop Grocery #4 and determined that neither the unguarded fan blade violation or the electrical outlet violation had been corrected. Accordingly, under the compliance manual guidelines he calculated an initial penalty of \$1,000 for each violation, reduced by 40% to \$600 for Contestant's small company size.

5. On November 21, 1988, compliance officer Kober conducted an inspection of Mom & Pop Grocery #7 at Trunk Road and Palmer-Wasilla Highway in Palmer, Alaska. As a result of the

inspection, Contestant was cited for, among other things, violation of Electrical Code 03.004(b)(1) for having a total of six unused openings in the two main electrical panel boxes. The violation was classified as "other than serious" and no monetary penalty was assessed. The Department's citation required that the violation was to be abated immediately. Contestant did not contest the violation.

6. On January 11, 1989, Kober conducted a follow-up inspection of Mom & Pop Grocery #7 and determined that the electrical panel box violation had not been corrected. Accordingly, under the compliance manual guidelines he calculated an initial penalty of \$1,000 which was reduced by 40% to \$600 as a result of Contestant's small company size.

7. In calculating the monetary penalties for the failure to abate violations, the Department made no reduction for Contestant's good faith or prior history of violations. At the hearing, however, Kober indicated that the compliance manual guidelines would allow a 10% reduction for prior history of violations since the original violations had been classified as other than serious. Kober further stated that no reduction for good faith could be given since Contestant made no effort to immediately abate the violations after they were first cited.

8. Contestant's owner Randy Frank did not challenge the validity of either the original violations or the subsequent failure to abate violations. However, he requested a reduction of

the assessed monetary penalties. He asserted that Kober did not properly identify himself during the inspections and questioned the timing of the inspections. He also stated that he had intended to correct the various violations but simply did not have sufficient time or the necessary parts to do the job. He felt that the citations were marginal although he acknowledged that the panel box violation could be dangerous. Sharon Sandvik, a clerk at Mom & Pop Grocery #4, testified that Kober had indicated that he was there to conduct a safety inspection but had given no indication as to whether the inspection was mandatory.

9. On rebuttal, Kober testified that the reason for inspecting several of Contestant's retail locations was that federal OSHA statistics show that the grocery industry has a high rate of lost work days due to occupational injuries and illnesses. He also maintained that he had properly identified himself and presented his credentials in keeping with the Department's guidelines.

CONCLUSIONS OF LAW

After listening to the testimony and reviewing the evidence, we are satisfied that the original code violations and the subsequent failure to abate violations were properly cited and are supported by the evidence.

With respect to the monetary penalties, we note that Contestant was given the maximum 40% credit for the small size of

its business. In addition, we agree with the Department that no reduction for good faith should be awarded since there is no evidence that Contestant made any effort to correct the hazards or to request the Department for additional time to correct the violations.

We further note that the Department's penalty calculation guidelines contained in chapter VI, pages 12-13, of the compliance manual permit a reduction of 10% for history of previous violations where the previous violations are of a non-serious nature. Accordingly, we believe that Contestant should be given an additional 10% reduction on the initial unadjusted penalty amounts of \$1,000 for each failure to abate violation. Such a reduction would lower the adjusted penalty to \$500 for each violation, for a total penalty amount of \$2,000.

Finally, we find no merit in Contestant's objections to scheduling or conduct of the inspections. We are familiar with the Department's procedures for presenting credentials prior to a safety inspection and we are satisfied that compliance officer Kober properly followed these procedures. In addition, we accept the Department's evidence concerning the high incidence of occupational injuries in the grocery industry and we find no improper motive in the timing or scheduling of these inspections. While we agree that the original code violations were not serious, we find that Contestant received ample warning in the original citations that it was required to immediately abate or correct the

cited safety hazards. We find it difficult to be sympathetic to Contestant's objections when the evidence makes clear that no serious effort was made to correct open and obvious code violations.

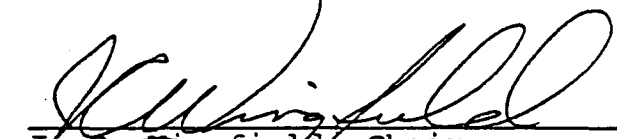
ORDER

1. The Department's "failure to abate" citations are AFFIRMED.

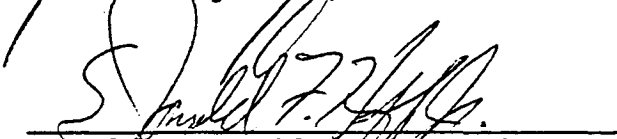
2. The monetary penalty for each of the failure to abate violations shall be reduced from \$600 to \$500, for a total monetary penalty of \$2,000.

DATED this 13th day of April, 1990.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD



J. C. Wingfield, Chairman

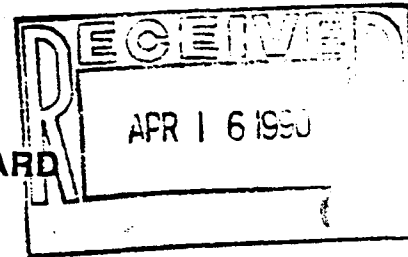


Donald F. Hoff, Jr., Member



Lawrence D. Weiss, Member

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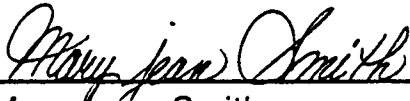


NOTICE TO ALL PARTIES

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, in the matter of the Department of Labor vs. Mom & Pop's Grocery #1, Docket No. 89-785, 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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