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

STATE OF ALASKA,
DEPARTMENT OF LABOR,

Complainant,

v.

ALLIED CONSTRUCTION,

Contestant.

Docket No. 89-789
Inspection No. WI-3924-548-88

DECISION AND ORDER

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

As a result of the inspection, on January 6, 1989, the Department issued a single safety and health citation to Allied Construction ("Allied"), alleging a violation of Alaska Construction Code 05.045(f)(1)(A) for failing to perform monitoring to determine possible employee exposure to asbestos. The citation was classified as "serious" and a penalty of $500 was assessed.

Allied gave timely notice of its desire to contest the citation. Accordingly, a hearing was held before the full Board on November 20, 1989, in Fairbanks, Alaska. The hearing officer was Robert W. Landau, Esq. The Department was represented by Assistant

Attorney General Mary B. Pinkel. Allied was represented by one its owners, Arvil Seay. Each party was given the opportunity to present evidence and make arguments. The record was deemed closed at the conclusion of the hearing.

After considering the evidence and arguments submitted by the parties, the Board makes the following findings of fact, conclusions of law, and order in this matter.

FINDINGS OF FACT

1. On December 14, 1988, Department compliance officer Ferd Wilkins conducted an occupational safety and health inspection of a renovation project at Building 1555, Fort Wainwright, Alaska.

2. The Building 1555 renovation project was being performed under contract awarded by the U.S. Army Corps Engineers. The general contractor on the project was Neal and Company, Inc. Allied Construction was a subcontractor hired to perform demolition work on the walls of the building; other subcontractors had also been hired to perform mechanical/piping work and electrical work. In addition, an asbestos abatement contractor had been hired to perform asbestos removal work. However, the asbestos abatement contractor had completed the first phase of its work and had left the worksite prior to Wilkins' inspection. Upon completion of the first phase of the asbestos removal work, Neal and Company's superintendent had instructed the various subcontractors to proceed with their work.

3. During Allied's demolition work on the walls of the building, certain materials were discovered which were suspected of containing asbestos. Upon being notified of this by Allied's foreman, Neal and Company's superintendent ordered that the affected areas be roped off and instructed subcontractors to continue working in other parts of the building but to avoid entering the roped-off areas. The evidence did not indicate that any other precautions were taken at that time, such as performing air monitoring for asbestos, supplying employees with approved respirators or protective clothing, erecting barriers or enclosures to confine airborne asbestos, or removing employees from the worksite altogether. The testimony further indicated that none of Allied's employees at the worksite were certified to perform asbestos abatement work.

4. During his inspection, Wilkins observed approximately seven Allied employees working in the building and spoke to the Allied foreman. The foreman indicated that he was aware of the newly-discovered suspected asbestos, that he had notified Neal and Company's jobsite superintendent of the discovery, and that he ordered Allied's employees to stay away from the roped-off areas.

5. As part of his inspection, Wilkins took bulk [illegible] samples from four different places in the building. He noted that there were stairwell openings between the basement, first and second floors. He also observed the use of fan-forced heaters, which in his opinion were capable of blowing airborne asbestos fibers throughout the building. He did not see any visqueen partitions or

other type of enclosures to contain any airborne asbestos fibers Wilkins expressed his concern about employee asbestos exposure t Neal and Company's superintendent, who then ordered the removal of all employees from the building until a certified asbestos abatement contractor could be called in.

6. The bulk samples taken by Wilkins were tested by Northern Testing Laboratories, an environmental analysis laboratory. Their results 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.

At the hearing, Patricia Kohart-Massey, an environmental analyst for Northern Testing Laboratories, testified that the above results show high concentrations of asbestos in Building 1555 and that an exposed employees who were not wearing adequate respirato protection equipment or clothing were at "high risk."

7. Arvil Seay, one of Allied's owners, testified that Allied Construction, as a demolition subcontractor, had no contractual responsibility or authority to perform asbestos monitoring or abatement on the project. He further asserted that under the contracts awarded by the Corps of Engineers and the general contractor, the asbestos abatement subcontractor was solely responsible for performing all asbestos monitoring and abatement at the worksite; other subcontractors were merely responsible for notifying the general contractor in the event that suspected asbestos material was encountered. Seay maintained that his

foreman had given the required notification and that Allied's work crew followed the general contractor's orders to keep away from the roped-off areas.

8. As a result of Wilkins' inspection, citations for failure to perform air monitoring for asbestos were issued to Neal and Company, Allied Construction, and Macomber Corporation (the mechanical subcontractor).

9. Because he felt that there was a significant risk of asbestos exposure to employees working in Building 1555, Wilkins classified the failure-to-monitor violation as "serious." In addition, he calculated a monetary penalty of $500 using the Department's compliance manual guidelines, giving appropriate reductions for small company size and no history of prior violations.

CONCLUSIONS OF LAW

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

> Each employer who has a workplace 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 Allied Construction 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, construction, alteration or renovation of structures where asbestos is present. The evidence establishes that Allied was engaged in demolition work on Building 1555 when it discovered material suspected of being asbestos; that it was later confirmed that high concentrations of asbestos were present at three locations in the building; that Allied had several employees working in the building who may have been exposed to airborne asbestos fibers; and that Allied failed to 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 Allied'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 o impossible in some cases; at the same time exposed employees shoul 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 resolved 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 Allied's employees were "exposed" to an asbestos hazard but that Allied 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) Allied had approximately seven 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) Allied'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 Allied's lack of control over the asbestos hazard are (1) Allied

was the demolition subcontractor on the project; (2) Allied did not have supervisory authority or responsibility for the worksite and was following orders from Neal and Company, the general contractor; (3) Allied was not contractually responsible for asbestos monitoring or abatement; (4) Allied was not in the business of performing asbestos monitoring or abatement; (5) Allied had no employees who were certified to perform 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, Allied took reasonable and realistic steps to abate the asbestos hazard. Relevant facts supporting this conclusion are (1) Allied immediately notified the general contractor as soon as it discovered suspected asbestos material; (2) Allied followed the general contractor's orders to resume work but to keep its employees away from the roped-off areas; (3) Allied relied on the general contractor to bring in an asbestos abatement contractor to deal with the suspected asbestos; (4) Allied relied on the general contractor to supervise the entire worksite and assure compliance with asbestos regulations; and (5) Allied 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 Allied 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 a 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 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

J.C. Wingfield, Chairman

Donald F. Hoff, Sr., Member

Lawrence D. Weiss, Member

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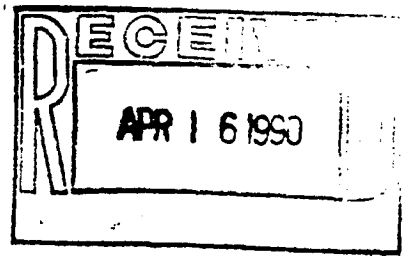

NOTICE TO ALL PARTIES

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. Allied Construction, Docket No. 89-789, 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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