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DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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STATE OF ALASKA, DEPARTMENT)
OF LABOR, DIVISION OF LABOR)
STANDARDS AND SAFETY,)
OCCUPATIONAL SAFETY AND)
HEALTH SECTION,)
)
Complainant,)
)
v.)
)
STATE OF ALASKA, DEPARTMENT)
OF TRANSPORTATION AND PUBLIC)
FACILITIES, FAIRBANKS)
INTERNATIONAL AIRPORT,)
)
Contestant.)
_____)

Docket No. 94-1056S

DECISION AND ORDER

This matter arises from an occupational safety and health inspection conducted by the Alaska Department of Labor, Occupational Safety and Health Section (OSHA) at a workplace under the control of the Alaska Department of Transportation and Public Facilities (DOTPF) at Fairbanks International Airport (Airport) on May 18, 1994.

As a result of the inspection, OSHA issued a citation to DOTPF on July 14, 1994. Citation 1, Item 1a alleges a violation of Hazard Communication (HC) Code 15.0101(e)(2) for failure to provide a written hazard communication program addressing the risks of hazardous chemicals and physical agents at the workplace. Item 1b alleges a violation of HC 15.0101(g)(1) for failure to provide material safety data sheets (MSDS) for each toxic or hazardous substance to which employees may be exposed. Item 1c alleges a

violation of HC 15.0101(i) for failure to provide training to employees on hazardous chemicals and physical agents at the workplace. Citation 1, Items 1a, 1b and 1c were grouped together into a single "serious" violation with a penalty of \$2,500.

Citation 1, Item 2 alleges a violation of General Safety Code (GSC) 01.0501(e) for failure to provide an eye wash capable of supplying 15 minutes of continuous rinse water to the eyes in the event of hazardous chemicals being splashed into an employee's eyes. The violation was classified "serious" with a penalty of \$2,500.

Citation 1, Item 3 alleges a violation of GSC 01.0403(b)(1) for failure to provide a written respiratory protection program addressing the use of self-contained breathing apparatus (SCBAs) by Airport firefighters. The violation was classified "serious" with a penalty of \$2,500.

Citation 1, Item 4 alleges a violation of GSC 01.1103(c)(1) for failure to provide guardrails for part of an elevated storage platform from which employees lowered containers of fire suppressant foam and other materials. The violation was classified "serious" with a penalty of \$2,500.

Citation 1, Item 5 alleges a violation of AS 18.60.075(a)(4) for failure to furnish a workplace free from recognized hazards by permitting the use of a rope hoist without a latch-type hook or a listed weight rating for lowering materials from the storage platform. The violation was classified "serious" with a penalty of \$2,000.

Citation 2, Item 1 alleges a violation of GSC 01.1102(a)(1) for failing to keep the workplace clean and orderly and in a sanitary condition. The violation was classified "nonserious" with no monetary penalty.

DOTPF contested each alleged violation. A hearing was held before the OSHA Review Board (Board) in Fairbanks on March 21, 1995. OSHA was represented by Chief of Enforcement Dennis Smythe. DOTPF was represented by Regional Safety Officer Mick Hotrum. Both parties presented witness testimony, documentary evidence and oral argument. Upon consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. On May 18, 1994, OSHA compliance officer Kayle Foster conducted an occupational safety and health inspection at Fairbanks International Airport in Fairbanks, Alaska.

2. The inspection was prompted by an employee complaint regarding staffing levels for Airport firefighters during emergency incidents and live fire training exercises. There are approximately 23 combined fire protection/public safety employees at the Airport. (OSHA Ex. 6.)

3. At the time of the inspection, Foster had been an OSHA safety compliance officer for approximately one year. Previously she was employed as a safety officer for the Alaska Department of Environmental Conservation for three years and as a fire inspector/investigator for the City of Fairbanks fire department for nine years. Foster's qualifications include certification as a firefighter, fire inspector, mechanical inspector and plans examiner/building inspector. She is also a certified trainer in hazardous materials for the State of Alaska and the State of California. (OSHA Ex. 1.)

4. As part of Foster's inspection at the Airport, she conducted a walk-through inspection of a work area where firefighting vehicles, equipment and materials were

kept. During the first part of her inspection, Foster was accompanied by Airport fire chief Mike Judd. However, Judd was unable to remain for the entire inspection and designated another person to act as the management representative for the rest of the inspection.

5. Foster noticed a number of chemical products in the workplace, including containers of Aqueous Film Forming Foam (AFFF) fire suppressant, pest control explosives, various cylinders and drums containing oils and fluids, and several other cleaning agents and solvents. (OSHA Ex. 2.)

6. Foster asked to see the Airport's written hazard communication program. None was provided during the inspection. At the informal conference between the parties in August 1994 after the citations had been contested, DOTPF produced a "Hazard Communication Code" dated March 1992. (OSHA Ex. 3.) According to Foster, the written program produced by DOTPF was deficient because it was generic in nature and did not cover the specific hazards, chemicals and equipment used by firefighters at the Airport.

7. During the inspection Foster also asked to see the MSDS sheets for each toxic or hazardous substance in use at the workplace. DOTPF produced an MSDS binder, but Foster was unable to find MSDS sheets for certain items such as the AFFF fire suppressant and the pest control explosives used at the Airport.

8. After the inspection Foster obtained an MSDS sheet for the AFFF fire suppressant. (OSHA Ex. 4.) According to the MSDS, AFFF had a health hazard rating of 3 on a scale of 0-4; it was stated that inhalation of AFFF could cause respiratory system irritation and temporary nervous system impairment. Subsequently DOTPF obtained a revised MSDS for AFFF which indicated that its health hazard rating had been downgraded

from 3 to 1. The revised MSDS noted, however, that a single overexposure above recommended guidelines could cause central nervous system depression and upper respiratory irritation, and that prolonged or repeated overexposure could cause more serious symptoms such as blood disorders, bone marrow depression, gastrointestinal disturbance, kidney effects, liver effects, or pulmonary edema. (DOTPF Ex. 11.)

9. Compliance officer Foster found no evidence that Airport firefighting personnel had received information and training about each of the hazardous chemicals used in the workplace. For example, employees would regularly handle containers of AFFF and pour them into the holding tanks of the fire vehicles, but had received no information or training regarding the specific hazards of AFFF. Foster concluded that the Airport's training on hazardous materials was general in nature and did not address the specific hazards posed by each chemical used in the workplace.

10. Foster also did not see any designated eye wash station suitable for quick drenching or flushing of the eyes in the event of contact with hazardous chemicals. Certain chemicals used in the workplace, such as the solvent used to wash fire protection vehicles, contained warning labels indicating that the chemical could cause eye irritation in which case the eyes should be flushed with water for at least 15 minutes. (DOTPF Ex. 13.)

11. Although there was no designated emergency eye wash station at the workplace, there was a shower head available nearby as well as a water hose and a laundry sink. After the inspection the Airport installed a designated emergency shower and eye wash station. (DOTPF Ex. 12.)

12. Foster asked to see the Airport's written respiratory protection program for the SCBAs used by firefighting personnel. No written program was provided during the

inspection, apparently because the responsible person was unavailable and the relevant materials were in his locker. From her interviews with employees Foster concluded that many of them were not familiar with the procedures for the selection, use and maintenance of the SCBAs.

13. At the informal conference DOTPF produced a written respiratory protection program for the Northern Region dated March 1990. However, there was no indication that the program applied to firefighting operations at the Airport nor did the program address the specific equipment used by Airport firefighters during aircraft rescue operations. (OSHA Ex. 5.)

14. At the hearing DOTPF produced a one-page Standard Operating Procedure (SOP) dated August 1982 concerning the use of emergency breathing equipment at the Airport, and a two-page excerpt from the Airport's SOP regarding rescue and firefighting training. DOTPF also produced an unsigned and undated set of operating procedures for the use, training, care, inspection and maintenance of SCBAs at the Airport. (DOTPF Ex. 23.)

15. During her inspection Foster observed an elevated storage platform about 14' above the shop floor where containers of the AFFF fire suppressant and other materials were stored. Near the perimeter of the platform there was a rope pulley suspended from the ceiling with an open-sided hook attached to the end of the rope. The pulley did not have a load weight rating indicating the maximum weight that could be safely handled. Also, there was no guardrail around the section of the platform where the pulley was located, although there were guardrails around the rest of the platform. (OSHA Ex. 2.)

16. Employees would periodically go up to the storage platform to retrieve AFFF containers for use in fire emergencies and training drills. Fire drills can require up to 200 gallons of AFFF. Each full five-gallon container of AFFF weighs approximately 40 pounds. Normally the AFFF containers were handed down from the platform to an employee standing on top of a fire truck but sometimes the rope pulley was used to lower containers all the way down to the floor. (DOTPF Ex. 24.)

17. Alaska occupational safety and health standards do not specifically address rope pulleys in general industry use. However, the American National Standards Institute (ANSI) issued a standard for overhead hoists in 1973. ANSI standards are voluntary but are generally recognized as consensus industry standards throughout the country.

18. ANSI Standard B30.16-1973 provides safety standards for overhead hoists and includes the following provisions:

16-1.1.1.1 Rating

The rated load shall be permanently marked on the hoist or load block and clearly legible from the operating position.

16-1.1.2.4 Hooks

* * *

d. Latch-type hooks shall be used unless the use of the latch increases the hazard.

(DOTPF Ex. 17.)

19. In general, Foster found the work area to be in "immaculate" condition. However, she noticed a few drums and containers that had oil or other fluids pooled on top. She also noticed oily footprints on the floor nearby and a strong odor of oil in the area.

Foster believed the oil on the floor created a slip hazard for employees working in or walking through the area. (OSHA Ex. 2.)

20. As a result of Foster's inspection, OSHA determined that each of the violations cited in Citation 1, Items 1-5, created the potential for serious injury and therefore classified each of these violations as "serious." Citation 2, Item 1, was classified as a "nonserious" housekeeping violation.

21. Total penalties in the amount of \$12,000 were assessed for the "serious" violations alleged in Citation 1. No reduction in the penalty amount was awarded for employer size, history of prior violations, or good faith. No penalty was assessed for the "nonserious" violation alleged in Citation 2.

CONCLUSIONS OF LAW

Citation 1, Items 1a, 1b and 1c

Hazard Communication 15.0101(e)(2) provides:

Employers shall develop, implement, and maintain at the work place a written hazard communication program for their work places which at least describes how the criteria specified in (f), (g), and (i) of this section for labels and other forms of warning, material safety data sheets, and employee information and training, will be met, and which also includes the following:

(A) A list of the hazardous chemicals or physical agents known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the work place as a whole or for individual work areas); and,

(B) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

HC 15.0101(g)(1) provides:

Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each toxic or hazardous substance which they use.

HC 15.0101(i) provides:

Employee information and training. Employers must provide employees with information and training on hazardous chemicals and physical agents in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

(1) Employees must be informed of:

(A) The requirements of this section;

(B) Any operation in their work area where hazardous chemicals and physical agents are present; and

(C) The location and availability of the written hazard communication program, including the required lists of hazardous chemicals, and physical agents and material safety data sheets and physical agent data sheets required by this section.

(2) Employee training must include at least:

(A) Methods and observations that may be used to detect presence or release of a hazardous chemical in the work area, such as monitoring conducted by the employer, continuous monitoring devices, visual appearance, or odor of hazardous chemicals when being released, etc.;

(B) The physical and health hazards of the chemicals and physical agents in the work area;

(C) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and

(D) The details of the hazard communication program developed by the employer, including an explanation of the labeling system, the material safety data sheet, and physical agent data sheet, and how employees can obtain and use the appropriate hazard information.

After reviewing the evidence, we conclude that the Airport did not fully comply with the above code requirements with respect to firefighting personnel. The "Hazard Communication Code" offered by DOTPF at the informal conference was not readily available to Airport employees at the time of the inspection, nor is it clear that this document even applied to Airport operations. More importantly, DOTPF's code fails to meet several of the specific requirements of the Hazard Communication Code, such as listing each hazardous chemical or physical agent used in the workplace and informing employees how to protect themselves from the specific hazards associated with each chemical or agent. We agree with OSHA that DOTPF's code is little more than a compilation of generic information pertaining to hazardous chemicals and does not contain a particularized discussion of the specific chemicals or hazards that might be encountered by Airport firefighters.

We also conclude that the Airport did not fully comply with OSHA requirements regarding MSDS information and employee training. Although the Airport did have an MSDS binder, it is apparent that MSDS sheets were not available for each known chemical product used in the workplace, for example the AFFF fire suppressant foam. It is equally apparent that Airport firefighters did not receive particularized training about AFFF and other hazardous materials in the workplace. A telling example of this is the compliance officer's testimony that Airport personnel told her that AFFF was so harmless that "you could drink the stuff."

We further conclude that the above violations were properly classified as "serious." While the AFFF fire suppressant may not be as hazardous to health as previously indicated by the manufacturer, the revised MSDS indicates there still exists the potential for significant injury or illness resulting from improper use or prolonged overexposure. In addition, there were other hazardous materials, such as pest control explosives, bleaches and cleaning solvents, and various oils and fluids used in the maintenance of vehicles, that could cause serious injury or illness in the event of improper handling or use.

Citation 1, Item 2

General Safety Code 01.0501(e) provides:

Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

The evidence makes clear that Airport employees were regularly exposed to splash hazards from using various chemicals in the workplace. Some of the chemicals had labels recommending flushing or drenching with water in the event of eye or skin contact. Although there was no designated eye wash station in the immediate area where the Airport firefighters worked, there was a shower head nearby as well as a water hose and laundry sink. While these water sources were not specifically designated for flushing or drenching of the eyes, we find that their availability, particularly the shower head, was minimally sufficient to comply with the code. The code does not require a designated eye wash station in every area where hazardous chemicals may be used. As long as there is some type of suitable facility for washing or flushing the eyes within a reasonable distance from the

immediate work area, we think the intent of the code has been satisfied. Accordingly, we conclude that this violation was not justified.

Citation 1, Item 3

General Safety Code 01.0403(b)(1) provides:

Written standard operating procedures governing selection and use of respirators shall be established.

The Airport did not have a readily available written respiratory protection program covering SCBAs at the time of the inspection. The one-page 1982 SOP for emergency breathing equipment is simply too incomplete and out of date to qualify as a comprehensive respiratory protection program. GSC 01.0403(b)(9) requires regular inspection and evaluation to determine the continued effectiveness of a respiratory protection program. Moreover, the 1982 SOP is deficient because it does not provide detailed information regarding respirator selection, use, maintenance and storage. The compliance officer's testimony persuades us that firefighters were not sufficiently informed of or trained in several of the essential aspects of SCBA use, such as fit testing and medical surveillance. We believe it is especially hazardous to provide sophisticated safety equipment such as SCBAs without adequate procedures or training since this may give employees a false sense of security in emergency situations.

DOTPF maintains that the Airport did have a detailed respiratory protection program for SCBAs in effect at the time of the inspection. We find this hard to believe considering that DOTPF did not produce the purported program until 10 months after the inspection and the copy produced is unsigned and undated. Moreover, even if DOTPF had a complying program in effect at the time of the inspection, we find that the program was

not adequately made available to employees. The best written procedures in the world will not be effective if they are stored in someone's locker and are not effectively communicated to employees. Furthermore, in view of the life-threatening emergency situations in which Airport firefighters are expected to use SCBAs and the consequences of improper use, we find the Airport's failure to have a readily available written respiratory protection program covering SCBAs justifies OSHA's classification of this violation as "serious."

Citation 1, Item 4

General Safety Code 01.1103(c)(1) provides:

Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in 01.1103(e)(3)) on all open sides, except where there is entrance to a ramp, stairway or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,

- (A) Persons can pass
- (B) There is moving machinery, or
- (C) There is equipment with which falling materials could create a hazard.

It is undisputed that there was a missing guardrail around a section of the storage platform approximately 14' above the shop floor. Apparently the missing section was removed to allow the AFFF containers and other materials to be lowered more easily from the platform. DOTPF argues that having the guardrail in place would pose an even greater hazard because it would require employees to either lift materials over the guardrail or constantly remove and reinstall the guardrail section which weighs about 100 pounds.

We are not persuaded that a greater hazard would be created by requiring the placement of a guardrail completely around the storage platform. While it may be less

convenient to have the guardrail in place, mere inconvenience or impracticality is not a valid defense to an employer's obligation to comply with applicable OSHA requirements. In addition, DOTPF did not demonstrate that alternative means of protecting employees were unavailable and that a variance request would have been inappropriate. Thus, the recognized elements of the "greater hazard" defense have not been satisfied. See Mark A. Rothstein, *Occupational Safety and Health Law*, §§ 120-21 at 168-71 (3rd ed. 1990) (hereinafter "Rothstein").

We further conclude that this violation was properly classified as "serious." In the event of an accident, there is little doubt that a fall from a height of 14' to a concrete floor below could cause serious bodily harm to an employee.

Citation 1, Item 5

AS 18.60.075(a)(4) provides:

An employer shall do everything necessary to protect the life, health and safety of employees including, but not limited to:

* * *

(4) furnishing to each of his employees employment and a place of employment which are free from recognized hazards which, in the opinion of the commissioner, are causing or are likely to cause death or serious physical harm to his employees.

This provision is commonly known as the "general duty clause." It is well established in OSHA law that the following elements are necessary to prove a violation of the general duty clause:

1. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
2. The hazard was a recognized hazard;

3. The hazard was causing or was likely to cause death or serious physical harm; and
4. There was a feasible and useful method to correct the hazard.

See, e.g., Department of Transportation and Public Facilities, Docket No. 94-1029S, Decision and Order at 11 (AKOSH Rev. Bd. 12/7/94); see generally Rothstein, § 141 at 179.

Upon review of the evidence, we conclude that all four elements of a general duty clause violation are satisfied. First, we believe the "homemade" rope pulley used by employees to lower fire suppressant foam containers and other materials from the storage platform constituted a hazard to which employees were exposed because the load weight capacity was not specified and the hook did not have a latch to prevent loads from slipping off. Second, we believe the hazards associated with the rope pulley were "recognized" hazards under applicable ANSI standards. We note that ANSI standards are generally accepted as national consensus standards for all types of workplaces throughout the country. In the absence of a specific OSHA standard covering overhead hoists or rope pulleys, we find it acceptable to rely on a generally applicable ANSI standard. Moreover, we believe the rope pulley was an "overhead hoist" within the scope of ANSI Standard B30.16-1973. Although the particular section relied upon by OSHA is entitled "Hand Chain Powered Hoists," there is language in that section implying that rope hoists are also covered. For example, Section 16-1.1.1.3(b)(2) cautions against operating a hoist with "twisted, kinked or damaged chain *or rope*" (emphasis added).

Third, we believe the rope pulley on the storage platform was capable of causing serious physical harm to employees. The foam containers weighed approximately 40 pounds each. If a given load proved to be too heavy for the rope pulley, or if the load

were to slip off the unlatched hook, an employee waiting to receive the load could be seriously injured. Fourth, we are persuaded that there was a feasible and useful method of correcting the hazards, namely marking the maximum load capacity on the pulley and providing a secure latch-type hook.

Citation 2, Item 1

General Safety Code 01.1102(a)(1) provides:

All places of employment, passageways, store rooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

The testimony and photographs submitted by OSHA demonstrate that several containers of chemicals in the work area had pools of oily liquid on their lids. In addition, some of these oils and liquids were observed on the adjacent floor surface. DOTPF argues that there was no hazard because none of the liquids was toxic. However, the toxicity (or lack of toxicity) of the liquids is relevant only to the issue of the seriousness of the violation, not to whether there was compliance with the cited standard. Despite the fact that most of the workplace was found to be clean and orderly, we find sufficient proof that there were certain slippery areas which presented a hazard to employees working in or walking through the area. We believe the violation was properly cited as a "nonserious" housekeeping violation.

Other Issues

At the hearing DOTPF raised a number of additional issues relating to the inspection, including: (1) OSHA had no jurisdiction to conduct the inspection because it exceeded the scope of the complaint about firefighter staffing during rescue operations;

(2) compliance officer Foster was not adequately qualified to conduct the inspection; (3) the Airport was improperly denied a closing conference at the conclusion of the inspection; (4) OSHA gave false and misleading information to the Commissioner of Labor in order to obtain his approval to cite a general duty clause violation; and (5) OSHA unreasonably rejected DOTPF's offer to settle the cited violations. Upon review of the limited evidence and argument submitted on these issues, we find no merit in any of these contentions.

Penalties

Except for Citation 1, Item 2, we have found the alleged violations to be justified. The total penalty amount for the affirmed violations is \$9,500. While we have no basis to dispute OSHA's penalty calculations, we believe that some credit ought to be given for the Airport's partial compliance with several of the cited standards. Accordingly, we exercise our discretion to reduce the total penalty amount for the affirmed violations by 50% from \$9,500 to \$4,750.

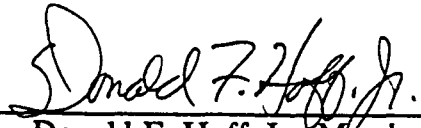
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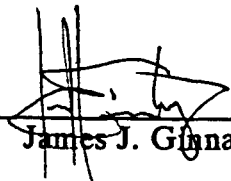
Based on the foregoing findings of fact and conclusions of law, it is hereby ordered as follows:

1. Citation 1, Items 1, 3, 4 and 5 are AFFIRMED as "serious" violations.
2. Citation 1, Item 2 is DISMISSED.
3. Citation 2, Item 1 is AFFIRMED as a "nonserious" violation.
4. The total penalties assessed are reduced to \$4,750.
5. After this decision becomes final, OSHA shall conduct a prompt follow-up inspection to verify abatement of the violations affirmed herein.

DATED this 17th day of JULY, 1995.

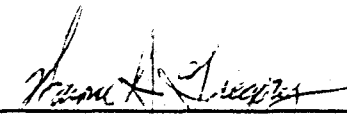
ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: 
Donald F. Hoff, Jr., Member

By: 
James J. Ginnaty, Member

Board Chairman Gregory, dissenting in part:

I agree with the decision of my colleagues pertaining to Citation 1, Items 2, 3 and 4, but respectfully dissent as to Citation 1, Items 1 and 5, and Citation 2, Item 1. I believe that this case demonstrates federal pressure on Alaska's program to achieve quotas in the area of citations and their classification. I will have no part in affirming any violation that has the appearance of being linked to quotas.

By: 
Wayne A. Gregory, Chairman