

OSH dec. file  
11-21-88

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

P. O. BOX 1149, JUNEAU, ALASKA 99802

RECEIVED  
Department of Law

STATE OF ALASKA, )  
DEPARTMENT OF LABOR, )  
 )  
Complainant, )  
 )  
vs. )  
 )  
INSULATION SPECIALTIES )  
MANUFACTURING COMPANY )  
 )  
Contestant. )

NOV 28 1988

Office of the Attorney General  
Anchorage Branch  
Anchorage, Alaska

Docket No. 88-726  
Inspection No. WI-391-341-87

DECISION AND ORDER

Introduction

This matter came before the board for a hearing on May 24, 1988 in Fairbanks, Alaska. The State of Alaska, Department of Labor, Division of Labor Standards and Safety, Occupational Safety and Health Section (hereafter "the Department") was represented by Assistant Attorney General Jan Hart DeYoung. Insulation Specialties Manufacturing Company ("the contestant") was represented by Jeff O'Bryant, attorney for the contestant. The record was deemed closed at the conclusion of the hearing.

At issue before the board are two citations which were issued by compliance officer Ferd Wilkens following an inspection of a worksite under the control of the contestant at the Aurora Industrial area in Fairbanks, Alaska in October of 1987. Citation #1 asserts a violation of Alaska General Safety Code 01.0105(c)(5). Therein, the Department alleges that the

contestant used an open flame kerosene space heater which wa directed toward an enclosed tank containing a flammable liquid and which thereby caused a fire and an explosion which resulted in a fatality. Citation #2 alleges that the employer did not have an effective hazard communication program in effect and further alleges that the employer did not display the Right To Know poster at the worksite, in violation of Alaska Health Code 15.0101(e)(2) and 15.0101(h)(1). The Department proposed a penalty of \$280.00 for Citation #1 (cited as SERIOUS), and a penalty of \$280.00 for Citation #2 (GROUPED FOR SERIOUS).

Discussion of Evidence and Testimony

The Department presented the testimony of Compliance Officer Wilkens. Wilkens, who has worked continuously in the field of industrial safety since 1970, testified that in earl October of 1987, he received a phone call from the Fairbanks Fire Department advising him that an accident had occurred at the Deer Street office of "Dan Helton's company." Wilkens responded as required. Upon arriving, he discovered that a chemical fire had occurred which had resulted in the death of one of contestant's employees, Michael Hotaling. Wilkens testified that in the course of his investigation he determined that a kerosene space heater had been in use at the time of the fire. The space heater was turned on and aimed at the base of the nitrogen cylinder. The heat from the space heater apparently softened the connecting hose which ultimately blew out and ignited a fire which led to the fatal explosion. According to Wilkens, the use of an open

flame heater to warm an enclosed container which has potential explosive danger is strictly prohibited under the General Safety Code provisions which he cited. Wilkens acknowledged that he was well aware that space heaters are in widespread use throughout the insulation business, but also stated that the risk is commonly understood although ignored.

On cross examination, Wilkens admitted that most of the information which he used to formulate the citation was gathered from second hand sources since the only first hand witness, (Hotaling) was killed in the explosion. He conceded that his attribution of causation of the fire is a guess which is based upon the reports of others, but he also stated that he believes it is a high percentage guess. Wilkens admitted that he was unable to say exactly what specific chemicals and mixtures were in the tank which exploded, but pointed out that he could have ascertained those contents with specificity if the contestant had had the required hazard information sheets in its possession.

Wilkens testified that the contestant was unable to present evidence to him that it had an effective hazard communication program in effect at the jobsite. There were no Material Safety Data sheets on site, there was no hazard communication and notification procedure in effect to let employees know what hazardous materials were in use on site, and there were no general information sheets or poster posted on site as required by law. (Wilkens, in fact, testified that he was told by an employee that the only hazardous materials education

that employee ever got was an instruction that "if you don't understand what the chemical is, stay the hell away from it.") Wilkens does not believe that the manufacturer's general information suffices as a "hazardous materials communication program".

Irene Hotaling testified for the contestant. She stated that early in June of 1986 she came to the Alaska Department of Economic Conservation and the Alaska Department of Labor to get forms, posters and other documentation she needed in order to be in compliance with various regulations on the job. She testified she was given three posters, each of which she posted in the office. She presented those posters as exhibits at the hearing. They were: "Safety and Health Protection on the Job", "Safe Practices Code", and "Emergency Information". She stated that posters were given to her by "the receptionist" in response to her inquiries and that she spoke with no one else at the respective agencies. She did not know it was necessary to talk to the Occupational Safety and Health Section about the requirements of a hazardous materials communication program, so she did not do so. Concerning Citation #1, Hotaling testified that she did not know at any time that her husband, the deceased, was using the space heater at all, much less improperly. She further testified that she never gave her husband permission to use the space heater in the fashion in which he used it.

Photographic exhibits 1 through 4 were also introduced by the Department.

In closing, the Department argued that the contestant knew or should have known that it was a common practice to apply open heat to a tank. The contestant, however, took no steps to prevent this practice. The Department also argued that since the contestant was working with hazardous materials the requirements of the code with respect to establishment of a hazardous communication program and posting of critical information on site apply. Since the program here was incomplete, and since the required information was not posted, the violation of the relevant code provision is clear.

In response, contestant argued that while there is no dispute regarding the existence of an open flame and regarding the application of that open flame to the tank by the deceased, it is not clear and the Department has not established whether there had been a determination made by the contestant regarding the possibility of explosion. The contestant further argued, based on Irene Hotaling's testimony, that the deceased had no authority to use the space heater in the manner indicated. Concerning Citation #2, the contestant argued that there was a partial or incomplete program in effect and that the contestant had not posted the required poster because she was never provided one by the Department of Alaska.

#### Findings of Fact and Conclusions of Law

This is a most unfortunate case. It is apparent from the evidence presented that the deceased, Michael Hotaling, one of the principal owners of the contestant company, had succumbed

to the dangerous habit of utilizing open flame heaters to warm enclosed containers. It is also clear that Hotaling's actions in doing so produced the precise catastrophic consequence which the law is designed to prevent; namely an explosion. Based upon the evidence presented to us, we have no difficulty whatsoever finding that the Department has satisfied the requisite elements of GSC 01.0105(c)(5). An open flame was applied here by Hotaling to an enclosed tank. It is well known in the insulation industry -- as it clearly was to all involved in this case -- that a possibility of explosion exists whenever an open flame is applied to urethane insulating material. Furthermore, notwithstanding Mrs. Hotaling's testimony, we have difficulty believing that her husband would have asked her for her permission before using the heater as he did. Accordingly, we conclude that the contestant did, in fact, violate the provision of GSC 01.0105(c)(5). Citation #1 should, therefore, be affirmed.

We likewise find no convincing evidence to support the contestant's rather weak defense to Citation #2. It may very well be, as she testified, that Mrs. Hotaling inquired of the respective state agencies as to what posters and signs were required to be posted on the job site. It may even be true that she received from those agencies only the specific posters which she introduced as exhibits at the hearing and which, alone, do not establish compliance with HC 15.0101(h)(1). However, that testimony and the inferential arguments drawn from it do not establish a valid defense. We find that compliance with HC

15.0101(e)(2) requires the employer to implement a written hazard communication program which includes posting of critical information, present on site of all relevant Material Safety Data sheets, and a plan instructing all employee as to how to deal with the specific hazardous materials which are present and in use. We likewise find that the employer has an obligation of compliance which far exceeds a mere act of inquiry directed toward the appropriate state regulatory agency. Since we are unable to find that the contestant here fully complied with the requirements of law, we conclude that Citation #2 should be affirmed.

With respect to penalties, it is tragic that the contestant's failure to comply with the requirements of law had to be punctuated by death. Although we cannot excuse the contestant's noncompliance, we are fully cognizant that there is no penalty which the Department can assess which will more effectively bring home the message to this or any other employer that there is a very real safety and health purpose underlying the regulations in question. The contestant paid the ultimate price. In light of that fact, we see nothing to be gained by the Department or the State in impressing a further burden on contestant. We therefore conclude that all penalties proposed by the Department for the infractions herein should be dismissed.

ORDER

1. Citation #1 is affirmed as issued.
2. Citation #2 is affirmed as issued.

3. The penalties proposed for Citations #1 and #2 are dismissed.

DATED at Juneau, Alaska this 21<sup>ST</sup> day of November, 1988.

OSHA REVIEW BOARD

By: Guy Stringham  
Guy Stringham, Chairman

By: J. C. Wingfield  
J. C. Wingfield, Member

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