

STATE OF ALASKA

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

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STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
v.)
)
STATE OF ALASKA,)
DEPARTMENT OF EDUCATION,)
)
Contestant.)

Docket No. 91-898
Inspection No. Gr-6835-049-91

DECISION AND ORDER

Following an occupational safety and health inspection at Mt. Edgecumbe High School in Sitka on August 15, 1991, the Alaska Department of Labor (DOL) issued two citations to the Alaska Department of Education (DOE) for violations of occupational safety and health codes.

DOE contests only the penalty for Citation 1. Citation 1 alleges that DOE violated Hazard Communication Code 15.0101(i) by failing to provide employees with information and safety training regarding the use of a particular hazardous material in the workplace. The citation was classified as "serious" and a monetary penalty of \$400 was assessed.

A hearing was held on the contested citation before the full Board in Sitka on March 10, 1992. DOL was represented by Eric Shortt, assistant chief of safety/health compliance. DOE was represented by John Yerkes, maintenance superintendent at Mt. Edgecumbe. Both parties submitted witness testimony, documentary evidence and arguments to the Board. Upon review and consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On August 15, 1991, DOL industrial hygiene compliance officer David Green conducted an occupational safety and health inspection at Mt. Edgecumbe High School, Sitka, Alaska. The school is operated and staffed by DOE employees.

2. During the inspection, maintenance superintendent John Yerkes directed Green's attention to the girls' dormitory shower room where DOE employees were applying tiles with an adhesive product named "Bostik Ultra-Set."

3. After examining the product, Green asked to see the material safety data sheet (MSDS) for the product. DOE was unable to locate or provide the MSDS. However, the label on the product indicated that it contained xylene and toluene, both of which are considered hazardous substances.

4. At Green's recommendation, Yerkes directed his employees to immediately stop work and use respirators and other appropriate protective equipment before restarting work.

5. The MSDS for the Bostik product confirms that it contains a number of hazardous ingredients. (DOL Ex. 1.) The product is hazardous if inhaled and can cause eye and/or skin irritation upon contact. The MSDS further states that when using the product, ventilation should be provided and protective gloves and eye protection should be worn. Even though there were respirators available at the worksite, employees applying the product had not been directed to use them because the product was thought to be non-toxic.

6. Prior to the work being performed, Yerkes had instructed the maintenance mechanic in charge of the work to check the MSDS for any product being used to determine whether it contained any hazardous ingredients. Both the maintenance mechanic and the supply technician who obtained the product indicated that they had checked the product and believed it was non-toxic. These employees were later reprimanded for failing to follow the Maintenance Section's safety program. (DOE Ex. 2.) The program covers, among other things, MSDS sheets, container labeling and hazardous materials training.

7. Yerkes testified that he did not exercise personal oversight on all products or supplies used at the school but instead relied on each employee to follow the safety program. He acknowledged, however, that on occasion employees had not understood or properly followed the safety program.

8. Because of the potential for serious health consequences in the event of an overexposure to the product, Green classified Citation 1 as a "serious" violation.

9. Under DOL's penalty calculation guidelines, the unadjusted penalty for a serious violation is \$1,000. In this case, the penalty was reduced by 20% based on the number of employees at the workplace; 30% due to DOE's good faith in immediately responding to the hazard; and 10% because the school had no history of prior violations. After the penalty reductions, the final penalty assessed was \$400.

CONCLUSIONS OF LAW

Hazard Communication Code 15.1101(i) states:

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.

DOE concedes that employees were not provided with adequate information, training or protective equipment regarding the Bostik adhesive, a product containing hazardous ingredients. DOE argues, however, that the \$400 penalty is inappropriate since employees had acted against the superintendent's direct instructions to determine whether any product used was toxic or hazardous.

In reviewing penalty assessments, the Board is not bound by DOL's penalty computations. See Nacirema Operating Co., 1 OSHC 1001, 1971-73 OSHD ¶ 15,032 (1972); see also Rothstein, Occupational Safety and Health Law ¶ 332 at 357 (3d ed. 1990). The

Board may independently review a penalty assessment and may exercise its discretion to lower or raise the assessed penalty.

In this case, we conclude that the evidence of employee misconduct may be taken into consideration in reviewing DOL's penalty assessment, but that such evidence does not provide a basis for completely eliminating the penalty. It is evident that DOE employees did not follow their superintendent's instructions to check the MSDS information on the Bostik product prior to using it. However, we also find that DOE management placed too much responsibility for safety on its employees and failed to adequately supervise their work. DOE management was aware that despite its safety training program, some employees were still not "getting it." This awareness should have caused management to exercise even greater supervision over employees who might obtain and use potentially hazardous materials.

Moreover, DOE's safety program provides that MSDS information is to be available at the workplace for all hazardous products used, yet there was no such information available for the Bostik adhesive at the time of the inspection. DOE's safety program further states that new products will not be put in use without MSDS sheets being available, yet this is exactly what occurred with the Bostik adhesive. In short, DOE failed to comply with its own safety program.

Nonetheless, we find that DOE management has demonstrated a cooperative approach and a positive attitude in attempting to meet its obligations under the OSHA law. Because of DOE's good

faith, combined with the evidence of employee misconduct, we believe the Department's penalty assessment should be reduced to \$200. We expect that DOE will take steps to improve its supervision of employees who may come into contact with hazardous materials and to ensure that adequate information and training is provided regarding such materials.

ORDER

It is hereby ordered as follows:

1. Citation 1 is AFFIRMED as a "serious" violation.
2. The penalty for Citation 1 is reduced from \$400 to \$200.

DATED this 29th day of July, 1992.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: Wayne A. Gregory
Wayne A. Gregory, Chairman

By: Donald F. Hoff, Jr.
Donald F. Hoff, Jr., Member

By: Lawrence D. Weiss
Lawrence D. Weiss, Member