STATE OF ALASKA

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

WALTER J. HICKEL, GOVERNOR

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-2700
FAX: (907) 465-2784

STATE OF ALASKA,
DEPARTMENT OF LABOR,

Complainant,

v.

CERTIFIED ASBESTOS ABATERS,

Contestant.

Docket No. 91-909
Inspection No. Gr-6835-055-91

DECISION AND ORDER

This matter arises from an occupational safety and health inspection conducted by the State of Alaska, Department of Labor (Department) at the Mt. Edgecumbe Hospital in Sitka on September 12-13, 1991.

As a result of the inspection, the Department issued two citations to Certified Asbestos Abaters (CAA) for violations of Alaska occupational safety and health codes. Citation 1 was subsequently dismissed by the Department. Citation 2 alleges two separate code violations. Item 1 alleges a violation of Hazard Communication Code 15.0101(e)(2) for failing to provide a written hazard communication program for workers at the Mt. Edgecumbe worksite. Item 2 alleges a violation of Construction Code

05.045(1)(5)(B) for failing to ensure that employees performing asbestos abatement have received face fit tests every six months since being certified to perform asbestos abatement work. Both alleged violations were classified as nonserious and no monetary penalty was assessed.

Upon CAA's contest of the citations, a hearing was held before the full Board in Juneau on March 12, 1992. The Department was represented by Assistant Attorney General Lisa M. Fitzpatrick. CAA was represented by engineer Henry Williams. Both parties presented 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 in this matter.

FINDINGS OF FACT

1. On September 12-13, 1991, Department compliance officer David Green conducted an occupational safety and health inspection of the Mt. Edgecumbe Hospital renovation project in Sitka, Alaska.

2. During the inspection, Green observed two workers, John Hammock and Victor Jones, performing asbestos abatement using glove bags inside a negative air enclosure.

3. Upon investigation, Green determined that there was no written hazard communication program at the worksite covering the asbestos abatement work being performed by Hammock and Jones.

4. Green further determined that Hammock and Jones had not had respirator face fit tests in over six months since they were certified to perform asbestos abatement work.

5. The general contractor at the site was Dawson Construction Company (Dawson). Initially Dawson had subcontracted with Power Insulation to perform the asbestos abatement work. However, after the start of the renovation project, Power Insulation was removed as the asbestos abatement contractor and was replaced by CAA. (Ex. A.)

6. Dawson and CAA entered into a subcontract whereby CAA agreed to perform the asbestos abatement work for the renovation project. (Ex. D.)

7. On September 5, 1991, as required by law, CAA submitted its plan for the asbestos abatement work to the Department. The work was to start on approximately September 12 and would end on approximately September 30, 1991.

8. In a letter dated September 6, 1991, the Department approved CAA's asbestos abatement plan and approved a number of certified workers to perform the work, including John Hammock. (Ex. C.) Victor Jones was not on the list of approved workers but was later approved by the Department.

9. Sometime between September 6 and September 12, 1991, Dawson hired Hammock and Jones to perform asbestos abatement work on the project. According to Dawson's superintendent at the site, John Polyacik, both workers were hired on CAA's behalf to begin the abatement work since CAA's supervisor had not yet arrived at the

worksite. Hammock and Jones themselves were unsure who their employer was for this project.

10. On September 11, 1991, Polyacik sent a fax message to CAA's office in Auburn, Washington. The message indicated that Hammock and Jones would be performing asbestos abatement work and would be glove-bagging asbestos pipe insulation inside a containment enclosure. (Ex. B.)

11. CAA's supervisor for the abatement work, Gary Parks, was delayed in getting to the worksite until two or three days after the inspection on September 12. He brought with him CAA's written hazard communication program.

12. Prior to the arrival of CAA's supervisor, Hammock and Jones performed asbestos abatement work under the general supervision of Dawson superintendent Polyacik. Polyacik himself, however, was engaged in performing air monitoring at the site and did not directly supervise Hammock or Jones as to the details of their work. Polyacik was at the asbestos removal area approximately two hours on the first day of the inspection.

13. The equipment used by Hammock and Jones in performing asbestos abatement work did not belong to CAA but apparently was obtained by Dawson after Power Insulation left the worksite.

14. According to CAA engineer Henry Williams, the agreement between Dawson and CAA was that Dawson would hire the individuals to perform the asbestos abatement work but they would be paid and supervised by CAA.

15. Once the CAA supervisor arrived at the worksite, both Hammock and Jones were placed on CAA's payroll and were retroactively paid for their work prior to the supervisor's arrival.

16. There is no evidence that CAA contacted Dawson to delay the start of the abatement work until CAA's supervisor arrived at the worksite. Nor is there any evidence that CAA made any attempt prior to the inspection to ensure that the workers hired to do the asbestos abatement had received appropriate hazardous materials information or timely face-fit testing.

CONCLUSIONS OF LAW

Hazard Communication Code 15.0101(e)(2) provides:

> Employers shall develop, implement and maintain at the workplace a written hazard communication program for their workplaces 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 workplace 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 unlabelled pipes in their work areas.

Construction Code 05.045(1)(5)(B) provides in pertinent part:

> Employers shall perform either quantitative or qualitative face fit tests at the time of initial fitting and at least every six months thereafter for each employee wearing a negative-pressure respirator....

It is undisputed that both of the above code provisions were violated with respect to the asbestos abatement work performed by John Hammock and Victor Jones. The main issue in dispute is whether CAA should be liable for the violations as their employer. CAA contends that Dawson, not CAA, should be responsible for these violations since Dawson hired both workers, put them to work and generally supervised their work prior to the arrival of CAA's supervisor at the worksite.

In multi-employer situations, the Department is not limited to citing one employer. Two or more employers may be liable under the OSHA law for the same violative condition.[1] Rothstein, Occupational Safety and Health Law § 162, at 198 (3d ed. 1990). In many instances employees may simultaneously have employment relationships with more than one employer. Each of these employers may be considered a "joint employer." In determining liability among joint employers, the federal OSHA Review Commission and the federal courts have rejected the common law concept of master and servant but instead have focused on business realities and the purposes of the OSHA Act. Among the

[1] Since this case involves only the question of CAA's liability, we express no opinion on whether Dawson is also liable for the same violations.

factors considered in assessing liability are: who pays the employee; who directs, supervises and controls the employee; who is responsible for providing safety training and instruction; and who the employees consider to be their employer. Rothstein, supra, § 163, at 198-99. Furthermore, in cases involving employees loaned by a primary employer to a secondary employer, it has been held that for a primary employer to avoid liability under the OSHA Act, it must have provided adequate safety training and instruction to the loaned employees. Rothstein, supra, § 164, at 199.

Applying the foregoing principles to the present case, we conclude that John Hammock and Victor Jones were employees of CAA for the purposes of the OSHA law. Most important, CAA paid both employees for the work in question. In addition, CAA was contractually responsible for performing the asbestos abatement work done by Hammock and Jones. CAA was also the party that filed the asbestos abatement plan for the work; Hammock was listed as an approved worker in that plan and Jones was subsequently approved by the Department. Moreover, asbestos abatement is precisely the kind of work in which CAA specializes whereas Dawson is a general contractor and not an asbestos abatement specialist. Furthermore, Dawson's faxed message to CAA on September 11 suggests that Hammock and Jones were hired on CAA's behalf; if Dawson was going to be responsible for their work, it would not have been necessary to notify CAA of their hiring. CAA thus was on notice that these two workers would be performing asbestos abatement and that the work had begun according to CAA's filed plan. Finally, despite the fact

that CAA's supervisor was delayed in getting to the worksite, CAA took no action to disavow responsibility for Hammock and Jones, delay commencement of the work until its supervisor could get to the worksite, or make sure that Hammock and Jones were provided with adequate hazardous materials information and timely face-fit testing. For all these reasons, we conclude that Hammock and Jones were CAA employees for OSHA purposes and therefore CAA was properly cited for the OSHA code violations.

We note that there is no evidence of any actual safety problem at the worksite. By all accounts, the asbestos abatement work was safely and properly completed. The technical nature of these violations is reflected in the fact that the Department classified both of them as nonserious and assessed no monetary penalty. We conclude that the Department's classification and penalty assessment were proper and reasonable under the circumstances.

ORDER

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

1. Pursuant to the Department's notice of dismissal, Citation 1 is DISMISSED.

2. Citation 2, Items 1 and 2, are AFFIRMED as nonserious violations with no monetary penalty.

DATED this 17th 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

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NOTICE TO ALL PARTIES

A person affected by an Order of the OSH Review Board may obtain a review of the Order by filing a complaint challenging the Order in Superior Court. The affected person must file the complaint 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, the order becomes final and is not subject to review by any court. AS 18.60.097(a).

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Alaska Department of Labor vs. Certified Asbestos Abaters, Docket No. 91-909, filed in the office of the OSH Review Board at Juneau, Alaska, this 17th day of July, 1992.

Mary Jean Smith
OSH Review Board

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