

**STATE OF ALASKA
DEPARTMENT OF LABOR**

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

STATE OF ALASKA, DEPARTMENT OF)	
LABOR AND WORKFORCE DEVELOPMENT,)	
DIVISION OF LABOR STANDARDS AND)	
SAFETY, OCCUPATIONAL SAFETY AND)	
HEALTH SECTION,)	
)	
Complainant,)	Docket No. 01-2166
)	Inspection No. 303696728
v.)	
)	
PURELY ALASKAN WATER, INC.,)	
)	
Contestant.)	
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DECISION AND ORDER

I. INTRODUCTION

This matter arises from an occupational safety and health inspection at a water bottling plant operated by Purely Alaskan Water, Inc., in Palmer, Alaska. Based on the inspection, the State of Alaska, Department of Labor and Workforce Development (Department) issued a citation to the company alleging violations of occupational safety and health standards and assessing monetary penalties.

Purely Alaskan Water contested the Department's citation. Prior to a Board hearing, the parties entered into a partial settlement agreement resolving one of the two

contested violations. Accordingly, the only item remaining in dispute is Item 1 of the citation Item 1 alleges that Purely Alaskan Water violated 29 CFR 1910.178(l)(6) by failing to ensure that an employee was trained and certified to operate a forklift. The alleged violation was classified as a repeat violation with a monetary penalty of \$2,000. The Board held a hearing in Anchorage on May 16, 2002. The Department was represented by Assistant Attorney General Robert A. Royce. Purely Alaskan Water was represented by its owner, Robert Gottstein. At the hearing, 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.

II. FINDINGS OF FACT

1. On April 30, 2001, Department safety enforcement officer SueLynn Hight conducted an occupational safety and health inspection at a water bottling plant operated by Purely Alaskan Water, Inc., located at 1800 South Glenn Highway, Palmer, Alaska. There were approximately seven employees working at the plant. The inspection was prompted by a complaint regarding forklift operation.

2. During her inspection, Hight observed an employee operating a forklift at the plant. (Ex. 2) She asked to see the written training certification for each employee authorized to operate the forklift. Plant manager Bart Colgrove, who had only recently taken over as plant manager, was unable to locate the training certifications and indicated that the company's papers were a mess due to a management change. Sometime after the inspection, Colgrove provided the training certifications for three employees and

indicated that a fourth employee had lost her card. (Ex. C) These certifications, however, did not include the employee who was operating the forklift during the inspection.

3. The employee observed by Hight operating the forklift during the April 30 inspection was Randall Lewis, a laborer and blow mold operator. When interviewed by Hight, Lewis said that he used the forklift daily to move pallets of bottled water but that he had never been trained or certified as a forklift operator. He also stated that he had been previously employed by Purely Alaskan Water from November 1999 to January 2001 as a blow mold supervisor, but he had left this position due to management issues. (Ex. 3)

4. At the hearing, Lewis testified that he operated the forklift nearly every day to move pallets of water bottles from one area of the plant to another. Lewis was aware that certification was required to operate the forklift but he operated it anyway to do his job. Occasionally he would ask other employees to use the forklift to move material for him. Lewis stated that he had asked the previous manager about forklift training but was told that we don't have the time. Lewis was not present when forklift training was provided to other employees. According to Lewis, everyone at the plant knew he was operating the forklift, including the plant manager.

5. Bart Colgrove began working for Purely Alaskan Water in February 2001 and became plant manager on March 16, 2001, approximately six weeks before the April 30, 2001 inspection. He presented evidence that the company had purchased forklift safety training information in September 2000. (Exs. E and F). He testified it was company policy that employees were not supposed to operate the forklift without training and certification. Colgrove did not see Randall Lewis operate the forklift on April 30.

6. According to Colgrove, Lewis had previously engaged in misconduct by sabotaging company equipment, including the blow mold machine. Because there were prior disputes between Lewis and the company, Colgrove believed that Lewis had deliberately operated the forklift during the April 30 inspection to make trouble for the company. Lewis denied this accusation and stated he was using the forklift before he was even aware that an OSHA inspector was at the plant. Enforcement officer Hight did not identify the source of the complaint that prompted her inspection, but she did indicate it was not Lewis.

7. Shelly Conatser was a production line employee who was also a supervisor. She testified that all employees had been notified not to operate the forklift without certification and that this was a well-known rule. Although she did not see Lewis operate the forklift on April 30, she acknowledged that she had seen him operate the forklift at other times and knew that he was not certified to do so, but did not report this to the plant manager. Conatser also stated her belief that the company had posted a sign on the forklift prior to the April 30 inspection indicating that operation of the forklift without proper certification and training would result in immediate termination. However, she was unaware of any employee being disciplined for improperly operating the forklift.

8. Chris Conatser, another production line employee and supervisor, was designated as the forklift trainer. He was not sure when the warning sign was placed on the forklift, but believed it occurred prior to the April 30 inspection. Enforcement officer Hight, however, testified that she inspected the forklift during the April 30 inspection but did not see any sign on it.

9. Approximately two weeks before the April 30 inspection, there had been a forklift accident at the plant. The accident happened while employee Don Hansen was operating the forklift to load a truck.

10. On May 8, 2001, Colgrove sent a letter to Hight explaining how company policy had changed since the accident and the April 30 inspection. First, employees who had no training on safe forklift operation were given training (including Randall Lewis). Second, the company appointed a forklift trainer (Chris Conatser) who was responsible for forklift training and certification. Third, the company posted a warning notice on the forklift and at other places in the plant that improper or unsafe forklift operation would be grounds for termination. (Exs. 4, 5, 6, 7)

11. Enforcement officer Hight had previously inspected the plant in November 2000 and, as a result, several OSHA violations were cited on February 28, 2001. One of the cited violations involved forklift operation by an uncertified employee. The company did not contest the prior citation and paid the assessed penalty. (Ex. 1)

12. Based on the earlier February 2001 citation and the April 30, 2001 inspection, Hight classified the forklift certification violation as a repeat violation. According to Hight, there was a potential hazard of serious injury if an uncertified employee were to operate

the forklift without proper training. Hight found no evidence of employee misconduct with regard to the forklift violation. She found no evidence of established written policies or rules regarding forklift operation and the consequences of noncompliance with such rules. Hight also found no evidence that the company had ever disciplined an employee for improperly operating the forklift. For these reasons, she concluded that the employee misconduct defense had not been established.

III. CONCLUSIONS OF LAW

29 CFR 1910.178(l)(6) states:

Powered industrial trucks. Operator training. Certification.
The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

To establish a violation of an occupational safety and health standard, the Department must prove by a preponderance of the evidence that (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) one or more employees were exposed or had access to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. See Mark A. Rothstein, *Occupational Safety and Health Law*, § 102 at 152 (4th ed. 1998); see also 8 AAC 61.205(i) (burden of proof for citations and penalties is on the Department by a preponderance of the evidence).

There is no dispute that the cited standard applies; that there was a failure to comply with the standard on April 30, 2001, when enforcement officer Hight observed

Randall Lewis, an untrained and uncertified employee, operate the forklift; and that one or more employees in the workplace were exposed or had access to this violative condition. As to employer knowledge, plant manager Colgrove may not have seen Lewis operating the forklift on April 30, but he knew or could have known with reasonable diligence that Lewis was operating the forklift. There was uncontroverted evidence that Lewis had used the forklift on a regular basis and that other employees, including supervisory employees, were aware of this. Accordingly, we find that the Department has demonstrated a prima facie case of violation.

Purely Alaskan Water does not dispute that Lewis improperly used the forklift, but argues that there was a workplace rule prohibiting uncertified employees from operating the forklift and that this violation occurred as a result of Lewis' misconduct. Unpreventable employee misconduct is recognized as an affirmative defense on which the employer has the burden of proof. See Rothstein, 117 at 176-81. To establish the employee misconduct defense, an employer must prove that (1) it had established work rules designed to prevent the violation; (2) it had adequately communicated these rules to its employees; (3) it took adequate steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *Id.* at 176; *see also, Jensen Construction Co.*, 7 OSHC 1477 (OSHRC 1979) (adopting the four-part misconduct test).

Upon review of the evidence, we conclude that Purely Alaskan Water fails to meet the elements of the employee misconduct defense. Although the company contends it was well known among employees that they could not operate the forklift without training and certification, it is evident to us that the company's work rules were not adequately

communicated to employees. Plant manager Colgrove candidly admitted that at the time of the inspection, the company's papers were in disarray and the employee handbook was being rewritten and was not available. There was no written program in effect for forklift safety, including safety meetings, training, and evaluation of operator competence. As indicated by the communications between Colgrove and Hight in May 2001, Purely Alaskan Water did not provide forklift training and certification program to all affected employees until after the April 30, 2001 inspection. Additionally, we find that the company failed to adequately notify employees of the disciplinary consequences of operating the forklift without proper training or certification. The testimony from the company's witnesses about when the warning signs were placed on the forklift and other places was inconclusive. Colgrove's May 8 letter suggests that these warnings were not posted until after the April 30 inspection. We also find no reason to disbelieve the enforcement officer's testimony that she saw no warning sign on the forklift during her inspection.

Moreover, we find that Purely Alaskan Water failed to adequately supervise the operation of the forklift by uncertified employees and did not enforce the prohibition against improper operation when a violation was discovered. The plant is a small workplace with less than ten employees. Prior to the inspection, it was known to several employees, including supervisory employees, that Randall Lewis was using the forklift, but no disciplinary action was taken by management. Because the company did not have an adequate or effective forklift safety program in effect at the time of the inspection, we are unable to excuse this violation on the grounds of employee misconduct.

Furthermore, the company's allegations of other misconduct by Lewis are

unrelated to this violation and are beyond the scope of the Board ' s review. Although the company may suspect Lewis of trying to undermine it based on previous disputes, we find no persuasive evidence that Lewis deliberately caused or created this safety violation. While we commend Purely Alaskan Water for taking positive steps to fully comply with forklift safety requirements after the inspection, it is clear to us that prior to the inspection there was no adequate program in place to ensure that only properly trained and certified employees would operate the forklift. Accordingly, we affirm the Department ' s citation and penalty.¹

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that Citation 1, Items 1 is AFFIRMED as a repeat violation with a penalty of \$2,000.

DATED this 14th day of October____, 2002.

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: _____ /s/ _____
Timothy O. Sharp, Chair

By: _____ /s/ _____
Carla Meek, Member

By: _____ Not Participating _____

1. Purely Alaskan Water did not express any objection to the classification of the violation or the amount of the penalty.

Cliff Davidson, Member