

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

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
v.)
)
KONOIKE CONSTRUCTION CO., LTD.,)
)
Contestant.)

Docket No. 89-769
Inspection No. Wi-3924-544-88

DECISION AND ORDER

This matter arises from three "failure to abate" citations and accompanying monetary penalties issued by the State of Alaska, Department of Labor ("the Department") to Konoike Construction Co., Ltd. ("Konoike") following an inspection of Konoike's worksite at Fort Wainwright near Fairbanks on December 9, 1988.

Citation #1-1a alleges that Konoike failed to abate a previous violation of Hazard Communication Code 15.0101(e)(2) by failing to develop, implement and maintain an adequate written hazard communication program at its workplace. Citation #1-1b alleges that Konoike failed to abate a previous violation of Hazard Communication Code 15.0101(i)(1) by failing to establish a safety education program for its employees in compliance with AS 18.60.066. Citation #1-1c alleges that Konoike failed to abate a previous violation of Hazard Communication Code 15.0101(h)(2) by failing to maintain a complete list of material safety data (MSDS) sheets containing information regarding toxic or hazardous chemicals to which employees might become exposed. Each of the three alleged violations was classified as a "failure to abate" violation and carried a proposed penalty of \$2000, for a total monetary penalty of \$6000.

Konoike filed a timely notice of contest dated January 11, 1989. Subsequently a hearing was held before the Board in Fairbanks on June 26, 1989. The Department was represented by Assistant Attorney General Lisa Fitzpatrick. Konoike was represented by its president, Barney Florcke. Both parties presented evidence in the form of witness testimony and

documentary exhibits. The evidentiary record was deemed closed at the conclusion of the hearing.

Findings of Fact

1. During 1988, Konoike Construction was engaged in the renovation of barracks at Fort Wainwright near Fairbanks. On September 19, 1988, Konoike's worksite at Fort Wainwright was inspected by the Department's safety compliance officer Bill Kober. As a result of Kober's inspection, Konoike was cited for three violations of the Hazard Communication Code: 1) not having an adequate written hazard communication program, 2) not having an adequate safety education program and 3) not providing a complete set of MSDS sheets for potentially hazardous or toxic chemicals at the worksite such as enamel paints and paint thinners. Konoike did not contest the citations resulting from Kober's inspection and duly paid the penalty of \$480 assessed by the Department. (See Department Exhibit A).

2. On December 9, 1988, compliance officer Ferd Wilkins conducted a follow-up safety inspection of Konoike's worksite to determine if the previously cited violations had been corrected.

3. Wilkins asked Konoike's project superintendent John Bishop and quality control manager Tom Toombs for a copy of the company's written hazard communication and safety education programs but neither Bishop nor Toombs could produce a copy of the required programs. Bishop and Toombs explained that the written hazard communication and safety education programs were still being developed in the wake of the Department's earlier citations but had not yet been completed. Instead they produced copies of Konoike's "Safety Plan" and "Job Hazard Analysis" (see Konoike Exhibits 1 and 2).

4. Wilkins also asked to see MSDS sheets for the enamel paints and paint thinners at the worksite. These could not be produced either; Toombs explained that the information sheets had been ordered but had not yet arrived.

5. As a result of his inspection, Wilkins concluded that Konoike had not satisfactorily corrected the earlier violations and recommended that appropriate "failure to abate" citations be issued to the company.

6. Prior to both the Kober and Wilkins inspections, Konoike's worksite at Fort Wainwright had also been inspected by health compliance officer Nathan Tibbs in January 1988 in response to a complaint regarding asbestos. During his inspection, Tibbs explained to Konoike representatives what the code requirements were for hazard communication programs and

gave the company a sample model program. In the narrative report of his inspection, Tibbs states that he evaluated, among other things, Konoike's safety policy and hazard communication program and found both of them to be adequate and in compliance with OSHA requirements (see page 7 of narrative report in Konoike Exhibit 3). At the hearing, Tibbs explained that the main reason he felt Konoike was not in violation of code requirements regarding hazard communication and safety education programs at the time of his inspection was because there was no indication of employee exposure to hazardous materials at that time. However, because of subsequent employee use of potentially hazardous materials such as paints and thinners after his inspection, he agreed that Konoike's written programs were incomplete and inadequate at the time of the Kober and Wilkins inspections.

7. Also prior to the Kober and Wilkins inspections, the Department's consultation and training section had conducted two evaluations of Konoike's worksite on January 13 and March 3, 1988 in response to requests from the company. Neither of the two consultative reports issued after the evaluations made any mention of Konoike's compliance with hazard communications code requirements. (See Konoike Exhibits 4 and 5). The consultative reports expressly advised Konoike that any subsequent safety or health compliance inspections would not be bound by the consultant's advice or by his failure to detect or point out specific hazards.

8. Mike Andrews, a representative from the Painters' Union, described the ongoing training provided by the union to its members regarding the handling of hazardous materials and proper protective equipment. Most of the painters dispatched by the union to work on the Konoike construction project had received hazard communication and safety training, and were familiar with the paints and chemicals used at the worksite. However, Andrews stated that the union safety training was not designed to be a substitute for employer training and that employers had a separate responsibility to provide adequate safety training and protective equipment for their employees.

9. During their testimony, Konoike witnesses John Bishop and Tom Toombs essentially conceded that the company did not have completed hazard communication or safety education programs as required by OSHA codes. They noted, however, that the company's Safety Plan and Job Hazard Analysis were in effect at the time of the Tibbs, Kober and Wilkins compliance inspections and that the company was making a good faith effort to correct the earlier citations. Bishop and Toombs also asserted that Wilkins had told them that if Konoike came into prompt compliance with the cited code requirements, the company would not be cited again for the same violations. However, Konoike made no request for an extension of time to come into compliance with the cited provisions.

10. Ray Jorgensen, former chief industrial hygienist for the Department, testified that he had reviewed Konoike's Safety Plan and Job Hazard Analysis. It was his opinion that these documents, while useful, did not meet the code requirements for written hazard communication or safety education programs.

Conclusions of Law

After considering the witness testimony and documentary exhibits in this matter, we conclude that at the time of the Wilkins follow-up inspection Konoike was not in full compliance with the specific code requirements regarding hazard communication programs, safety education and training programs, and the availability of MSDS sheets for chemicals used at the worksite. Konoike's Safety Plan and Job Hazard Analysis, while useful documents, do not adequately or fully comply with the requirements of the Hazard Communication Code. The company's own witnesses recognized that they were not in full compliance, and we credit their honesty in acknowledging the situation.

There is no question that Konoike was aware of the code requirements after the Kober inspection in September 1988; the company had also been informed of the same requirements earlier by compliance officer Tibbs during his inspection in January 1988. We believe that Konoike had ample time to assemble the necessary programs and obtain the required MSDS sheets. If they did not have sufficient time, they could have petitioned for an extension of the applicable abatement deadlines as permitted by AS 18.60.093(e) but they elected not to do so.

While it is apparent that most of the painters at Konoike's worksite had received proper hazard communication and safety training through their union, we would like to stress that such union-sponsored training in no way serves to relieve Konoike of its own legal responsibility to comply with applicable safety and health requirements. OSHA laws and regulations have clearly placed the primary burden of safety compliance on the employer, not on employees or their unions.

Despite Konoike's noncompliance with applicable safety and health requirements, we find that several mitigating factors exist in this case. First, compliance officer Tibbs' written statement that Konoike's safety plan and hazard communication program were in compliance with applicable requirements after his January 1988 inspection directly contradicts the citations issued for the same items just several months later. It was not unreasonable for Konoike to believe after Tibbs' inspection that its safety training and hazard communication plans were adequate and in compliance with OSHA requirements. Such reliance, however, was no longer justified after the Kober inspection when the original citations were issued.

Second, we acknowledge that Konoike may well have become confused about its safety obligations as a result of the multiple overlapping safety inspections conducted by the Department at the Fort Wainwright worksite in 1988. During that time period, Konoike's worksite was subjected to no less than three compliance inspections and two consultative inspections by a total of four different Department representatives. While we do not agree with Konoike's contention that the Department affirmatively misled or deceived the company, we find that the multiplicity of inspections, inspectors and inspection reports could have contributed to the company's confusion in complying with applicable safety requirements.

Third, we find that Konoike did take some steps to comply with the cited code requirements even though upon reinspection they were not in strict compliance. In addition, the company appears to have demonstrated a certain amount of good faith in attempting to meet its safety and health obligations. For the foregoing reasons, we conclude that the failure to abate citations should be upheld but that the proposed monetary penalties should be reduced in half, to a total of \$3000.

Order

1. Citations #1-1a, #1-1b and #1-1c are AFFIRMED as "failure to abate" violations.
2. The total monetary penalties for the above violations are reduced to \$3000.

DATED this 6th day of October, 1989.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

Guy Stringham
Guy Stringham, Chairman

Donald F. Hoff, Jr.
Donald F. Hoff, Jr., Member

J. C. Wingfield
J. C. Wingfield, Member

