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. 01-2163
	)	Inspection No. 303693618
v.	)	
SEWARD FISHERIES, INC.,	)	
Contestant.	)	

DECISION AND ORDER

I. INTRODUCTION

This matter arises from an occupational safety and health inspection at a seafood processing plant operated by Seward Fisheries, Inc., in Seward, Alaska. Based on the inspection, the State of Alaska, Department of Labor and Workforce Development (Department) issued a citation to Seward Fisheries alleging violations of occupational safety and health standards and assessing monetary penalties.

Seward Fisheries contested certain of the Department=s alleged violations and penalties. Prior

to a Board hearing, the parties entered into a partial settlement agreement resolving all but one of the contested items. The Board subsequently approved the partial settlement agreement. Accordingly, the only item remaining in dispute is Item 3b of the citation.

Item 3b alleges a violation of 29 CFR 1910.146(c)(4) for failure to develop and implement a permit-required confined space program to control entry of employees into the Fish Bin Chiller Alley at the Seward plant. This item was classified as a serious violation with a proposed penalty of $975.

A hearing was held before the Board in Anchorage on May 13, 2002. The Department was represented by Assistant Attorney General Robert A. Royce. Seward Fisheries was represented by Leauri Lopes, Safety Director for Icicle Seafoods, Inc., the parent company of Seward Fisheries. At the hearing, both parties presented witness testimony, documentary evidence and closing arguments. Upon 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.

II. FINDINGS OF FACT

1. On September 7-8, 2000, Department compliance officer Patrick Wheat conducted an occupational safety and health inspection at a seafood processing plant operated by Seward Fisheries at 601 Port Avenue in Seward, Alaska.

2. During his inspection, Wheat observed an area of the plant known as the Fish Bin Chiller Alley. The Fish Bin Chiller Alley is a corridor approximately 60 feet long and 5 feet wide. Within the corridor are five chiller units and a network of pipes that provides chilled water to the plant=s ammonia refrigeration system. The chiller units are located on one side of the corridor and the connected piping is routed overhead as well as on the opposite side of the corridor about 18 inches off the floor. There is

a suspended metal catwalk above the chillers and pipes about 8 feet 6 inches from the floor. The catwalk is accessible by ladders at either end of the corridor. The ends of the corridor are open and not enclosed. There are building exits at each end of the corridor: a standard door at one end and a 12-foot by 12-foot overhead garage door at the other end. There are two large fixed fans at one end of the corridor as well as several overhead fans in the plant to provide ventilation. Additionally, there is lighting approximately every 10 feet through the corridor. (Exs. 2, D, E, F, G and H.)

3. The processing season at the Seward Fisheries plant normally takes place between July 1 and the third week in August, a period of approximately seven weeks. The plant=s ammonia refrigeration system is used only during the processing season. During the season, Seward Fisheries= employees go into the Fish Bin Chiller Alley on an hourly basis to monitor the temperature gauges for the chiller units. Employees also go into the alley numerous times each day to check the water levels in the tanks. Maintenance work on the ammonia refrigeration system is normally before or after the processing season when there is no ammonia in the system.

4. A person working in or walking through the Fish Bin Chiller Alley would have to walk in the center of the corridor between the chiller units on one side and the low pipe on the other side approximately 18 inches off the floor. The effective walking area between the chillers and the pipe is approximately 13 inches wide, except for several places where there are bolted flanges in the pipe narrowing the walking width to 10 2 inches. There are also overhead pipes located approximately 5 feet 2 inches above the floor. (Exs. 2, E and F.)

5. Based on his inspection, compliance officer Wheat concluded that the Fish Bin Chiller Alley was a permit-required confined space under applicable occupational safety and health standards.

In Wheat=s opinion, the alley was a confined space because (1) due to the obstructions posed by the chiller units and network of pipes, there was restricted entry and exit from the corridor in the event of an accidental release of ammonia, hindering an employee=s ability to escape as well as the ability of others to rescue an injured employee, and (2) based on the original design of the plant, the Fish Bin Chiller Alley was not designed for continuous employee occupancy due to the obstructions in the corridor that would impair an employee=s access and egress. Wheat also noted that the ammonia used in the refrigeration system was potentially toxic because if it were released in a concentrated form it could cause serious burns and damage to lung tissue.

6. Jeff Sutphin is the chief engineer at the Seward Fisheries plant. Sutphin was in charge of a process hazard analysis of the plant performed prior to the OSHA inspection. The Fish Bin Chiller Alley was evaluated as part of the process hazard analysis but was determined not to be a confined space or a high-risk area from an occupational safety and health standpoint. Sutphin agreed that a concentrated ammonia release could be harmful but he believed that in the event of an emergency an employee could exit the alley in less than 10 seconds at either end of the corridor. Sutphin also noted that the ammonia refrigeration piping system expands and contracts depending upon the temperature, sometimes causing the packing nuts on the ammonia pipe to loosen but rarely causing any ammonia leak.

7. Tim Crozer is the safety manager at the Seward Fisheries plant. Crozer testified that although he is 6 feet 5 inches tall, it is not difficult for him to walk through the Fish Bin Chiller Alley and that it is not necessary to step over pipes or turn sideways. When walking through the alley, Crozer has to twist his body a little and has to duck under one overhead pipe, but he is otherwise unimpeded. Like Sutphin, Crozer believes that the Fish Bin Chiller Alley has adequate access and egress in the event of an emergency and is not a confined space like a tank, vessel, or other enclosure.

8. Amy Duz is a safety and health consultant for Icicle Seafoods and previously worked for Icicle as a plant manager in Dutch Harbor. She is a certified safety specialist and has substantial experience with ammonia refrigeration systems and the confined space standard. Duz was a team leader for the process hazard analysis at the Seward plant and believes that the Fish Bin Chiller Alley does not qualify as a confined space. With regard to the restricted entry or exit requirement, Duz reviewed numerous OSHA compliance letters but was unable to find any applicable clarification of the

requirement. Based on the OSHA information available, Duz believes it is not possible to establish with any certainty whether the obstructions in the Fish Bin Chiller Alley are significant enough to hinder access or egress. Regarding the continuous employee occupancy requirement, Duz believes that the design of the alley was intended for employee occupancy because there is adequate lighting, ventilation, and room for an employee to perform work tasks such as monitoring temperature gauges and water levels.

III. CONCLUSIONS OF LAW

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) the employer failed 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).

29 CFR 1910.146(c) states in pertinent part:

> *General Requirements.* (1) The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.
>
> . . .
>
> (4) If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. . . .

29 CFR 1910.146(b) defines Aconfined space@ to mean a space that is:

> (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
>
> (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
>
> (3) Is not designed for continuous employee occupancy.

The parties agree that the Fish Bin Chiller Alley meets the first of the three required elements for a confined space but disagree as to whether the second and third requirements are met.

A. Restricted Means of Entry or Exit

In determining whether a space has limited or restricted means for entry or exit, OSHA will evaluate its overall characteristics to determine if an entrant=s ability to escape in an emergency would be hindered. OSHA Instruction CPL 2.100 (May 5, 1995) (Ex. 3 at 20). Because this is a performance-based standard, there are no minimum requirements for access or egress; instead we must evaluate the totality of the circumstances. Upon review of the record, we are persuaded by a slight preponderance of the evidence that an employee=s ability to escape or be rescued from the Fish Bin Chiller Alley in the event of an emergency would be hindered by the location of the chiller units and piping system which poses a tangible obstruction in passing through the corridor. Even under normal circumstances, it is apparent that a person would have to do some twisting and/or bending to walk through the tightest spaces which are 10 2 - 13 inches wide, and would also have to duck his/her head to avoid some of the overhead pipes. These obstructions would be an even greater hindrance in the event of an emergency such as an ammonia release, which could immediately blind or incapacitate an employee.

Moreover, the fact that each end of the Fish Bin Chiller Alley is open and adjacent to a building exit does not mean that there are no limits or restrictions on access or egress. In Instruction CPL 2.100, OSHA commented that an access door or portal which is too small to allow an employee to walk upright and unimpeded through it will be considered to restrict the employee=s ability to escape. Ex. 3 at 19-20. Similarly, we find that parts of the Fish Bin Chiller Alley are too small to allow an employee to walk upright and unimpeded through it and therefore restrict the employee=s ability to escape in an emergency. We believe that the hazards of exiting the Fish Bin Chiller Alley in an emergency could be greatly minimized or eliminated by relocating the chiller units and certain of the pipes closer to the sidewalls to allow greater freedom of movement in the central walkway.

B. Continuous Employee Occupancy

The preamble to the permit-required confined space standard states that AOSHA believes that the final rule=s definition properly places the focus on the design of the space, which is the key to whether a human can occupy the space under normal operating conditions.@ 58 Federal Register 4478 (January 14, 1993). In a subsequent interpretation letter, OSHA states: AIf, when the space was originally designed or subsequently redesigned, the designer took into consideration that humans would be entering the space and provided for the human occupancy (such as: provided ventilation, lighting, sufficient room to accomplish the anticipated task, etc.), then the space would be designed for employee occupancy.@ Ex. B.

Although we regard this as a close question, we conclude that the Department has not met its burden of proof to demonstrate that the Fish Bin Chiller Alley was not designed for continuous employee occupancy. The plant was built in approximately 1965, but it is unknown if the Fish Bin

Chiller Alley was part of the original plant design. The floor plan drawn by the consulting engineer (submitted by Seward Fisheries) does not show the chiller units or the piping system. However, we are persuaded that the current configuration of the Fish Bin Chiller Alley does provide for continuous employee occupancy for the following reasons: there are two separate points of entry and exit into and from the alley; there is ample ventilation in the immediate area, as evidenced by the two large fans at the end of the alley; there is adequate lighting provided, as evidenced by the 150-watt lights spaced every 10 feet; the alley contains equipment requiring hourly monitoring by employees; and sufficient space is provided so that employees can enter the alley and perform their assigned work tasks. Even if the Fish Bin Chiller Alley was not part of the original plant design, it is apparent to us that the space was designed and/or modified to provide for continuous employee occupancy.

Since the Department fails to persuade us that the Fish Bin Chiller Alley was not designed for continuous employee occupancy, the alley does not meet all of the requirements to be considered a Aconfined space@ under 29 CFR 1910.146, and therefore a written space program was not required.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that Citation 1, Item 3b and the penalty of $975 are DISMISSED.

DATED this 10th 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
Cliff Davidson, Member