

BEFORE THE ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

STATE OF ALASKA, DEPARTMENT OF LABOR)
AND WORKFORCE DEVELOPMENT, DIVISION)
OF LABOR STANDARDS & SAFETY,)
OCCUPATIONAL SAFETY & HEALTH SECTION,)
Complainant,)

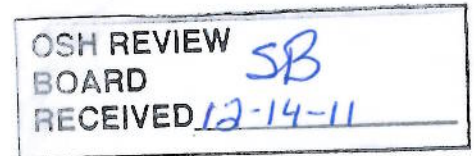
v.)

ASRC ENERGY SERVICES, INC.,)
Contestant.)



) Docket No. 10-2250
) Inspection No. 310856356
) OAH No.10-0254-OSH

DECISION AND ORDER



I. Introduction

This matter arises from an industrial accident that occurred on October 29, 2009, when an employee of ASRC Energy Services, Inc. [ASRC] was severely injured when struck by a tanker truck driven by another worker. The injured employee had been assisting the driver in hitching a trailer up to the tanker and was pinned between the rear wheels of the tanker and the trailer.

The Division of Labor Standards and Safety, Occupational Safety and Health Section [Division] issued a single, one part citation to ASRC, alleging a violation of the occupational safety and health standard set forth at 29 C.F.R. §1910.132(d)(1)(i). That standard requires employers to perform a workplace hazard assessment to determine whether hazards are present that necessitate the use of personal protective equipment [PPE], and if such hazards are present to select and have employees use the appropriate PPE. The complaint asserts that ASRC's workplace hazard assessment had failed to identify a need for employees to use reflective clothing or a safety vest while working in darkness or where vehicles are operating in close proximity.¹

ASRC filed notice of contest and an answer to the complaint, followed by a motion to dismiss the complaint or, in the alternative, for summary adjudication. ASRC's motion asserts that dismissal is proper because reflective clothing and vests do not constitute PPE within the meaning of 29 C.F.R. §1910.132(d).² It asserts that summary adjudication is appropriate because

¹ Division Ex. 4, p. 5.

² Motion at 6-8.

undisputed evidence establishes that ASRC conducted a hazard assessment and required use of reflective clothing.³ Lastly, ASRC contends that the violation, if there was one, should be characterized as *de minimus*.⁴

The Division contends that dismissal of the citation is not warranted because a safety vest and reflective clothing are types of PPE,⁵ and that summary adjudication should be denied because a hazard assessment was not performed by the appropriate ASRC personnel.⁶ The Division adds that the violation is serious.

After considering the evidence and the arguments of the parties, the Occupational Safety and Health Review Board grants ASRC's motion.

II. Facts

On October 27, 2009, John Fay, an employee of ASRC, was working at C Pad Chemical, Prudhoe Bay, Alaska.⁷ Mr. Fay was the Lead Operator for the shift beginning at 6:00 p.m. that evening.⁸ As part of his duties, Mr. Fay was responsible for completing a Task Hazard Assessment for his tasks for his shift, as were all of the other employees working on C Pad.⁹ Mr. Fay completed his Task Hazard Assessment, signed it, and gave it to his foreman, Dale Mitchell, to review.¹⁰ The Task Hazard Assessment identified two sequential tasks: driving and fluid transfer.¹¹ It identified several potential hazards for the former task, among them "other drivers."¹² Among the procedures identified to protect against that hazard was "eyes on task other drivers."¹³ The Task Hazard Assessment form lists a variety of PPE's that might be required.¹⁴ One "other" PPE identified on the form by Mr. Fay was a "reflective vest."¹⁵

At around 11:30 p.m. that, a chemical tanker trailer truck operated by Alaska West Express arrived at C Pad.¹⁶ The driver's task was to drop off his fully-loaded tanker and pick up

³ Motion at 4-6.

⁴ Motion at 8-10.

⁵ Opposition at 7-8.

⁶ Opposition at 5-6.

⁷ ASRC Ex. 2, ¶4

⁸ ASRC Ex. 2, ¶4.

⁹ ASRC Ex. 2, ¶5.

¹⁰ ASRC Ex. 2, ¶6.

¹¹ ASRC Ex. 2 (Ex. A, p. 2)

¹² ASRC Ex. 2 (Ex. A, p. 2)

¹³ ASRC Ex. 2 (Ex. A, p. 2)

¹⁴ ASRC Ex. 2 (Ex. A, p. 2)

¹⁵ ASRC Ex. 2 (Ex. A, p. 2)

¹⁶ Div. Ex. 1 (Statement of John Fay, December 2, 2009; hereinafter, "Fay Statement"), p. 2.

an empty one.¹⁷ Charles Smutz, the driver,¹⁸ entered the office and after filling out the necessary paperwork went outside with Mr. Fay.¹⁹ The area where the tanker transfer was to occur was lighted by worklights.²⁰ Mr. Smutz parked his full tanker next to the empty tanker and disengaged it.²¹ He then pulled ahead and began backing up to the empty tanker.²² As Mr. Smutz was backing up, he could see Mr. Fay in his mirror.²³ Mr. Fay was wearing an arctic parka with green fluorescent reflective tape on the arms, chest and back.²⁴ Mr. Fay was standing off to the right (passenger) side of the empty tanker.²⁵

Mr. Smutz's first attempt to hook up the empty tanker was unsuccessful, so he pulled ahead again, climbed out of the cab, and came back to talk to Mr. Fay.²⁶ After speaking with Mr. Fay, Mr. Smutz returned to the cab and again began to back up to the empty tanker.²⁷ He looked for Mr. Fay in his mirror but did not see him.²⁸ Mr. Smutz backed up, looking out of his left side mirror.²⁹ Once again, the cab and tanker failed to couple.³⁰ Mr. Smutz got out of the cab again, and found that Mr. Fay had been caught between the right rear fender of the cab and the frame of the tanker.³¹ Mr. Fay was severely injured.

III. Discussion

An employer in Alaska must do everything necessary to protect the safety of employees,³² including complying with all occupational safety and health standards and regulations adopted by the Division.³³ The Division has by regulation adopted 29 C.F.R. §1910.132(d)(1)(i).³⁴ That standard requires employers to perform a workplace hazard assessment to determine whether

¹⁷ See Fay Statement, p. 2.

¹⁸ Div. Ex. 2 (Statement of Charles Smutz, November 5, 2009; hereinafter, "Smutz Statement"), p. 7.

¹⁹ Fay Statement, p. 2.

²⁰ Smutz Statement, p. 5.

²¹ Fay Statement, p. 3; Smutz Statement, p. 2.

²² Fay Statement, p. 3; Smutz Statement, p. 2.

²³ Smutz Statement, pp. 2-3.

²⁴ Fay Statement, p. 2 (arctic parka which had green fluorescent reflective tape on the arms, chest + back"); Smutz Statement, p. 3 ("blue jump suit with reflective stripes").

²⁵ Fay Statement, p. 3; Smutz Statement, pp. 2-3 (about 5 or 10 feet off to the side).

²⁶ Fay Statement, p. 3 ("we discussed the situation"); Smutz, p. 3 ("John said something about it being low, I said something about trying again.").

²⁷ Smutz Statement, p. 4.

²⁸ Smutz Statement, p. 4. Mr. Smutz states: "I[']m sure I looked in my mirror to see John. But I don[']t remember exactly." Viewed favorably to the Division, the reasonable inference is that Mr. Smutz looked in his mirror, but did not see Mr. Fay.

²⁹ Smutz Statement, p. 4.

³⁰ Smutz Statement, p. 4.

³¹ Fay Statement, p. 3; Smutz Statement, p. 4.

³² AS 18.60.075(a).

³³ AS 18.60.075(a)(1).

³⁴ 8 AAC 61.1010(b).

hazards are present that necessitate the use of personal protective equipment (PPE) and if they are present (or are likely to be present) to select and have the affected employees wear the type of PPE that will protect the employee from the hazards identified.

The complaint in this case rests on a citation issued following an investigation of the accident described above. The citation asserts that ASRC violated 29 C.F.R. §1910.132(d)(i) and as an example states that ASRS had “placed the employee at risk of injury due to the employer’s failure to identify [t]he appropriate PPE for [use] on the hazard assessment.”³⁵ ASRC filed a motion to dismiss or in the alternative for summary adjudication, asserting that it is not liable for violation of the referenced standard because (1) ASRC conducted a hazard assessment and (2) (a) reflective clothing is not PPE within the meaning of 29 C.F.R. §1910.132(d)(1)(i), and in any event (b) ASRC required use of reflective clothing.

A. General Legal Standards

1. *Motion to Dismiss*

ASRC argues that the citation should be dismissed because reflective clothing is not PPE. A citation may be dismissed when the conduct alleged, even if it occurred, would not constitute a violation of the referenced health and safety standard.³⁶ Whether conduct falls within the scope of a health and safety standard is a question of law. The Board has in the past construed a standard broadly to achieve the intended result of assuring worker safety.³⁷ When the language of a standard is not explicit, the Board may consider extrinsic evidence of its meaning, including the legislative history and preamble and, where appropriate, industry practice.³⁸

2. *Summary Adjudication*

In the alternative to dismissal, ASRC argues that it is entitled to summary adjudication in its favor because the undisputed evidence establishes that ASRC conducted a hazard assessment, and that, assuming reflective clothing is PPE, ASRC required the use of reflective clothing. In order to be entitled to judgment on a motion for summary adjudication, the moving party must show that taking all reasonable inferences from the evidence in favor of the other party, on the undisputed material facts the moving party is entitled to judgment as a matter of law.

³⁵ Div. Ex. 4, p. 5.

³⁶ See 8 AAC 61.170(a); Civil Rule 12(b)(6).

³⁷ Department of Labor v. Ketchikan Pulp Co., OSHRB No. 90-826 at 9 (May 2, 1991) (“workplace” for purposes of logging operations includes logging road). See generally, Rothstein, §125 (4th Ed. 1998).

³⁸ See Superior Rigging & Erecting Co., 18 OSHC 2089, 200 OSHD ¶32,060 (2000).

B. Reflective Clothing Does Not Constitute PPE

ASRC argues that reflective clothing is not PPE within the meaning of 29 C.F.R. §1910.132(d)(1), because the requirement that employees wear PPE does not apply to hazards such as being crushed by moving vehicles. ASRC argues that the reference to PPE in 29 C.F.R. §1910.132(d)(1) is limited, pursuant to 29 C.F.R. §1910.132(a), to hazards that pose a threat of harm through “absorption, inhalation, or physical contact.”³⁹ PPE, ASRC asserts, is protective equipment in the nature of a barrier or shield to prevent the hazards posed by absorption or inhalation of, or physical contact with, substances, objects, gas, or radiation.⁴⁰ In particular, ASRC relies on a decision issued by a federal administrative law judge that expressly rejected characterizing reflective clothing as PPE within the meaning of 29 C.F.R. §1910.132.⁴¹

29 C.F.R. §1910.132(a) states:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition whenever it is necessary by reason of hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact.

The Division contends that a reflective vest is PPE, because “it is intended to protect employees from accidents during times of low visibility.”⁴² It points out that 29 C.F.R. §1910.132(a) calls for the use of “[p]rotective equipment, including personal protective equipment..., protective clothing, respiratory devices, and protective shields and barriers” and that it is not limited to the types of protective equipment expressly listed.⁴³

ASRC argues that while 29 C.F.R. §1910.132(a) includes other forms of protective equipment than those specifically listed, it does not include types of protective equipment that are not within the same general class as the listed items: that is, it does not include items that

³⁹ Motion at 6.

⁴⁰ Motion at 6 (“All of the equipment listed has one common denominator – it provides a ‘shield[]’ or a ‘barrier[]’ against some hazard of the work environment which can harm an employee through ‘absorption, inhalation, or physical contact.’”). See also 29 C.F.R. §1910.133-136 (specific standards for protective equipment for eye, face, head, foot and respiratory protection).

⁴¹ Motion at 7, citing Secretary of Labor v. AAA Delivery Services, Inc., 21 O.S.H. (BNA) 1219 (2005).

⁴² Opp. at 7.

⁴³ Opp. at 7.

protect an employee by means other than by providing a shield or barrier (since all of the listed items share that characteristic).⁴⁴

ASRC's position reflects a common rule of statutory interpretation which holds that when a statute includes a general term, followed by specific examples, it should be construed as limited to things sharing the characteristics of those enumerated.⁴⁵ But it does not take reference to the sometimes-arcaic rules of statutory construction to discern that ASRC is substantially correct: it takes only close attention to the wording of 29 C.F.R. §1910.132(a).

Reduced to essentials, that standard says: "Protective equipment...shall be provided [etc.] whenever it is necessary by reason of [1] hazards of [a] process or [b] environment, [2] chemical hazards, [3] radiological hazards, or [4] mechanical irritants encountered in a manner capable of causing injury...through absorption, inhalation, or physical contact." The hazard at issue in this case is the risk of being struck by a moving vehicle in the workplace. That is not a chemical hazard, a radiological hazard, or a mechanical irritant. Thus, the requirement for use of PPE depends on whether the risk of being struck by a moving vehicle in the workplace is a hazard of "process" or "environment."

To say that the hazard posed by being struck by a moving vehicle in the workplace is a hazard of "environment" within the meaning of 29 C.F.R. §1910.132(a) would effectively render the reference to that particular type of hazard meaningless: it would mean that a hazard of "environment" is any hazard in that exists within the workplace environment, that is to say, any hazard in the workplace "environment" in the sense of the workplace location or vicinity. Such a meaning would make the requirement for PPE so extensive as to escape any reasonable limit. A hazard of "environment", we believe, is something different than a hazard of the workplace generally. We see no basis for deeming the risk of being struck by a moving vehicle on a job site to be an environmental hazard within the meaning of 29 C.F.R. 1910.132(a) and (d). We do not think that is the meaning intended.⁴⁶

⁴⁴ Reply at 10, *citing Helvering v. Morgan's, Inc.*, 293 U. S. 121, 126 n. 1 (1934); *Eyecare v. Department of Human Services*, 770 N.W. 2d 832, 837 (Iowa 2009).

⁴⁵ The Latin term for this familiar rule of statutory construction is "ejusdem generis." See generally, 2A "Sutherland's Statutory Construction" §47.17-47.18 (5th Ed. 1992). See, e.g., *City of Kenai v. Friends of Recreation Center*, 129 P.3d 452, 459 (Alaska 2006). When a statute provides that it "includes" specific items, rather than that it "includes but is not limited to" those items, it can be argued that the use of the term "includes" is intended to limit the application of the statute to the specific items mentioned. *Eyecare v. Department of Human Services*, 770 N.W. 2d 832, 837 (Iowa 2009), cited by ASRC, discusses this possibility.

⁴⁶ The dictionary definition of "environment" notes two meanings of the word: (1) "the circumstances, objects, or conditions by which one is surrounded"; and (2) "the complex of physical, chemical, and biotic

A closer question is presented when we consider whether the risk of being struck by a moving vehicle in the workplace is a hazard of “process”. The term “process” connotes, we believe, a specific industrial or mechanical process, not the “process” by which a competent employee performs his or her duties. Viewed in that light, a hazard of process is a hazard associated with a specific industrial or mechanical process. This reading, we think, reflects and is consistent with the types of hazards identified in the specific standards.

Reading the term “hazard of process or environment” as excluding the hazard of being struck by a moving vehicle in the workplace would yield an understanding of “personal protective equipment” that is consistent with the specific types of equipment that the general term “protective equipment” is stated to include: equipment which, as ASRC points out, shares the characteristic that it provides protection in the form of a barrier or shield, rather than in the form of a warning device.

Our understanding of the intended meaning of the term “personal protective equipment” in 29 C.F.R. §1910.132(a) reflects the manner in that standard has been interpreted federal Occupational Safety Health Review Commission. In a 2006 decision, the commission addressed a citation issued against the Postal Service, after a letter carrier’s pushcart was struck by a vehicle.⁴⁷ A citation for violation of 29 C.F.R. §1910.132 was dismissed by an administrative law judge on the ground that the standard did not require the wearing of reflective clothing.⁴⁸ On appeal, the commission concluded that reading the standard as applicable to reflective clothing would be unreasonable.⁴⁹ The commission noted that there are specific regulations that require the use of high visibility or other warning garments in appropriate circumstances.⁵⁰ In addition, the commission observed that although the federal Occupational Safety and Health Administration had, in five cases between 1992 and 2004 (none of which resulted in a commission decision on point), cited employers under 29 C.F.R. §1910.132(a) for failure to provide reflective vests, a 2004 letter of interpretation issued by the Secretary of Labor had

factors...that act upon an organism...and ultimately determine its form and survival.” Webster’s Ninth New Collegiate Dictionary, p. 416 (1990).

⁴⁷ Secretary of Labor v. United States Postal Service, OSHRC Docket No. 04-0316 (2006 OSHRC No. 22; November 20, 2006) (hereinafter, USPS I).

⁴⁸ Secretary of Labor v. United States Postal Service, OSHRC Docket No. 04-0316 (July 25, 2005).

⁴⁹ USPS I, at 5 (“[W]e conclude that the Secretary’s interpretation is not reasonable.”).

⁵⁰ *Id.*, at 6, citing 29 C.F.R. §1917.71(e) (marine terminal employees); 29 C.F.R. §1918.86(m) (cargo-handling personnel); 29 C.F.R. §1926.201 (flaggers in construction industry).

“effectively removed[d] the primary basis of the Secretary’s §1910.132(a) enforcement policy.”⁵¹

In light of the ambiguity in the standard, the absence of reference to protection by means of warning, and the federal precedent directly on point, we conclude that the citation, insofar as it is based on the failure to require the use of a reflective vest, must be dismissed.

C. Conduct of Hazard Assessment

The conclusion that reflective clothing is not PPE means that the failure to require the wearing of reflective clothing would not be a violation of 29 C.F.R. 1910.132(d). However, that reflective clothing is not PPE does not mean that there was no requirement to conduct a hazard assessment. In support of its motion, ASRC submitted a written hazard assessment form, purporting to bear the signature of Mr. Fay’s signature, from the date and location in question, along with Mr. Fay’s affidavit and that of his supervisor, both stating that on the date in question Mr. Fay performed a hazard assessment. This evidence, if not disputed by admissible evidence, would warrant summary adjudication in ASRC’s favor, to the extent that the citation alleges a failure to conduct a hazard assessment.

The citation does not assert that ASRC failed to conduct a hazard assessment. Rather, it asserts that ASRC “fail[ed] to identify [t]he appropriate PE for [use] on the hazard assessment.”⁵² Nonetheless, the Division opposed summary adjudication with respect to the conduct of a hazard assessment, based on the argument that the hazard assessment was performed by an employee, and the standard calls for the hazard assessment to be conducted by the employer, not by an employee.⁵³ This argument is without merit. There is no requirement that employers must retain independent consultants or contractors to perform hazard assessments, and it is apparent that absent the use of such third parties an employer can only act through its employees. An employer may conduct a hazard assessment by using its own employees.

It may be that rather than asserting that the employer may not conduct an assessment with its own employees, what the Division meant to say is that the hazard assessment must be conducted by an employee who is a supervisor, or who has been specially trained for that purpose, rather than by an employee who, like Mr. Fay, will be carrying out his duties in the area of the workplace that has been assessed. But nothing in the text of the standard supports that

⁵¹ *Id.*, at 8.

⁵² Div. Ex. 4, p. 5.

⁵³ Opp. at 5.

argument, and the Division presented no evidence that Mr. Fay was unqualified to perform the assessment himself. The standard does not prescribe a particular manner or procedure for performing a hazard assessment, and in this particular case, the hazard assessment form that Mr. Fay filled out on its face identifies a variety of potential hazards. Taking all reasonable inferences in favor of the Division, it has not shown that ASRC failed to comply with the directive that it perform a hazard assessment.

IV. Conclusion

A reflective vest or clothing is not “personal protective equipment” within the meaning of 29 C.F.R. §1910.132. The undisputed evidence establishes that ASRC conducted a hazard assessment. Accordingly, the citation is **DISMISSED**.⁵⁴

DATE: 11/5/2011

By: ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Timothy O. Sharp, Chairperson

T.A. Trosvig

Thomas A. Trosvig, Member

James Montgomery, Member

⁵⁴ The Division has adopted OSHA Directive CPL-02-01-050, effective August 11, 2011. See AKOSH Program Directive 11-03. Under the federal directive, the failure to provide reflective clothing must be cited under Section 5(a)(1) of the federal occupational health and safety statutes, the so-called “general duty” clause, rather than under 29 C.F.R. §1910.132. See OSHA Directive CPL-02-01-050 at 32, Sec. XII(G). Because the Division did not allege a violation of AS 18.60.075(a)(2), or under the Alaska general duty clause, AS 18.60.075(a)(4), or request leave to amend the citation to include such an allegation, we do not consider whether the employer’s conduct was in violation of either AS 18.60.075(a)(2) or (4). We express no opinion as to whether either provision of Alaska law would apply under the circumstances of this case.

We note that in USPS I, the commission affirmed the administrative law judge’s decision that the federal general duty clause was not violated under the facts of that case. We also note that in Secretary of Labor v. The Ruhlin Company, OSHRC Docket No. 04-2049 (November 20, 2006), the commission affirmed the dismissal of a citation against a construction employer for violation of the federal general duty clause based on the failure of a non-flagger employee to wear a reflective vest, on the ground that the employer lacked adequate notice that the general duty clause would apply to a non-flagger, in light of the specific requirement for flaggers to wear reflective vests. In light of those decisions, the Division may choose to take appropriate action to inform Alaska employers generally, or in the construction industry in particular, regarding their obligations (in the view of the Division) with respect to reflective clothing.

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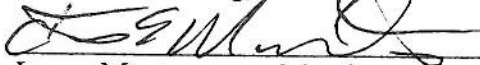
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Tomas A. Trosvig, Member



James Montgomery, Member

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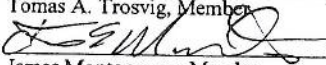
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argument, and the Division presented no evidence that Mr. Fay was unqualified to perform the assessment himself. The standard does not prescribe a particular manner or procedure for performing a hazard assessment, and in this particular case, the hazard assessment form that Mr. Fay filled out on its face identifies a variety of potential hazards. Taking all reasonable inferences in favor of the Division, it has not shown that ASRC failed to comply with the directive that it perform a hazard assessment.

IV. Conclusion

A reflective vest or clothing is not "personal protective equipment" within the meaning of 29 C.F.R. §1910.132. The undisputed evidence establishes that ASRC conducted a hazard assessment. Accordingly, the citation is **DISMISSED**.⁵⁴

DATE: 11/8/2011

By: ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Timothy O. Sharp, Chairperson

T.A. Trosvig

Thomas A. Trosvig, Member

James Montgomery, Member

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

Ronald Taylor, Esq.

Toby Steinberger, AAE

under a courtesy copy to Sharon Busch
Signature Phil Robert Date 12-13-11

⁵⁴ The Division has adopted OSHA Directive CPL-02-01-050, effective August 11, 2011. See AKOSH Program Directive 11-03. Under the federal directive, the failure to provide reflective clothing must be cited under Section 5(a)(1) of the federal occupational health and safety statutes, the so-called "general duty" clause, rather than under 29 C.F.R. §1910.132. See OSHA Directive CPL-02-01-050 at 32, Sec. XII(G). Because the Division did not allege a violation of AS 18.60.075(a)(2), or under the Alaska general duty clause, AS 18.60.075(a)(4), or request leave to amend the citation to include such an allegation, we do not consider whether the employer's conduct was in violation of either AS 18.60.075(a)(2) or (4). We express no opinion as to whether either provision of Alaska law would apply under the circumstances of this case.

We note that in USPS I, the commission affirmed the administrative law judge's decision that the federal general duty clause was not violated under the facts of that case. We also note that in Secretary of Labor v. The Ruhlin Company, OSHRC Docket No. 04-2049 (November 20, 2006), the commission affirmed the dismissal of a citation against a construction employer for violation of the federal general duty clause based on the failure of a non-flagger employee to wear a reflective vest, on the ground that the employer lacked adequate notice that the general duty clause would apply to a non-flagger, in light of the specific requirement for flaggers to wear reflective vests. In light of those decisions, the Division may choose to take appropriate action to inform Alaska employers generally, or in the construction industry in particular, regarding their obligations (in the view of the Division) with respect to reflective clothing.