

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-5980
FAX: (907) 465-2107

WAYNE A. GREGORY, CHAIRMAN
DONALD F. HOFF, JR.
BUD C. KNOX

ROBERT W. LANDAU, HEARING OFFICER

STATE OF ALASKA, DEPARTMENT)
OF LABOR,)
)
Complainant,)
)
v.)
)
QUEST ENVIRONMENTAL INC.,)
)
Contestant.)

Docket No. 93-972
Inspection No. Ma-9066-188A-93

DECISION AND ORDER

Quest Environmental Inc. (Quest) contests a citation issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection on February 17, 1993, at the Hill Building, 508 West Sixth Avenue, Anchorage, Alaska.

The Department's citation alleges that Quest violated Construction Code 05.045(1)(2)(C) during asbestos decontamination by failing to provide one of its air monitoring technicians with appropriate body soap and hot water as required by Occupational and Industrial Structures (O&IS) Code 02.106(d)(3)(B) and (C). The violation was classified as "other than serious" and no monetary penalty was assessed.

Pursuant to Quest's notice of contest, a hearing was held before the Board in Anchorage on August 18, 1993. The Department was represented by Assistant Attorney General Robert A. Royce. Quest was represented by its president, John E. Johnston. The 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.

FINDINGS OF FACT

1. On February 17, 1993, Department compliance officer Krystyna Markiewicz conducted an occupational safety and health inspection of an asbestos abatement project at the Hill Building, 508 West Sixth Avenue, Anchorage, Alaska.

2. The primary asbestos abatement contractor at the worksite was Trans-Alaska Environmental Services. Trans-Alaska was responsible for performing the actual asbestos abatement work and providing the necessary decontamination facilities, including shower facilities.

3. Another contractor at the worksite, Environmental Health Sciences, was responsible for inspecting the project to ensure compliance with applicable safety and health regulations including OSHA standards.

4. Quest's responsibility on the project was to provide air quality monitoring. Air monitoring was performed by a single Quest technician approximately 2-5 times each work day. After each

air monitoring, Quest's technician would use the decontamination and shower facilities provided by Trans-Alaska.

5. Compliance officer Markiewicz inspected the decontamination and shower facilities at the worksite. She found that there was no body soap available for showering. Upon further investigation, she determined that dishwashing liquid was being provided as a body soap. Two brands of dishwashing liquid were provided: Ivory and Dawn.

6. During her inspection, Markiewicz also found that hot water was not consistently available at the shower facility, apparently because it was occasionally diverted for use in the asbestos abatement work. She determined that hot water for showering was unavailable approximately 10% of the time.

7. Quest's air monitoring technician at the worksite, Shad Wells, gave the following written statement:

During the Hill Building job there was Ivory dish soap available in shower for washing. Hot water was not always available due to large amounts of water used in containment for fiber control and cleaning.

(Exhibit 3.)

8. Prior to the inspection, Quest's management did not know that dishwashing liquid was being used at the shower facility as a body soap, or that hot water was not always available for showering. No complaints had been made to Quest's management regarding either the use of dishwashing liquid or the lack of hot water at the shower facility.

9. Compliance officer Markiewicz believed that dishwashing detergent was not appropriate as a body soap during asbestos decontamination. Upon telephoning the manufacturer of Dawn and Ivory dishwashing liquids, she was informed that the manufacturer did not recommend the use of dishwashing liquid as a body soap. However, the manufacturer did not know the specific hazards of using dishwashing liquid during daily showering because the product had never been tested for that purpose. (Exhibit 1.)

10. The Material Safety Data Sheet (MSDS) for Dawn liquid dishwashing detergent states that "prolonged contact with concentrated material may be drying or transiently irritating to skin." (Exhibit 2). However, Quest was unaware of the information in the MSDS. Nothing on the labels of either Dawn or Ivory dishwashing liquids indicates that the product should not be used as a body soap.

CONCLUSIONS OF LAW

Construction Code 05.045(1)(2)(C) applies to asbestos abatement decontamination and provides as follows:

Shower Area. Where feasible, shower facilities must be provided which comply with 02.106(d)(3), Occupational and Industrial Structures Code.

Occupational and Industrial Structures Code 02.106(d)(3) provides in relevant part:

(B) Body soap or other appropriate cleansing agents shall be provided.

(C) Showers shall be provided with hot and cold water feeding a common discharge line.

Quest maintains that the dishwashing liquid provided at the shower facility was an "appropriate cleansing agent" under the O&IS Code and that if it had known that dishwashing liquid was not considered appropriate, it would have immediately provided suitable body soap. Quest also argues that it was unaware that hot water was occasionally unavailable for showering during decontamination and therefore it should not be held responsible for the violation. The Department responds that Quest should have known that dishwashing liquid was not appropriate for use as a body soap and that it failed to take adequate measures to ensure the constant availability of hot water for showering.

It is well established in occupational safety and health law that to prove a violation, the Department must demonstrate that there has been noncompliance with an applicable standard to which employees were exposed, and that the employer knew or should have known of the allegedly hazardous condition. See Rothstein, Occupational Safety and Health Law §105, at 144-46 (3rd ed. 1990). In this case, we are not persuaded that the Department has met its burden of proof to demonstrate noncompliance with the cited standards and that the cited employer had sufficient knowledge of the allegedly noncomplying condition.

O&IS Code 02.106(d)(3)(B) permits the use of "appropriate cleansing agents" for showering but does not define or otherwise explain what cleansers are deemed appropriate. Moreover, the dishwashing liquid provided in this case was a consumer product with no warning or labeling suggesting that use as a body soap

might be hazardous. Furthermore, although the MSDS for the dishwashing liquid states that "prolonged contact with concentrated material may be drying or transiently irritating to skin," the evidence suggests that Quest's employee only came into contact with the dishwashing liquid for very brief moments during showering and that the concentrated dishwashing liquid was partially diluted with shower water. Thus, we find that the employee was not exposed to "prolonged contact with concentrated material." Under these circumstances, we conclude that the use of dishwashing liquid as a body soap has not been shown to be inappropriate or hazardous.

We also find that even though hot water occasionally may have been unavailable for showering, this does not automatically lead to the conclusion that the cited standard was violated or that a hazard existed. O&IS Code 02.106(d)(3)(C) merely requires that showers be provided with hot and cold water from a common discharge line. The standard does not explicitly require that hot water must be made available all the time; a reasonable reading of this requirement is that hot water must be made available at times when employees are showering. In this case, although Quest's only exposed employee stated in writing that hot water was not always available, it was not established that this had actually occurred when he was showering. Since the employee did not testify at the hearing or otherwise elaborate on his brief written statement, we do not have sufficient evidence to find that O&IS Code 02.106(d)(3)(C) has been violated or that a hazard existed.

Furthermore, even if there were sufficient evidence to demonstrate a technical violation of the cited standards, we do not believe the Department has proved that Quest had sufficient knowledge of the allegedly violative conditions. It is clear that Quest did not have actual knowledge of the cited conditions. In the absence of actual knowledge, constructive knowledge may be shown if the employer failed to exercise "reasonable diligence" in detecting hazardous conditions. Rothstein, supra, §105 at 146. However, we do not find that Quest failed to exercise reasonable diligence in detecting the alleged hazards. Quest did not provide the shower facilities, the dishwashing liquid or the hot water; this responsibility belonged to Trans-Alaska, the primary abatement contractor. Quest had only one employee at the worksite and had no supervisory or management personnel present. Quest's employee did not notify or complain to Quest's management that the soap provided was inappropriate or that there was no hot water available for showering during decontamination. Moreover, a different contractor at the worksite, Environmental Health Sciences, was specifically responsible for assuring compliance with OSHA requirements on the project but did not notify Quest of any problem regarding either the dishwashing liquid or the hot water. Based on all these considerations, we believe that Quest did not have sufficient knowledge, either actual or constructive, of the allegedly hazardous conditions cited.

Accordingly, we conclude that the Department's citation should be dismissed.

ORDER

1. Citation No. 1 is DISMISSED.


DATED this 17th day of November, 1993.

ALASKA OCCUPATIONAL SAFETY &
HEALTH REVIEW BOARD



Wayne A. Gregory, Chairman

NOT PARTICIPATING
Donald F. Hoff, Jr., Member



Bud C. Knox, Member