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DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

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Law Offices of Robert W. Landau

STATE OF ALASKA,
DEPARTMENT OF LABOR,

Complainant,

v.

EARTH MOVERS OF FAIRBANKS,
INC.,

Contestant.

Docket No. 92-921
Inspection No. Fr-4341-118-92

DECISION AND ORDER

Earth Movers of Fairbanks, Inc. (Earth Movers) contests a citation issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection at Pump Station No. 5 near Milepost 165 of the Dalton Highway, Chandalar, Alaska.

The Department's citation alleges that Earth Movers violated section 02.310(b)(2)(D) of the Occupational and Industrial Structures Code by allowing the storage of a combustible cardboard carton in a furnace room. The violation was classified as "other than serious" and no monetary penalty was assessed.

A hearing was held on the contested citation before Board members Donald F. Hoff, Jr. and Lawrence D. Weiss in Fairbanks on September 15, 1992. The Department was represented by Assistant Attorney General Toby N. Steinberger. Earth Movers was represented by Gary Georgell, Safety Director. Both parties submitted witness testimony, documentary evidence and arguments to the Board. 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 29, 1992, Department compliance officer Carl Francis conducted an occupational safety and health inspection at an equipment maintenance facility at Pump Station No. 5 near Milepost 165 of the Dalton Highway, Chandalar, Alaska.

2. The equipment maintenance facility was owned and operated by Alyeska Pipeline Service Company (Alyeska). Alyeska had contracted with Earth Movers to perform maintenance and repairs on heavy equipment and vehicles owned by Alyeska.

3. Earth Movers employed approximately 14 persons at the facility. Alyeska had one equipment supervisor on-site in charge of the facility.

4. During his inspection, compliance officer Francis entered an unlocked furnace room and saw a long cardboard carton leaning against the wall approximately 6 feet from the furnace (Ex. 4).

5. The carton apparently contained fluorescent light tubes. It is unknown how long the carton had been in the furnace room.

6. According to Francis, if the combustible cardboard box in the furnace room were to ignite, it could result in smoke and/or fire injuries to employees working throughout the building. However, because the probability of such an occurrence was remote, the violation was classified as "other than serious" and no monetary penalty was assessed. There were no other safety violations cited with respect to the furnace room.

7. Francis testified that Earth Movers, as the primary occupant of the facility, should have been aware of the hazard created by the cardboard carton and was therefore responsible for the exposure of its employees to the hazard.

8. According to testimony from both Earth Movers and Alyeska personnel, Alyeska was solely responsible for all maintenance at the facility, including the changing of fluorescent lights and all aspects of furnace room maintenance. See Ex. D. Whenever a maintenance problem arose, Earth Movers would contact Alyeska personnel to deal with it.

9. Earth Movers had no contractual responsibility for maintenance of the furnace room, nor did it include the furnace room during its daily inspections of the facility. Although the door to the furnace room was unlocked, there was no reason for Earth Movers' personnel to go into the room and there is no

evidence that any Earth Movers' employees did so except on rare occasion.

10. Earth Movers had no actual knowledge that the cardboard carton was in the furnace room. The evidence suggests that the carton probably was left in the furnace room by Alyeska maintenance personnel.

11. Alyeska was not cited for this alleged violation.

CONCLUSIONS OF LAW

Section 02.310(b)(2)(D) of the Occupational and Industrial Structures Code provides:

The furnace room of all industrial housing units shall have at least a Class B (one hour) fire resistive door and frame. The door shall be equipped with a self-closing device. The walls of this compartment shall have a one-hour rating, and shall have fusible linked dampers any place the one-hour wall is pierced or ruptured. At no time shall combustible materials be stored in a boiler or furnace room or near any potential source of ignition, except appropriate and contained furnace fuel. (Emphasis added.)

Earth Movers does not dispute that the cardboard carton found in the furnace room was in violation of the above provision. However, Earth Movers contends that it should not be held responsible for this violation since it did not create, control or have any knowledge of the violative condition.

In determining liability for safety violations at workplaces with more than one employer, this Board has previously

adopted analytical rules established by the federal Occupational Safety and Health Review Commission (OSHRC) and the federal courts. See, e.g., Dawson Construction Company, Docket No. 91-883, at 4 (July 17, 1992). According to the federal rules, safety violations at multi-employer workplaces are evaluated in terms of two concepts, exposure and control. "Exposure" refers to whether employees of the cited employer perform work in or have access to the zone of danger created by the hazard. "Control" means control of the hazard, either by creating the hazard or having the authority and ability to abate it. Rothstein, Occupational Safety and Health Law, § 165, at 200-01 (3rd ed. 1990).

Early OSHRC decisions held that an employer was liable for safety violations if its employees were merely exposed to a hazard, even if the employer neither created nor controlled the hazard. In 1976, however, the OSHRC modified its position to hold that a noncreating and noncontrolling employer is not liable if it did not know and could not reasonably be expected to know of the hazard. Anning-Johnson Co., 4 OSHC 1193, 1975-76 OSHD ¶ 20,690 (1976); Grossman Steel & Aluminum Corp., 4 OSHC 1185, 1975-76 OSHD, ¶ 20,691 (1976). The OSHRC's Anning-Johnson/Grossman rule has been widely upheld by the federal courts. See, e.g., D. Harris Masonry Contracting, Inc. v. Dole, 876 F.2d 343 (3rd Cir. 1989); Electric Smith, Inc. v. Secretary of Labor, 666 F.2d 1267 (9th Cir. 1982); Rothstein, supra, ¶ 168, at 206 n.10 (citing cases). Although the OSHRC has declined to extend the Anning-Johnson/Grossman rule beyond the construction industry, we see no

reason why it should not also be applied to other multi-employer situations. See Rothstein, supra, ¶ 168, at 210 (suggesting that the Anning-Johnson/Grossman rule should apply to all employers). Accordingly, we apply the Anning-Johnson/Grossman rule to the facts of this case.

On the issue of exposure, we conclude that Earth Movers' employees were exposed to the hazard created by the cardboard carton in the furnace room. In the event of a major fire started in the furnace room, all of Earth Movers' employees at the facility would be exposed to possible injury from the fire and/or smoke inhalation.

However, we are persuaded that Earth Movers did not have sufficient control over the furnace room to be held liable for the violation. First, a preponderance of the evidence suggests that the hazard was created by Alyeska, not by Earth Movers. Second, Earth Movers had no contractual responsibility for the furnace room, nor did its employees have any reason to enter the furnace room. Responsibility for maintenance of the furnace room belonged entirely to Alyeska. Third, Earth Movers had no actual knowledge of the carton in the furnace room, nor could it reasonably be expected to be aware of the carton. Earth Movers' personnel did not work in the furnace room nor was the room included as part of its daily safety inspection. In our view, the furnace room cannot reasonably be considered a part of Earth Movers' "work area."

In conclusion, we believe that responsibility for this violation belonged to Alyeska and not to Earth Movers. Earth

Movers lacked sufficient control over the furnace room and also lacked the requisite knowledge required to establish a violation. Accordingly, the Department's citation should be dismissed.

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that the Department's citation against Earth Movers of Fairbanks, Inc. is DISMISSED.

DATED this 18th day of November, 1992.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

NOT PARTICIPATING
Wayne Gregory, Chairman

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

Lawrence D. Weiss
Lawrence D. Weiss, Member

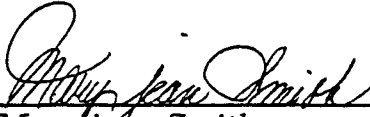
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NOTICE TO ALL PARTIES

A person affected by an order of the OSH Review Board may obtain a review of the order by filing a notice of appeal in the Superior Court as provided in the Alaska Rules of Appellate Procedure. The notice of appeal must be filed within 30 days from the date of issuance of the order by the OSH Review Board. After 30 days from the date of issuance of the order, the order becomes final and is not subject to review by any court. AS 18.60.097.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Alaska Department of Labor vs. Earth Movers of Fairbanks Inc., Docket No. 92-921, filed in the office of the OSH Review Board at Juneau, Alaska, this 18th day of November, 1992.



Mary Jean Smith
OSH Review Board

OSH:12