

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, DIVISION OF LABOR)
STANDARDS AND SAFETY,)
OCCUPATIONAL SAFETY AND)
HEALTH SECTION,)
Complainant,) Docket No. 99-2126
v.) Inspection No. 301265369
K & K RECYCLING, INC.,)
Contestant.)
_____)

DECISION AND ORDER

K & K Recycling, Inc. (K & K) contests a citation issued by the State of Alaska, Department of Labor (Department) following a workplace accident involving a K & K employee at the Alpine Oil Field at Prudhoe Bay on February 3, 1999.

The Department's citation alleges that K & K violated Alaska Statute 18.60.058(a) by failing to timely report an accident resulting in the hospitalization of one of its employees. The alleged violation was classified as "serious" and a monetary penalty of \$1,500 was assessed.

K & K contested the citation as permitted by law. A hearing was held before the Occupational Safety and Health Review Board in Fairbanks on September 21, 1999. The Department was represented by Assistant Attorney General Toby N. Steinberger. K & K Recycling was represented by its president, Bernie Karl. Both parties submitted witness testimony, documentary evidence and oral 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.

FINDINGS OF FACT

1. On February 3, 1999, K & K was performing work as a subcontractor at the Alpine Oil Field operated by ARCO Alaska, Inc. at Prudhoe Bay, Alaska.

2. One of K & K's employees, Homer White, was injured while helping to move a 40' x 54' ATCO shop building. According to ARCO's accident investigation report, when the building was loaded onto a lowboy trailer, the overhead door roller accidentally gave way due to excessive snowload and jarring of the building, causing the door to fall approximately 12 feet on top of White and trapping him underneath. (Ex. B.)

3. White was airlifted to Anchorage where he was hospitalized for about one to two weeks. He sustained a fracture of his right leg, a lower spine injury, and a head injury. (Ex. 5.)

4. According to K & K president Bernie Karl, a "Report of Occupational Injury or Illness" form regarding White's accident was filed with the workers' compensation office at the Department of Labor on the day after the accident. (Ex. 5.) However, Karl stated

that no separate report of the accident was made to the Department's occupational safety and health (OSHA) office because he was unaware of the OSHA accident reporting requirement.

5. On February 12, 1999, nine days after White's accident, OSHA enforcement officer Pat Laakso first learned of the accident by word of mouth. He contacted Bernie Karl, who was cooperative and provided information about the accident. When Laakso explained the OSHA accident reporting requirement, Karl indicated he was not familiar with the requirement. Karl noted that the Department's occupational safety and health poster, which must be posted in a prominent place at an employer's workplace, does not specifically mention the reporting requirement. (Ex. A.) However, the back side of the workers' compensation reporting form, which K & K filed with the workers' compensation office, describes the OSHA reporting requirement. (Ex. 3.) Karl also acknowledged having a copy of the Department's "Emergency Information" sheet, which states: "All serious and fatal injuries must be reported immediately to the Alaska Department of Labor, Division of Labor Standards and Safety." (Ex. 8.)

6. The accident was investigated by a team of representatives from ARCO, K & K and other subcontractors. The investigation began shortly after the accident and took several days. According to Bernie Karl, who was a member of the investigation team, the investigation covered every aspect of the accident and recommended several corrective measures. The investigation team's initial report classified the "risk rank" of White's injury as "high." (Ex. 9.) The team's final report, however, downgraded the injury risk to "medium." (Ex.

B.) At the hearing, White indicated he was still off work due to his injuries but planned to go back to work soon.

7. On March 25, 1999, upon completion of the Department's review of the accident, a citation was issued to K & K for failure to comply with the injury reporting requirements in AS 18.60.058(a). The violation was classified as "serious" and a penalty of \$1,500 was assessed. (Ex. 1.) No other violations were cited in connection with the accident.

8. Both enforcement officer Laakso and assistant enforcement chief Mike Russell agreed that K & K's reporting violation was not serious in nature. However, the violation was classified as "serious" because federal OSHA guidelines for this type of violation provide for a mandatory penalty and the Department's computer program would not permit the violation to be classified as "other than serious" and still carry a monetary penalty. (Ex. 4.)

9. The Department calculated the monetary penalty under its penalty assessment guidelines. The unadjusted penalty of \$5,000 was reduced by 60 percent based on K & K's company size and by 10 percent based on its history of no prior violations, resulting in a final assessed penalty of \$1,500. No penalty reduction was awarded for good faith because under the penalty guidelines, a good faith reduction may not be applied to a serious violation.

10. Homer White, the accident victim, testified favorably about K & K's safety program. He has worked for K & K on the North Slope for about six years. According to White, K & K provides considerable safety training to its employees and has a written safety program covering its activities. Employee safety meetings are held each work day. White testified that Bernie Karl was a "tyrant" when it came to safety matters and would not hesitate to

discipline an employee for a safety violation. This was the first accident involving a K & K employee on the North Slope.

CONCLUSIONS OF LAW

Alaska Statute 18.60.058(a) provides:

Reporting of injuries and illnesses. (a) In the event of an employment accident that is fatal to one or more employees or that results in the in-patient hospitalization of one or more employees, the employer shall report the accident orally by telephone or in person to the nearest office of the division of labor standards and safety or by telephone to the federal toll-free number provided by the division. The report must relate the name of the establishment, the location of the accident, the time of the accident, a contact person and the telephone number of the contact person, a brief description of the accident, the number of fatalities or hospitalized employees, and the extent of any injuries. The report must be made immediately but in no event than eight hours after receipt by the employer of information that the accident has occurred. However, if the employer first receives information of a fatality or in-patient hospitalization of one or more employees eight or more hours after the accident but within 30 days after the accident, the employer must make the report within eight hours after receiving information of the fatality or in-patient hospitalization. This subsection does not apply to an employer that first receives information of a fatality or in-patient hospitalization more than 30 days after the accident.

While the Alaska Occupational Safety and Health Act (AS 18.60.010-.105) is generally modeled after the federal OSHA law (29 U.S.C.A. ' ' 651-678), we note that the accident

reporting requirement in AS 18.60.058(a) is stricter than the parallel federal regulation in 29 C.F.R. ' 1904.8 (1997). Alaska law requires an employer to report the hospitalization of one or more employees after an accident, whereas the federal regulation requires reporting of only those accidents which result in the hospitalization of three or more employees.

We also note that AS 18.60.058(a) requires reporting to the Department's division of labor standards and safety, as distinguished from the division of workers' compensation. The OSHA reporting requirement is distinct from the requirement in AS 23.30.070(a) to report employee injuries to the workers' compensation office within 10 days of an employer's knowledge of the injury. The workers' compensation injury report form specifically notifies employers of the separate OSHA reporting requirement (Ex. 3).¹ Although both the OSHA and the workers' compensation programs are administered by the Department of Labor, reporting an employee injury to the workers' compensation office does not satisfy the separate legal requirement to report the injury or accident to OSHA. As explained by the Department, the purpose of the OSHA reporting requirement is to allow for the prompt investigation of employee accidents and the preservation of material evidence or witness testimony.

It is undisputed that K & K failed to timely report the White accident to the OSHA office. K & K asserts that it was unaware of the OSHA reporting requirement, and that if 100 small employers in Alaska were contacted, not one would be aware of the requirement.

¹ The OSHA reporting requirement described in the workers' compensation injury report form appears to be out of date and does not incorporate the change from 24-hour to 8-hour notification adopted in 1997. We recommend that the Department update this information in the workers' compensation injury report form.

However, even if this assertion were true, it is a fundamental principle that ignorance of the law is no excuse. In this regard, we note that the OSHA reporting requirement is contained in OSHA statute, which carries even greater weight than an administrative regulation or policy manual. All employers in Alaska are expected to be familiar with the OSHA laws and standards applicable to them. While we believe the Department could do a better job of informing employers of the accident reporting requirement, we are compelled by the undisputed facts of this case to find that K & K was in violation of AS 18.60.058(a).

However, the Department fails to persuade us that the violation was properly classified as "serious." Under AS 18.60.095(b), "a serious violation is considered to exist if the violation creates in the place of employment a substantial probability of death or serious physical harm." We do not believe that K & K's failure to report the accident and injury to Mr. White created a substantial probability of death or serious physical harm in the workplace. This violation was regulatory in nature and did not have an immediate or direct impact on the safety or health of K & K's employees. Moreover, the federal OSHA guidelines provide that an "other than serious" citation should be issued for this type of violation. *See* Exhibit 4. The inability of the Department's computer program to implement this guideline is not a legitimate reason to classify the violation as serious. Both of the Department's enforcement officers at the hearing agreed that the violation was more in the nature of a non-serious violation. Accordingly, we reclassify the violation as "other than serious."

Further, we conclude that no monetary penalty should be imposed for this violation. Under AS 18.60.095(c), an employer who violates the Alaska OSHA Act in a non-serious manner "may" be assessed a civil penalty of up to \$7,000. We find this penalty provision to be discretionary rather than mandatory.² We further find that mitigating circumstances exist which make a monetary penalty inappropriate. K & K has a good safety record and appears to have a good safety program in place. We credit Mr. White's testimony regarding K & K's safety program, taking into account that he was the unfortunate victim of this

² We recognize that the federal OSHA guidelines implementing the similar federal reporting requirement provide that the unadjusted penalty "shall" be \$5,000. *See* Exhibit 4.

accident. We also note that Mr. Karl was actively involved in ARCO's investigation of the accident immediately after it happened, and promptly reported the injury to the workers' compensation office. Moreover, ARCO's investigation of the accident appears to have been timely and comprehensive, mitigating any harm caused by the delay in reporting the accident to OSHA. Finally, we note that K & K was not cited for any safety violations directly causing the accident. In light of these mitigating circumstances, we conclude that no monetary penalty should be imposed.

ORDER

Citation 1, Item 1 is affirmed, but is reclassified as an "other than serious" violation with no monetary penalty.

DATED this 26th day of January, 2000.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: _____/s/_____
Timothy O. Sharp, Chair

By: _____/s/_____
Carla Meek, Member