ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
P.O. BOX 21149
JUNEAU, ALASKA 99802

STATE OF ALASKA, DEPARTMENT OF LABOR, Complainant, vs. MATRIX CONSTRUCTION, INC., Contestant.	)

Docket No. 88-747
Inspection No. Ni-6959-001-88

DECISION AND ORDER

This matter came before the Board for a hearing on April 27, 1989, in Anchorage, Alaska. The State of Alaska, Department of Labor ("the Department") was represented by Assistant Attorney General Mary Pinkel. Matrix Construction, Inc. ("Matrix") was represented by its president, Jim Dokoozian. Evidence was submitted in the form of witness testimony and documentary exhibits, and the record was deemed closed at the conclusion of the hearing.

As a result of a safety compliance inspection of Matrix's worksite on E. Northern Lights Blvd. in Anchorage on June 22, 1988, the Department issued several citations to Matrix, only one of which was contested to the Board. Citation #1, Item #1 alleges that Matrix violated Alaska General Safety Code 01.0504(a)(2)(A) by allowing the use of an air receiver tank which had no pressure gauge or relief valve as required by the 1968 edition of the A.S.M.E. Boiler and Pressure Vessel Code. The alleged violation was classified as "serious" and a penalty of $180 was assessed.

Summary of the Evidence

Safety compliance officer John Nielson testified that he conducted the inspection of Matrix's worksite and was accompanied by Bill Kober, another safety inspector. Matrix was the general contractor on a multi-employer worksite. Nielson stated that he was quite familiar with air receiver

violations as a result of 10 years as a federal safety inspector and one year as a state safety compliance officer. During his inspection Nielson observed an air receiver tank being used in conjunction with an Englo compressor to operate a pneumatic nailer/stapler. According to Nielson, the receiver had no legs, no pressure gauge, no relief valve and appeared to be a makeshift device not suited to the work in question. Both ends of the receiver were badly dimpled, stressed and extruded; it was Nielson's opinion that the device could erupt or explode at any time. The pressure gauge on the Englo compressor showed a reading of 120 p.s.i. The compressor had its own relief valve, but Nielson testified that this was insufficient to protect the air receiver since the relief valve on the compressor was set for the maximum pressure and the air receiver tank could explode before the compressor's relief valve had a chance to operate.

Nielson noted that the air receiver was in use at the center of one of the main rooms under construction. As the general contractor, Matrix had control over the entire worksite and either knew or should have known that a non-complying air tank was being used. Nielson also explained the "serious" classification the violation, stating that in the event of an accident, serious bodily harm or death could result from an explosion of the receiver. Finally, Nielson explained how the Department's penalty of $180 was calculated, giving Matrix a reduction for company size, good faith and past history.

Three exhibits were admitted in support of the Department's case: a drawing of the compressor and air receiver (photos were taken during the inspection but were later lost or misplaced); a copy of the 1968 Boiler and Pressure Vessel Code; and a copy of the 1986 Boiler and Pressure Vessel Code (which has replaced the 1968 version but is identical to it with respect to the violation in question).

Compliance officer Bill Kober testified telephonically. He accompanied Nielson during the inspection, observed the air receiver in use and told Matrix's foreman to disconnect it immediately since he felt it could blow up at any moment and injure nearby employees with shrapnel. Kober also stated that Matrix's foreman knew that the air receiver was being used to supplement the compressor.

Kathleen King, a paralegal for the state Department of Law, testified that she spoke to Matrix's foreman, George Haley, regarding the air receiver. According to King, Haley said the receiver belonged to one of his subcontractors and had been used at the worksite for about 7-10 days prior to the state's inspection.

Jim Dokoozian testified on behalf of Matrix. He stated that the air receiver tank had been brought onto the worksite without his knowledge by one of the framing subcontractors. While he was not present during the safety compliance inspection, he acknowledged that the tank was unmarked and unstamped and should have been removed. He noted, however, that the tank was not leaking, did not show any holes and had been used repeatedly for many projects by the subcontractor without any mishap. He felt that the relief valve on the compressor was sufficient to protect the receiver tank and that the Department's classification as "serious" and its penalty assessment were subjective and inappropriate.

George Haley was Matrix's working foreman and superintendent at the worksite. He denied having told King that the tank had been at the worksite for 7-10 days prior to the inspection. However, he testified he knew the air tank had been brought in by one of the subcontractors, he didn't object to its being used, and he was not concerned about the vessel exploding. As soon as the safety inspector pointed out the tank, Haley didn't question the inspector's judgment but immediately ordered the tank taken off the job.

Findings of Fact and Conclusions of Law

There does not appear to be any real dispute that the air receiver tank was not in compliance with applicable safety code requirements. Matrix's main defense is on the issue of employer knowledge of the hazardous condition. In its initial letter of contest, Matrix stated that it was not aware that the tank had been brought onto the worksite and that if it had known of its use, it would have immediately ordered its removal. However, the testimony of Matrix's foreman at the hearing revealed that he was aware the tank was being used on the project and he took no action to remove it until the time of the safety inspection. Under established principles of occupational safety and health law, the foreman's awareness of the tank's use clearly satisfies the requirement that the employer must have knowledge of the allegedly unsafe condition.

Moreover, it is irrelevant that the air receiver may have been brought onto the project by a subcontractor who was not separately cited for a safety violation. As the general contractor on the project, Matrix has a separate and independent responsibility to monitor all work areas under its control and to protect its employees from all safety hazards on the job regardless who may have caused them.

Regarding the seriousness of the violation, we do not agree with Matrix's argument that the hazard created was not a serious one. We note that both of the Department's safety

inspectors were quite concerned about the signs of wear on the tank and believed it might explode at any time. In the event of such an explosion, there can be no doubt that a nearby employee might be seriously injured. Accordingly, we believe the violation was properly classified as "serious."

Finally, Matrix has objected to the penalty asessment as subjective and excessive. We have listened to the inspector's explanation of how the penalty was calculated according to the guidelines contained in the Department's compliance manual and we feel these guidelines constitute a reasonable and objective system for making penalty calculations. We also note that the Department's initial unadjusted penalty for this violation was $600 and that Matrix received a reduction of 70% for such mitigating factors as small company size, good faith and past compliance history. We do not believe there is any good reason to further adjust the monetary penalty amount.

Order

1. Citation #1, Item #1 is affirmed as a "serious" violation.

2. The penalty of $180 for Citation #1, Item #1 is also affirmed.

DATED this 6th day of July, 1989, at Juneau, Alaska.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

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Donald F. Hoff, Jr., Member

J.C. Wingfield, Member