

**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. 95-2053
)	Inspection No. 105872550
v.)	
)	
NAUTILUS FOODS,)	
)	
Contestant.)	
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DECISION AND ORDER

Nautilus Foods (Nautilus) contests a citation issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection at Nautilus' seafood processing plant in Valdez, Alaska, on August 30, 1995.

The Department's citation alleges several violations of Alaska occupational safety and health standards. After an informal conference between the parties, the Department amended the citation by vacating Citations 1 and 2 and reissuing them as Citations 3, 4 and 5. Citation 3, Item 1, alleges a violation of the Occupational and Industrial Structures Code (O&IS) 02.110(c)(2) for not providing at least 60 square feet of floor space per occupant in rooms used for sleeping purposes. The violation was classified as a "repeat" violation and a penalty of \$2,400 was assessed.

Citation 4, Item 1a, alleges a violation of O&IS 02.110(c)(11) for not providing windows in the employee living quarters. Citation 4, Item 1b alleges a violation of O&IS 02.106(c)(2)(F) for not equipping the men's toilet rooms with an exhaust or ventilation system. Citation

4, Item 1c, alleges a violation of O&IS 02.110(h) for not providing sufficient lighting in the employee living quarters. Citation 4, Item 1d, alleges a violation of O&IS 02.110(c)(7) for not providing employees with adequate storage facilities for their personal property. Citation 4, Items 1a-1d, were grouped together into a single violation classified as "serious" with an assessed penalty of \$675.

Citation 4, Item 2, alleges a violation of General Safety Code (GSC) 01.0702(f)(4) because the ammonia refrigeration room did not comply with the Safety Code for Mechanical Refrigeration issued by the American Society of Heating, Refrigeration and Air Condition Engineers (ASHRAE). The violation was classified as "serious" with an assessed penalty of \$675.

Citation 4, Item 3, alleges a violation of GSC 01.0805(a)(2) for not providing a safety guard for a bench-mounted electric-powered wire brush. The violation was classified as "serious" and a penalty of \$675 was assessed.

Citation 5, Item 1, alleges a violation of Electrical Code 03.002(g)(1)(A) for not providing sufficient clearance from an electrical panel in the welding area. Citation 5, Item 2, alleges a violation of GSC 01.0501(e) for not providing an adequate emergency eye wash station to employees exposed to corrosive materials. Both of these items were classified as "other than serious" with no monetary penalty.

Nautilus contested to the Department's amended citations in a letter dated December 22, 1995. In the letter Nautilus indicated that it contested Citation 3, Item 1; Citation 4, Item 1a; and all of the monetary penalties. The letter stated the specific reasons for contesting the foregoing items.

Pursuant to Nautilus' contest, a hearing was held before the Board in Anchorage on December 16, 1996. The Department was represented by Assistant Attorney General Robert A. Royce. Nautilus was telephonically represented by its president, Tom Waterer. At the outset of the hearing Nautilus requested a continuance, which was opposed by the Department. The Board denied a continuance but permitted Nautilus to participate in the hearing by telephone. 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 in this matter.

FINDINGS OF FACT

1. On August 30, 1995, Department enforcement officer David Green conducted an occupational safety and health inspection at a seafood processing plant operated by Nautilus Foods at Hazelet Avenue and City Dock in Valdez, Alaska.

2. Nautilus' processing plant was a two-story building. The first floor was comprised of the fish processing area, the ammonia refrigeration room, washrooms, a break room, a mechanical shop, and an office. The second floor contained an employee bunkhouse, a storage area, and an open area. (Ex. 1.)

3. The employee bunkhouse contained approximately 14 partitioned cubicles divided by a central hallway. The partitions between the cubicles consisted of plywood sections approximately 6-7 feet high which did not go all the way to the ceiling. Most of the cubicles had curtains or hanging blankets to provide a privacy screen from the central hallway.

4. Each cubicle housed two employees and contained up to 4 bunk beds. Each employee was assigned one bed for sleeping and one bed for storage. Green described the bunkhouse as "crowded, dank, dark, with no ventilation."

5. Using a measuring tape, Green determined that the dimensions of each cubicle were 6 feet by 8 feet, for a total of 48 square feet to house two occupants. In his measurement of the sleeping area, Green did not include the central hallway, which he estimated was about 3 feet wide, or any other areas on the second floor of the plant.

6. Nautilus president Tom Waterer testified that the bunkhouse was built in 1990 and was approved by the state fire marshal and the city building inspector to house up to 32 persons. The bunkhouse is only used during the processing season from May to September each year. Waterer

testified that a maximum of 24 employees were housed in the bunkhouse.

7. Waterer estimated that the dimensions of the bunkhouse, including the partitioned cubicles and central hallway, were approximately 85 feet by 22 feet, for a total area of 1,870 square feet. However, he did not take measurements of these areas; his testimony was based on his memory of the building plans.

8. In Nautilus' December 1995 letter contesting the citation, plant manager Jeff Green stated that the bunkhouse was approximately 800 square feet and housed up to 28 employees.

9. The Department classified the sleeping area violation as a "repeat" violation, based on a previous citation issued in 1993 to Nautilus Marine, Inc. involving the same bunkhouse and the same code violation. The previous violation was affirmed in a settlement agreement signed by Tom Waterer as president of Nautilus Marine in August 1994. (Ex. 2.)

10. According to Waterer, Nautilus Marine and Nautilus Foods are two distinct legal entities and have different ownership. Both companies have been in existence for about 10 years, but Nautilus Marine is no longer operating. Waterer acknowledged that both companies performed the same type of work at the same location.

11. Dennis Smythe, the Department's OSHA enforcement chief, testified about the calculation of the monetary penalties. Penalties are calculated using the guidelines in the Department's OSHA compliance manual. Under the guidelines, an initial unadjusted penalty is determined based on the probability and severity of an accident resulting from a cited condition. The unadjusted penalty may be reduced up to 60% based on the employer's size in terms of total number of employees; up to 25% for good faith in maintaining an overall safety program; and up to 10% if there is no history of prior similar violations.

12. Under AS 18.60.095(b) of the Alaska OSHA Act, a penalty of up to \$70,000 may be assessed for repeated violations. The sleeping area violation was deemed to have a low probability and severity of an injury and therefore carried an unadjusted penalty of \$1,500. This amount

was multiplied by two because it was the second violation of the same code requirement at the same location within a three-year period. The \$3,000 penalty was then reduced by 20% based on Nautilus' employee size, for a final penalty assessment of \$2,400. No credit was given for good faith or history due to the previous citation of the same violation.

13. During his inspection, enforcement officer Green found several other code violations at Nautilus' plant. He found that there were no windows in the employee bunkhouse. This violation was classified as "serious" because the lack of windows deprived employees of a means of escape in the event of a fire, an ammonia leak, or other emergency.

14. In addition, Green found three other code violations relating to the living and sleeping quarters provided to employees: (1) the men's toilet rooms did not have an exhaust or ventilation system; (2) the lighting in the bunkhouse was below the minimum required by the code; and (3) employees were not provided suitable storage facilities for their personal property. These three items were not considered serious violations, but were grouped with the window violation into a single "serious" citation because they involved similar or related hazards that may increase the potential for injury resulting from an accident.

15. Under AS 18.60.095(b), a penalty of up to \$7,000 may be assessed for each serious violation. The initial unadjusted penalty for Citation 4, Items 1a-1d, was \$1,500. This amount was reduced by 20% for company size, 25% for good faith, and 10% for no prior similar violations, resulting in a final assessed penalty of \$675.

16. Green also found that the ammonia refrigeration room did not comply with the ASHRAE Safety Code for Mechanical Refrigeration in the following ways: (1) the doors to the refrigeration room were not self-closing or tight-fitting; (2) there was no sign indicating the type or number of pounds of refrigerant required in either refrigeration system; (3) there were no signs indicating the shut-off valves to each vessel and control switch, and exposed high and low pressure piping was not labeled with the name of the refrigerant and the letters "HP" and "LP;" and (4) there was no information

card placed conspicuously near the compressors containing operating and emergency instructions. (Ex. 4.)

17. The refrigeration code violations were classified as "serious" because of the potential danger of an ammonia leak which could cause serious injury or death. The Department calculated an unadjusted penalty of \$1,500 which was reduced by a total of 55% for size, good faith and prior history, for a final penalty of \$675.

18. During his inspection of the shop area, Green observed an electric wire brush that did not have a safety guard. (Ex. 5.) This violation was classified as "serious" because of the potential for significant bodily harm in the event of an accident with the unguarded brush. For this violation the Department also calculated an unadjusted penalty of \$1,500 which was reduced by 55% for a final penalty of \$675.

19. Nautilus was also cited for two "other than serious" violations (Citation 5, Items 1 and 2) which carried no monetary penalty and were not contested by the company.

CONCLUSIONS OF LAW

In its response to the Department's amended citation, Nautilus contested Citation 3, Item 1 (the sleeping area violation) and Citation 4, Item 1a (the window violation), as well as all of the proposed monetary penalties. We will address each of these issues separately.

Citation 3, Item 1

At the time of the inspection, O&IS 02.110(c)(2) provided:
Each room used for sleeping purposes shall contain at least 60 square feet of floor space per occupant. At least a 7-foot ceiling shall be provided.¹

¹ Effective December 6, 1995, the Department repealed all existing Alaska occupational safety and health standards and in their place adopted substantially all federal OSHA safety and health standards. At the same time the Department promulgated a limited set of state-specific standards, including a standard for temporary labor camps which continues to require that rooms used for sleeping purposes must contain at least 60 square feet per occupant. 8 AAC 61.1040(a). The comparable federal OSHA standard, however, requires only 50 square feet per employee. 29 C.F.R. ?

The Department regards each of the cubicles in Nautilus' bunkhouse as a separate "room used for sleeping purposes." Since each cubicle was measured at 48 square feet and housed two employees, the Department asserts that each employee was provided with only 24 square feet of sleeping space, much less than the 60 square feet required by the standard. Nautilus president Waterer, on the other hand, contends that the entire bunkhouse is the relevant area for sleeping purposes and consists of approximately 1,870 square feet. This total space, divided by the maximum 24 employees alleged by Waterer to be housed in the bunkhouse, would provide approximately 78 square feet per individual, exceeding the code requirement.

We find that Waterer's estimate of the total sleeping area in the bunkhouse is unsupported by the evidence. Waterer's estimate is directly contradicted by the statements of Nautilus plant manager Jeff Green in the December 1995 letter that the bunkhouse was approximately 800 square feet and housed up to 28 employees. Plant manager Green's estimate yields approximately 28.5 square feet per employee and is much more consistent with the testimony of enforcement officer Green, even if the central hallway area is added to the area of the partitioned cubicles.² We conclude that plant manager Green's statements in the December 1995 letter are admissions which are sufficient to establish a violation of the cited standard, even if the testimony of the enforcement officer is disregarded.³

Because we conclude that Nautilus' written response to the citation admits facts
(..continued)
1910.142(b)(2).

² Based on enforcement officer Green's testimony and diagram, the area of the cubicles would be 672 square feet (48 sq. ft. x 14 cubicles), while the hallway area would be 126 square feet (42 ft. long x 3 ft. wide), for a total area of 798 square feet.

³ Our reliance on the enforcement officer's testimony is diminished by our impression that the inspection was documented in a sloppy and deficient manner. The officer admitted that he did not have enough film with him to photograph the cited conditions, thus depriving the parties and the Board of valuable evidence. Moreover, on his diagram of the processing plant (Ex. 1) -- a critical piece of evidence -- the officer penciled in the sleeping cubicles in a careless and imprecise manner. Further, the officer's poor memory and apparent lack of preparation for the hearing give us little confidence in the reliability of his observations about the workplace.

sufficient to establish the sleeping area violation, we need not decide whether the language "each room used for sleeping purposes" in the cited standard refers to each individual cubicle or to the bunkhouse as a whole. Under either interpretation, Nautilus was not in compliance with the standard. However, to avoid future uncertainty in the application of the standard, we recommend that the Department review the temporary labor camp standard in 8 AAC 61.1040 to determine whether any clarification is warranted with respect to partitioned sleeping areas that are not fully-enclosed rooms.

In its written response to the citation, Nautilus set forth several additional reasons why it believes the sleeping area requirement should not be enforced: (1) the state fire marshal and the city building inspector approved occupancy of up to 32 people in the bunkhouse; (2) employees have never complained about having less than 60 square feet each of sleeping space; (3) the bunkhouse is only used for temporary housing approximately four months each season; (4) the Department does not enforce the sleeping area requirement uniformly, as there are other seafood processors in Valdez and elsewhere in the state who are not in compliance with the standard; and (5) compliance with the standard would cause Nautilus to suffer serious economic disadvantage and financial loss.

We conclude that none of the foregoing reasons provide a justification for not enforcing the sleeping area requirement. Building occupancy permits based on fire safety or building codes are not dispositive of occupational safety and health requirements. While occupancy permits may address fire protection and building safety concerns, they do not address other important concerns such as adequate employee privacy, living space and personal hygiene which are safeguarded by the OSHA standard. Additionally, Nautilus' claim that employees have never complained about having less than 60 square feet each of sleeping space each is irrelevant; OSHA enforcement is not premised on prior employee complaints.⁴

Moreover, the seasonal use of the bunkhouse is not grounds for a waiver of the sleeping

⁴ Nautilus' claim would also appear to be contradicted by the employees' reference to the bunkhouse as the "Rat Hole." (Ex. 2.)

area requirement. The Alaska temporary labor camp standard permits sleeping areas to be reduced to 50 square feet per occupant in temporary labor camps that are occupied for no more than 60 consecutive days per year. 8 AAC 61.1040(b). Nautilus' bunkhouse would not qualify for this reduction since it is occupied from May to September each year. Nor is there any evidence that Nautilus ever sought or obtained a variance from the requirements of the standard, even though the bunkhouse had been cited previously for the same violation.

We further find that Nautilus' claim of selective enforcement of the sleeping area requirement is unsupported by any proof and is outside the scope of this proceeding.⁵ We also find that Nautilus' claims of economic disadvantage and financial loss are unsupported by any proof. Economic infeasibility is established only when an employer's existence as an entity is shown to be financially imperiled by compliance. *Faultless Division, Bliss & Laughlin Industries, Inc. v. Secretary of Labor*, 674 F.2d 1177, 1190 (7th Cir. 1982). No such showing has been made here.

Finally, we reject Nautilus' contention that a "repeat" classification is unjustified on the grounds that Nautilus Foods and Nautilus Marine are separate legal entities. According to the Department's compliance manual, an employer may be cited for a repeated violation if the employer was cited previously for a substantially similar condition at the same establishment within the previous three years. Alaska Compliance Manual, Chapter IV at 39-41.⁶ Nautilus Foods was cited for the same code violation at the same fixed establishment that Nautilus Marine had been cited for two years earlier. The prior citation against Nautilus Marine was resolved by a settlement agreement signed by its president Tom Waterer, who is now president of Nautilus Foods. (Ex. 3.) Based on the same code violation, the same workplace, and the same company manager, we conclude that Nautilus Foods may properly be cited for a repeated violation.

⁵ Enforcement officer Green testified that he had inspected other seafood plants in Valdez and that they were in compliance with the sleeping area requirements.

⁶ This portion of the compliance manual has been adopted by reference in the Department's regulations. 8 AAC 61.140(c).

Citation 4, Item 1a

At the time of the inspection, O&IS 02.110(c)(11) provided:
All living quarters shall be provided with windows the total of which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation.⁷

It is undisputed that the employee living quarters on the second floor of Nautilus' processing plant did not have windows. The Department contends that the lack of windows deprived employees of ventilation and an escape route in the event of a fire or other emergency.

Nautilus' written response to this violation makes the following arguments:

(1) the state fire marshal and the city building inspector approved permits for the bunkhouse to be built without windows; (2) the design of the bunkhouse does not allow for the amount of window space required by the code; (3) the fire marshal required three exits to the building, which provide adequate ventilation for the bunkhouse; and (4) the window requirement has not been uniformly enforced against other seafood processors.

We are unpersuaded by any of these arguments. As discussed earlier, building occupancy permits issued under fire safety or building codes do not govern compliance with occupational safety and health requirements. Nor did Nautilus present any proof that it was not technically possible to provide windows in the bunkhouse. Moreover, the three exits in the plant required by the fire marshal for safe egress do not satisfy the OSHA requirement to have opening windows in employee living quarters for ventilation. Finally, Nautilus offered no proof that the window requirement has been selectively enforced with respect to other seafood processors.

Although we conclude that Nautilus was in violation of the window requirement, we are not persuaded that the violation was properly classified as "serious." A serious violation exists if the

⁷ This requirement is currently codified in 29 C.F.R. ? 1910.142(b)(7), which has been adopted in Alaska.

violation creates in a place of employment a substantial probability of death or serious physical harm. AS 18.60.095(b). We do not agree with the Department's interpretation that a primary purpose of the window requirement is to provide an escape route in the event of an emergency. The language of the standard refers to ventilation, not egress. Moreover, there are separate provisions in the O&IS Code pertaining to safe means of egress from bunkhouses, which were not cited by the Department.⁸ Further, we are not persuaded that any lack of ventilation caused by the absence of windows would likely result in serious bodily harm to employees. Accordingly, we believe this violation is more properly classified as "other than serious."⁹

Proposed Penalties

Nautilus argues that the Department's proposed monetary penalties are excessive and unfair. We have reviewed the Department's penalty calculations and find no abuse of its discretion under the compliance manual guidelines. Each penalty was calculated based on the probability and severity of an injury resulting from the cited condition. Nautilus was given appropriate reductions for company size, good faith and prior history, except for the sleeping area violation, where credit for good faith and prior history were properly denied based on the same code violation two years earlier. We do not find the proposed penalties to be excessive or unfair.

Nautilus also fails to convince us that the penalties would impose serious financial hardship or would threaten the continued existence of the company. We note that Nautilus has been in operation at the Valdez plant for a number of years and employs up to 140 persons during the processing season. By Alaska standards, it is a relatively large employer.

Nautilus argues that the penalty for the refrigeration code violations in Citation 4, Item 2,

⁸ O&IS 02.110(c)(21) provides: "All bunk houses shall be equipped with a means of egress which complies with Article 3 of this subchapter." Article 3 sets forth requirements for means of egress, employee emergency plans and fire prevention plans.

⁹ The Department acknowledged that the three other violations grouped with the window violation in Citation 4, Items 1a-1d, were considered to be nonserious.

is unjustified because the cited code requirements are for informational purposes only and unqualified persons are not permitted to operate the system. We do not agree with Nautilus' narrow interpretation of the cited code provisions. The information required by the code could be critical in the event of an emergency where the qualified technician is unavailable. We also note that one of the cited code violations was for not having self-closing or tight-fitting doors to the refrigeration room. Because of the potential risks to employees from an ammonia leak, we find that the Department was justified in assessing a \$675 penalty for this violation.

Nautilus further argues that the penalty for the unguarded electric wire brush in Citation 4, Item 3, is excessive considering that the company had not been cited previously for this type of violation and no accidents had occurred. However, we find that Nautilus was given the maximum allowable credit for good faith and prior history, and there is no basis for any further reduction of the \$675 penalty.

There is one penalty modification we believe is warranted. Since we conclude that Citation 4, Items 1a-1d, should be reclassified as "other than serious" violations and such violations normally do not carry a monetary penalty, we believe the proposed \$675 penalty for these items should be dismissed.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered as follows:

1. Citation 3 is affirmed as a "repeat" violation with a penalty of \$2,400. 2.

Citation 4, Items 1a-1d, are affirmed but are reclassified as "other than serious" violations with no monetary penalty.

3. Citation 4, Item 2, is affirmed as a "serious" violation with a penalty of \$675.
4. Citation 4, Item 3, is affirmed as a "serious" violation with a penalty of \$675.
5. Citation 5, Item 1 and 2, are affirmed as "other than serious" violations with no

monetary penalty.

DATED this 3rd day of June, 1997.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

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

By: _____/s/_____
James J. Ginnaty, Member