

violation with a penalty of \$1,125.

Citation 2, Item 1, alleges a violation of 29 CFR 1910.23(c)(1) for failure to guard open-sided floors or platforms 4 feet or more above ground level. This item was cited as a “repeat” violation with a penalty of \$5,600, amended at hearing to \$8,400.

Citation 2, Item 2, alleges a violation of 29 CFR 1910.37(b)(1) for failure to provide adequate lighting for employee exit routes. This item was cited as a “repeat” violation with a penalty of \$2,400.

Citation 2, Item 3, was withdrawn by the Department at hearing.

Citation 3, Item 1, alleges a violation of 8 AAC 061.120(b) for failure to post occupational safety and health citations until the completion of abatement. This item was cited as an “other” violation with a penalty of \$1,350.

Citation 3, Item 2, alleges a violation of 29 CFR 1910.132(d)(2) for failure to certify in writing that a workplace hazard assessment has been performed. This item was classified as an “other” violation with no monetary penalty.

Citation 3, Item 3, alleges a violation of 29 CFR 1910.157(e)(3) for failure to document an annual maintenance check on a fire extinguisher. This item was classified as an “other” violation with no monetary penalty.

The Department also cited Nautilus for four “failure to abate” (FTA) violations for failing to correct violations cited in an earlier inspection in 2002. FTA No. 1 alleges a failure to abate a violation of 29 CFR 1910.305(a)(2)(iii)(F) for failure to protect employees from accidental contact with fluorescent lighting fixtures less than 7 feet above the floor. A penalty of \$18,000 was proposed for this violation.

FTA No. 2 alleges a failure to abate a violation of 29 CFR 1910.23(a)(8)(ii) for failure to provide adequate floor hole covers on the fish processing floor. A penalty of \$9,000 was proposed for this violation.

FTA No. 3 alleges a failure to abate a violation of 29 CFR 1910.27(c)(4) for failure to provide sufficient clearance behind fixed ladders to provide secure footing. A penalty of \$9,000 was proposed for this violation.

FTA No. 4 alleges a failure to abate a violation of 29 CFR 1910.1200(e)(1) for failure to adequately implement a written hazard communication program by providing and documenting employee training in the program. A penalty of \$18,000 was proposed for this violation.

Nautilus initially contested all of the Department’s alleged violations and proposed penalties. At hearing, however, Nautilus limited its contest of the alleged violations to Citation 2, Item 1; Citation 3, Item 2; and the four failure to abate violations, but indicated that it still wished to contest all of the monetary penalties and certain of the violation classifications.

A three-day hearing was held before the Review Board in Anchorage on August 22-24, 2005. The Department was represented by Assistant Attorney General Judith A. Crowell. Nautilus was represented by Edward P. Weigelt, Jr., Esq. 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.

II. FINDINGS OF FACT

1. On July 10, 2003, Department Enforcement Officer Roman Gray conducted an occupational safety and health (OSHA) inspection of a seafood processing plant operated by Nautilus Foods located at Hazelet Avenue and City Dock in Valdez, Alaska. The plant was built in 1964 and was operated seasonally by Nautilus from May to September each year.

2. Gray previously conducted OSHA inspections at the Nautilus plant in 2000 and 2002. Following the 2002 inspection, the Department cited Nautilus for a number of occupational safety and health violations with proposed monetary penalties totaling \$20,220. (Ex. 8.) Nautilus did not contest the alleged violations or proposed penalties arising from the 2002 inspection.

3. According to Gray, seafood processing is a "high hazard" industry for OSHA inspection purposes. Gray described a number of occupational safety and health hazards typically associated with seafood processing: large amounts of product to process in a relatively short period of time; the constant use of knives and other cutting equipment; wet and slippery flooring in the workplace; exposure to cold temperatures, particularly in the freezers; and long working hours with tired employees using dangerous equipment.

4. At the time of the 2003 inspection, Nautilus had approximately 66 employees working at the plant. During the inspection, Nautilus was represented by Dave Kaayk, the plant manager, and George Edge, a refrigeration engineer who was also designated as the plant's safety and health manager.

5. During his inspection, Gray looked for correction of violations from the 2002 inspection and observed several hazards cited previously which had not been corrected.

6. Regarding FTA No. 1, Gray observed that there were ceiling-mounted fluorescent light fixtures 5 feet 9 inches above the floor with no barriers or protection to prevent employees from accidentally striking the sharp sheet-metal edges of the fixtures when they entered and exited the storeroom multiple times daily. (Ex. 2 at Photos AA, AB, AC.) This item had been cited as Citation 1, Item 2d in the 2002 inspection. (Ex. 8.) Although George Edge indicated in May 2003 that the light fixtures would be removed in the process of raising the ceiling, this was not accomplished by the time of the July 2003 inspection. (Ex. 11.) The overhead light fixtures were removed on July 11, 2003, the day after the inspection. (Ex. 15.)

7. Under the Department's penalty calculation guidelines in the Field Inspection Reference Manual (FIRM), a failure to abate violation carries a penalty of

\$1,000 for each day the violation continues unabated, up to a maximum of 30 days. (Ex. 9.) The only penalty reduction allowed is for company size. In this case, the lighting fixture violation had existed for more than 30 days since the preceding inspection, so the initial penalty was \$30,000, less 40% based on the number of employees employed by Nautilus, for a final penalty assessment of \$18,000.

8. Regarding FTA No. 2, Gray determined that there were insufficient drain gutter covers covering the gutter floor holes to protect employees from slipping into them on the wet and slippery processing room floor. (Ex. 2 at Photos AD, AE, AF, AG, AH, AI, AJ, AK.) This violation had been cited as Citation 1, Item 3 in the 2002 inspection. During the 2003 inspection, Gray estimated that approximately 80% of the grate covers for the gutter floor-holes had been fabricated and installed. Plant manager Kaayk testified that at the time of the inspection there were sufficient grates and metal plates to cover the floor gutter openings even though some of these may not have been in place during the inspection.

9. In calculating the penalty for FTA No. 2, the Department gave Nautilus a 50% credit for having partially abated this violation, resulting in a final proposed penalty of \$9,000.

10. Regarding FTA No. 3, Gray observed that the egg-loft fixed ladder to an attic storage area had rungs only 3½" from the wall behind it, which was insufficient clearance to provide secure footing. (Ex. 2 at Photos AL, AM, AB.) During the 2002 inspection, Gray had seen three fixed ladders with insufficient clearance and this item was cited as Citation 1, Item 7 in the 2002 inspection. In 2003, Gray determined that two of the three fixed ladder violations had been abated but the clearance hazard pertaining to the egg-loft fixed ladder was still unabated. The day after the 2003 inspection, Nautilus modified the ladder by remounting it 7 inches from the wall. (Ex. 16.)

11. Because Nautilus had partially abated the ladder clearance violation prior to the 2003 inspection, the Department reduced the proposed FTA penalty by 50%, resulting in a final proposed penalty of \$9,000.

12. Regarding FTA No. 4, Gray determined that Nautilus had failed to adequately implement a hazard communication program with documented employee training of foreign employees, particularly numerous Turkish and Mexican employees who did not speak much English. This violation was originally cited following the 2000 inspection and was cited as a "repeat" violation in Citation 2, Item 3 after the 2002 inspection.

13. The Department determined that a number of employees who worked for Nautilus in 2002 still had not received hazard communication training by the time of the July 2003 inspection. In late July and August 2003, Nautilus provided documentation that 59 employees had received hazard communication training. (Ex. 17, 18, 19, 23.)

14. In accordance with the Department's penalty calculation guidelines, the initial penalty for this violation was calculated at \$30,000 (\$1,000 per day for 30 days), less 40% for company size, for a final proposed penalty of \$18,000.

15. Regarding Citation 1, Item 1a, Gray observed three damaged extension cords at the workplace. (Ex. 1 at Photos A, B.) Regarding Citation 1, Item 1b, he observed that there were open holes on the top of a breaker box, which could allow water to enter and create an electrical hazard. (Ex. 1 at Photos C, D.)

16. The Department grouped Items 1a and 1b into a single violation because they involved similar or related hazards. Because the processing plant was a wet environment, these electrical violations were classified as "serious." To calculate the penalty, the severity of an injury was judged to be high while the probability of an accident was low, resulting in an unadjusted penalty of \$2,500. After a reduction of 40% for company size and 15% for good faith in promptly correcting the hazards, the final proposed penalty was \$1,125.

17. Regarding Citation 1, Item 2, Gray noted three instances of obstructions to egress in the plant: a fixed ladder had its legs mounted on the egg-loft stair landing, creating an obstruction to egress and a tripping hazard on the stairs; the box storage room had cartons stacked on the stair landing which obstructed egress and posed a tripping hazard; and the box storage room also had cartons stacked on both sides of the exit pathway leaving a walkway only 19" wide. (Ex. 1 at Photos E, F, G.) Two of the three hazards were abated during the inspection while the third was abated a month later. Because a fall injury caused by obstructed egress could result in broken limbs, this violation was classified as "serious." The severity of the hazard was judged as moderate while probability of an accident was deemed to be low, resulting in an unadjusted penalty of \$2,000. Applying a reduction of 40% for company size and 15% for good faith, the final proposed penalty for this item was \$900.

18. Regarding Citation 1, Item 3, Gray observed a Nautilus employee driving a forklift outside the plant on the public road while not wearing a seatbelt. (Ex. 1 at Photos H, I, J, K; Ex. 5 at Photos CH, CI.) The violation was classified as "serious" due to the probability of serious injury or death in the event of a vehicular accident. The unadjusted penalty for this violation was \$2,500, less a 40% reduction for company size and 15% for good faith, resulting in a final penalty of \$1,125.

19. Regarding Citation 2, Item 1, Gray observed three instances of open-sided floors without the required guardrails or fall protection. First, there was no fall protection where an employee was photographed sitting at the second floor edge of the egg-storage attic. Second, there was no fall protection around the top edge of freezers where employees walked while performing freezer maintenance. The top of the freezers was measured at 89 inches above the floor. Third, a dock railing next to open water did not have a mid-rail. (Ex. 1 at Photos L, M, N, O, P.) This item was classified as a "repeat" violation of Citation 1, Item 5 in the 2002 inspection. Under the Department's penalty calculation guidelines, the penalty for a first repeated violation is double the amount of the previous violation. In this case the penalty for the open-sided floor violation in 2002 was \$4,200, therefore the penalty for the repeated violation in 2003 was amended at hearing to \$8,400.

20. Regarding Citation 2, Item 2, Gray found that the emergency light inside the walk-in freezer was defective. (Ex. 1 at Photo Q.) This item was

classified as a “repeat” violation of Citation 1, Item 1b in the 2002 inspection. Because the 2002 violation carried a penalty of \$1,200, the penalty for the repeated violation in 2003 was doubled to \$2,400.

21. Regarding Citation 3, Item 1, Gray found that the citations from the 2002 inspection were not posted as required until the completion of abatement of all items. As a regulatory violation, this item was classified as an “other” violation with an unadjusted penalty of \$3,000. (Ex. 9.) After awarding the 40% reduction for company size and 15% for good faith, the final proposed penalty for this item was \$1,350.

22. Regarding Citation 3, Item 2, Gray determined that Nautilus had not performed or certified the required assessment of hazards at its workplace. Employees operated hazardous fish processing equipment, used knives, worked inside freezers, worked at mechanized fish processing stations, but there was no written and hazard-specific requirement for the use of engineering controls or personal protective equipment. (Ex. 1 at Photos R, S, T.) This violation was classified as an “other” violation with no monetary penalty.

23. Regarding Citation 3, Item 3, Gray saw a fire extinguisher in a dock storage room that was not tagged as having been inspected during the preceding 12 months. (Ex. 1 at Photo U.) This item was classified as an “other” violation with no monetary penalty.

24. According to plant manager Dave Kaayk, the Nautilus plant ceased operation after the 2004 season. The plant is currently closed and Nautilus has no plans to reopen it.

III. CONCLUSIONS OF LAW

At hearing, Nautilus limited its contest of the Department’s alleged violations to Citation 2, Item 1; Citation 3, Item 2; and the four failure to abate violations. Accordingly, the Board will consider whether these contested items have been properly established as OSHA violations. The Board will also consider whether all of the alleged violations were properly classified and whether all of the proposed monetary penalties are justified.

A. Failure to Abate Violations

To establish a failure to abate violation, the Department must show that (1) the original citation became a final order; (2) the same hazard was found upon reinspection; and (3) there was continued employee exposure to the unabated hazard. See *York Metal Finishing Co.*, 1 OSHC 1655 (OSHRC 1974); *Kit Manufacturing Co.*, 2 OSHC 1672 (OSHRC 1975); see generally Mark A. Rothstein, *Occupational Safety and Health Law*, §§ 294, 316 (4th ed. 1998).

We conclude that the Department has met the requirements to establish a failure to abate violation with respect to each of the four FTA items cited. First, the parties stipulated that the previous 2002 citations were not contested and therefore

became a final order. Second, the evidence demonstrates that some of the same hazards still existed during the 2003 inspection, namely (1) the low-hanging fluorescent light fixtures in the egg-room loft had not been removed or otherwise protected against employee contact; (2) there were still uncovered floor grate openings on the fish processing floor; (3) the egg-loft fixed ladder to the attic storage area still had a clearance of only 3½ inches to the back wall; and (4) numerous employees, including many who did not speak English well, had not received employee training in the hazard communication program. Third, the evidence establishes that employees were exposed or had access to each of the hazardous conditions cited in the FTA items.

B. Citation 2, Item 1

29 CFR 1910.23(c)(1) requires that every open-sided floor or platform 4 feet or more above adjacent floor or ground level must be guarded by a standard railing on all open sides except where there is entrance to a ramp, stairway or fixed ladder. The Department cited three instances of open-sided floors without the required guarding: (1) the drop ceiling in the egg-storage attic; (2) the top of the freezers; and (3) a dock railing next to open water.

The evidence persuades us that the Department has established a violation of this code requirement with respect to the freezer tops and the dock railing. The photographic evidence demonstrates that employees had ready access to these areas without the required fall protection. Maintenance employees were required to go on top of the freezers as evidenced by the catwalks with guard rails connecting one bank of freezers to another, but there was no fall protection around the top of the freezers. As to the dock railing, even though there was a top rail in the section occupied by Nautilus employees, the photographs and other evidence clearly show there was no mid-rail and that the floor surfaces were often wet and slippery. These two hazardous conditions were open and obvious and Nautilus had been cited previously for open-sided floors. We find these two instances are sufficient to establish a “repeat” violation.

However, we are not persuaded that the unprotected drop ceiling in the egg-storage attic was in violation of the cited code requirement. The evidence persuades us that the drop ceiling, which was nothing more than quarter-inch thick sheets of plywood suspended on cables, was not intended to be a work surface or platform within the meaning of the code. The area was restricted and employees were not permitted to go up there. Although an employee was photographed sitting on a tank near the edge of the drop ceiling, we believe he improperly entered a restricted area. Accordingly, we conclude that this alleged hazard was not in violation of the code.

C. Citation 3, Item 2

29 CFR 1910.132(d)(2) requires an employer to verify that a workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and which identifies the document as a certification of hazard assessment.

Through the testimony of Enforcement Officer Gray, the Department demonstrated that Nautilus did not perform the required workplace hazard assessment nor did it provide any written certification that such an assessment had been done. Gray testified that during the inspection, plant manager Kaayk and safety manager Edge admitted that no hazard assessment had been performed. Because the Nautilus plant involved hazardous work procedures and equipment, there is no question that Nautilus was required to conduct a specific hazard assessment and provide certification of the assessment. We find no evidence that Nautilus complied with this requirement and therefore we uphold this alleged violation.

D. Classification of Violations and Penalty Assessment

Alaska Statute 18.60.095 sets forth the classifications and penalties for various types of OSHA violations. For a “serious” violation, an employer may be assessed a penalty of up to \$7,000 for each violation. AS 18.60.095(b). For “repeat” violations, an employer may be assessed a penalty of up to \$70,000 for each violation. AS 18.60.095(a). For “other than serious” violations, an employer may be assessed a penalty of up to \$7,000 for each violation. For “failure to abate” violations, an employer may be assessed a penalty of up to \$7,000 for each day the violation is uncorrected. AS 18.60.095(d). For posting violations, an employer may be assessed a penalty of up to \$7,000 for each violation. AS 18.60.095(g). In assessing a penalty, the Department must give due consideration to the employer’s size, the gravity of the violation, the good faith of the employer, and the employer’s history of previous violations. AS 18.60.095(h).

To calculate monetary penalties, the Department relies on the guidelines set forth in the Field Inspection Reference Manual. 8 AAC 61.140(c). The Review Board, however, is not bound by the FIRM guidelines in evaluating the classification of a violation or the assessment of a penalty. 8 AAC 61.140(h).

Although Nautilus concedes the existence of most of the violations cited by the Department, it contests the Department’s penalty assessments and certain of the violation classifications on the following grounds: Nautilus promptly and reasonably abated most of the cited violations, some at great expense; the probability of an accident and the severity of injury should be deemed to be low for most if not all of the cited violations, justifying a lower penalty; there is no history of employee injuries from unsafe conditions at the plant; and Nautilus is a small company with financial problems that should not be overly penalized for making reasonable good faith efforts to comply with OSHA requirements. Nautilus suggests that a total penalty of \$10,000 would be appropriate in this case.

We are not persuaded by Nautilus’ arguments. We recognize that seafood processing is a high hazard industry and that many of Nautilus’ employees are relatively unskilled foreign workers who speak little or no English. Although Nautilus promptly abated many of the hazards cited in the 2003 inspection, largely through the commendable efforts of its safety manager George Edge, we do not believe that the company’s top management has been fully committed to improve its safety and health record and meet applicable OSHA requirements. In various memos to

OSHA, Mr. Edge candidly expressed his frustration with management's lack of support on safety and health matters:

I don't have enough time for the OSHA work to do a very complete job of it. If I put much time in the OSHA work then it will cut into my time for sleep and increase my level of risk in working with ammonia and in doing other work involving potentially dangerous activities. Currently I am working 12-14 hours a day, seven days a week, and I don't have the time to do my main job of refrigeration with no assistant and a 24-hr a week operation. Trying to do OSHA work on top of this is just too much of a demand on my time and attention.

(Ex. 20; see also Ex. 13.) The evidence presented persuades us that Nautilus has not developed an appropriate "safety culture" at its workplace, including regular safety meetings and proper documentation and recordkeeping regarding safety and health matters. It is apparent to us that most of Nautilus' efforts to abate and correct the cited hazards were the direct result of OSHA enforcement inspections, not the company's independent desire to come into compliance and remain in compliance with OSHA requirements.

We are also unpersuaded by Nautilus' argument that the lack of injuries at the workplace should be considered a mitigating factor. The OSHA law requires compliance with applicable safety and health requirements without waiting for an accident or injury to occur. We specifically reject Nautilus' argument that "150 violations [since 2000] is not bad for a large facility." In view of the hazardous nature of seafood processing work, we believe Nautilus should be striving for zero violations, not settling for 150 violations.

We further conclude that most of the Department's violation classifications and proposed penalties are supported by the evidence and gave Nautilus proper credit for small company size and good faith in promptly abating many of the violations. However, we believe certain modifications are warranted. On FTA No. 2, we are persuaded that there were enough grates and metal plates to cover floor openings at the plant and therefore this violation should have been cited as a repeat violation instead of a failure to abate violation. As a repeat violation, the penalty should be doubled from the previous violation to a total of \$4,200 instead of the FTA penalty of \$9,000. On Citation 1, Item 3, we agree that the forklift operator was not wearing a seatbelt but we are unpersuaded that he was operating the forklift in an unsafe manner. Therefore we exercise our discretion to reduce the monetary penalty from \$1,125 to \$0. On Citation 2, Item 1, we are persuaded that the drop ceiling in the egg-storage attic was a restricted area and was not a regular work area. Therefore we find that one of the three instances of open-sided floors alleged by the Department is not justified and we reduce the penalty accordingly from \$8,400 to \$5,600. On Citation 3, Item 1, we find that Nautilus' failure to post the 2002 citation until completion of abatement was a regulatory violation not directly affecting occupational safety or health conditions. Therefore we exercise our discretion to reduce the penalty from \$1,350 to \$0. We conclude that all of the remaining violations and penalties should be affirmed as cited.

IV. ORDER

1. Citation 1, Items 1a and 1b are affirmed as a “serious” violation with a penalty of \$1,125.
2. Citation 1, Item 2 is affirmed as a “serious” violation with a penalty of \$900.
3. Citation 1, Item 3, is affirmed as a “serious” violation but the penalty of \$1,125 is reduced to \$0.
4. Citation 2, Item 1, is affirmed as a “repeat” violation but the penalty of \$8,400 is reduced to \$5,600.
5. Citation 2, Item 2, is affirmed as a “repeat” violation with a penalty of \$2,400.
6. Citation 3, Item 1, is affirmed as an “other” violation but the penalty of \$1,350 is reduced to \$0.
7. Citation 3, Item 2, is affirmed as an “other” violation with no monetary penalty.
8. Citation 3, Item 3, is affirmed as an “other” violation with no monetary penalty.
9. FTA No. 1 is affirmed as a “failure to abate” violation with a penalty of \$18,000.
10. FTA No. 2 is modified from a “failure to abate” violation to a “repeat” violation and the penalty is reduced from \$9,000 to \$4,200.
11. FTA No. 3 is affirmed as a “failure to abate” violation with a penalty of \$9,000.
12. FTA No. 4 is affirmed as a “failure to abate” violation with a penalty of \$18,000.

DATED this ____ day of _____, 2005.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: _____
Timothy O. Sharp, Member

By: _____
Cliff Davidson, Member

By: _____
Thor Christianson, Member