



State of Michigan
John Engler, Governor

Department of Consumer & Industry Services
Kathleen M. Wilbur, Director

Bureau of Safety and Regulation
State Secondary Complex
7150 Harris Drive
P.O. Box 30643
Lansing, Michigan 48909-8143

December 27, 2000

Appeals

Clifford A. Knaggs
Knaggs, Harter, Brake & Schneider, PC
1375 South Washington Avenue, Suite 300
Lansing, MI 48910

RE: Lansing Ice & Fuel, Declaratory Ruling

Dear Mr. Knaggs:

You have requested a declaratory ruling as to whether Lansing Ice & Fuel (LIF) is engaged in construction work within the meaning of the construction safety standards promulgated under the Michigan Occupational Safety and Health Act (MIOSHA) 1974 PA 154; MCL 408.1001 *et seq*; MSA 17.50(1) *et seq*. when it is in the process of refueling construction equipment at a construction site. You state that LIF "is a petroleum, lubricant, heating oil, gasoline, diesel fuel and propane company engaged in the business of residential, commercial and industrial petroleum distribution." (Request for Declaratory Ruling, ¶ 1). You also indicate that the sole business of LIF "is the distribution of petroleum products", that it does not engage in construction work, and that it is properly classified "as a Bulk Petroleum Storage 5171 and/or Petroleum Distribution 5172" pursuant to the standard industrial classification manual (SICM). (Request for Declaratory Ruling, ¶¶ 13 & 23).

Under § 63 of the Administrative Procedures Act of 1969, MCL 24.263; MSA 3.560(163), an agency is authorized to issue a declaratory ruling "as to the applicability to an actual state of facts" of the statute or a rule administered by the agency. A declaratory ruling is subject to judicial review in circuit court. MCL 24.264; MSA 3.560(164).

The question of whether the construction safety standards can be applied to an employer whose primary business is not construction was decided in *Great Lakes Steel Division v Department of Labor*, 191 Mich App 323; 477 NW2d 124(1991). There, the petitioner, a steel manufacturer, was cited by MIOSHA for violating several of Michigan's construction safety standards involving construction activities. Petitioner contested the citation on the grounds that the construction safety standards only applies to construction work and that as a manufacturer the standards did not apply to its operations.

The Administrative Law Judge agreed with Petitioner and dismissed the citations. On review, the Board of Health and Safety Compliance and Appeals reversed the decision of the Administrative Law Judge concluding that the construction safety standards apply to the work performed notwithstanding the SICM classification of the employer. The Petitioner filed a petition for review in circuit court and the court reversed the decision of the Board and reinstated the holding of the Administrative Law Judge. The Circuit Court held that the construction

classified? 191 Mich App at 325-327

The Court held:

The pertinent statutory language in this case is MCL [408.]1004(4); MSA 17.50(4)(4). That provision applies the construction safety standards to "work activity" designated in major groups 15, 16, and 17 of the SICM. We find that the statute unambiguously applies the construction safety standards to construction activities without regard to the employer's classification. The definition of "construction operations" does not contain any indication that the standards are to be applied according to the employer's classification. (Emphasis added). *Id.* at 327.

Here, it is contended that LIF is not subject to the construction safety standards because it does not fall within the major groups 15, 16, and 17 of the SICM. This type of claim was rejected by the Court in *Great Lakes Steel* which recognized that the SICM "was established to classify businesses for statistical purposes". 191 Mich App at 327. The involved statute, MCL 408.1004(4); MSA 17.50(4)(4) "unambiguously applies the construction safety standards to construction activities without regard to the employer's classification". *Id.*

Thus, LIF's primary classification as a Bulk Petroleum Storage 5171 and/or Petroleum Distribution 5172 is not determinative to the issue of whether it is engaged in construction work when it is in the process of delivering fuel and refueling construction equipment at a construction site. Rather, it is the act of refueling that must be considered when determining which MIOSHA standard must be followed.

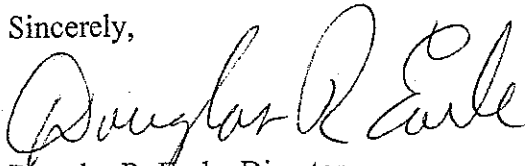
The general rule is that mere delivery alone to a construction site is not considered construction work. In *West Allis Lime & Cement Company*, 1971-1973 CCH OSHD ¶ 15,703 (No. 1324, 1973), *affirmed* 1974-1975 CCH OSHD ¶ 19,155 (No. 1324, 1974), the respondent, a cement company, was cited by OSHA for violating a construction safety standard. The administrative law judge summarized the facts as follows:

A ready-mix concrete truck with a revolving drum at the rear, owned by Respondent, drove onto the construction site about 150 feet, backed down a declining roadway approximately 500 feet down to and underneath the building structure, then continued to back under the building structure approximately 150 feet to a position at a material hoist. The driver got out, walked to the rear of the vehicle and adjusted a trough to rest above a material bucket. He then operated control levers at the rear of the truck, discharging the concrete into the bucket.

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In conclusion, the Department of Consumer and Industry Services declares that based on the information you provided in your letter of February 24, 2000, LIF is engaged in construction work within the meaning of the construction safety standards promulgated under the MIOSHA when it is in the process of refueling construction equipment at a construction site.

Sincerely,

A handwritten signature in cursive script that reads "Douglas R. Earle". The signature is written in dark ink and is positioned above the printed name and title.

Douglas R. Earle, Director
Bureau of Safety and Regulation

cc: Kal Smith
Diane Phelps
Richard Gartner