



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

standards did not apply because petitioner was not primarily engaged in construction operations.

On appeal, the Court of Appeals agreed with the holding of the Board and upheld the citations. In reaching this result, the Court described the relevant issue in the following manner:

The MIOSHA provides for the promulgation and enforcement of construction safety standards. MCL 408.1019; MSA 17.50(19); MCL 408.1013; MSA 17.50(13). Section 19 provides that the construction safety standards are designed to protect employees "engaged in construction operations." MCL 408.1004(4); MSA 17.50(4)(4) defines "construction operations" as follows:

'Construction operations' means the work activity designated in major groups 15, 16, and 17 of the standards industrial classification manual, United States bureau of the budget, 1972 edition.

The purpose of the standard industrial classification system is to facilitate the collection, tabulation, presentation, and analysis of data relating to establishments. Another purpose is to promote uniformity and comparability in the presentation of statistical data collected by various agencies of the United States government, state agencies, trade associations, and private research organizations. The SICM classifies businesses by industry. A business' "primary activity" determines its industry. Industries are categorized into groups, which form major groups, which are then classified into divisions. Major groups 15, 16, and 17 fall within the construction division.

Each industry classified under major groups, 15, 16, and 17 contains a list of specific activities. If a business is "primarily engaged" in one of the enumerated activities, it is classified under that industry. Accordingly, a business conducting an activity designated as construction would nonetheless not be classified under the construction division if the business' "primary activity" is not construction...

In this case, petitioner was engaged in construction activity at the time it received the citations. However, petitioner clearly is not "primarily engaged" in construction. Petitioner is primarily engaged in manufacturing. The issue for decision is whether the MIOSHA construction safety standards apply to all construction activities designated under major groups 15, 16, and 17 of the SICM or to activities of businesses so classified under those major groups. Simply put, did the Legislature intend that the standards be applied according to the activity performed by the employee or the industry under which the employer is

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.

When the bucket was filled, the driver stopped the flow of concrete, allowed the bucket to be raised by means of a hoist to various floors of the structure, and awaited its return. This operation was continued until the vehicle was empty. Thereafter, the vehicle backed up a short distance, the driver washed out the truck, assembled the trough, and drove forward approximately 150 feet leaving the construction site. The vehicle was on the site approximately 30 minutes. The vehicle did not have a reverse signal alarm nor was there an observer present to signal that it was safe for the vehicle to back up.

The Respondent contested the citation on the ground, *inter alia*, that it was not subject to the construction standards because it was not engaged in "construction work". The Administrative Law Judge rejected this claim on the grounds that because the cement driver performed a variety of functions in discharging his load, that these functions "were an integral part and cannot be separated from construction activity", *id.* at p 21,004. See, *National Engineering and Contracting Company v Occupational Safety and Health Review Commission*, 838 F2d 815, 818 (CA 6, 1987).

The Administrative Law Judge concluded:

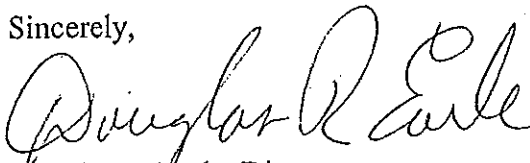
I am of the opinion that the activity engaged in is of sufficient magnitude to be considered construction work within the meaning of 29 CFR 1910.12(b). At a construction site, the men work in a noisy environment, attention directed to their work tasks, and often oblivious to vehicles on the site. The inherent danger arising from a vehicle backing a considerable distance without an alarm or signalmen is the very hazard the standard was intended to eliminate. Indeed, the danger would be magnified by excluding some vehicles from the standard requirement thereby lulling employees into a false sense of security. *Id.*

Here, in a similar vein, there are inherent risks involved arising from delivering and refueling construction equipment, while the equipment is running, at a construction site. Those hazards include, but are not limited to, fires, explosions, unexpected movement of the equipment by the equipment operator, and fuel spills. A purpose of the construction safety standards is to protect the employer's drivers who are exposed to construction equipment, left running, while handling flammable and/or combustible fuel. The involved activity does constitute construction work because the refueling process constitutes an integral and necessary part of the construction work being performed. In other words, without the use of the construction equipment being refueled, the construction work could not have been performed. Therefore, refueling is a necessary act in furtherance of the overall construction work activity.

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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 typed name.

Douglas R. Earle, Director  
Bureau of Safety and Regulation

cc: Kal Smith  
Diane Phelps  
Richard Gartner