

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
P.O. Box 21149
Juneau, Alaska 99802

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
vs.)
)
GLEN SMART d/b/a)
GENERAL ROOFING and)
RITE-WAY ROOFING, J.V.,)
)
Contestant.)

Docket No. 90-813
Inspection No. KU-9353-572-89

DECISION AND ORDER

This case arises from occupational safety and health citations issued by the State of Alaska, Department of Labor ("Department") to Glen Smart d/b/a General Roofing and Rite-Way Roofing, J.V. ("Contestant"), following an inspection on November 29, 1989, at a worksite where Contestant was performing roofing work in Anchorage, Alaska.

The Department's citation alleges two violations of the Alaska Construction Code. Citation 1 alleges Contestant violated Construction Code 05.240(d)(1) by failing to provide adequate fall protection for employees working on a roof. The violation was classified as "serious" and a penalty of \$200 was assessed. Citation 2 alleges Contestant violated a Construction Code 05.240(a)(6) by failing to keep a fire extinguisher at or near

its tar kettle during operation. This violation was classified as "other than serious" and no monetary penalty was assessed.

Contestant timely contested the Department's citations, bringing the matter within the Board's jurisdiction. A hearing was held before the full Board in Anchorage on September 18, 1990. The Department was represented by Assistant Attorney General Toby N. Steinberger. Contestant was represented by its job superintendent, Glen Smart. At the hearing, the parties presented witness testimony, documentary exhibits and oral argument. The record was deemed closed at the conclusion of the hearing. Following are the Board's findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. On November 29, 1989, Department compliance officer Dick Kukowski conducted an occupational safety and health inspection of a construction worksite at 5601 Minnesota Drive, Building C, in Anchorage. Accompanying Kukowski was Danny Sanchez, a compliance officer in training who had recently joined the Department but had worked in construction safety since 1978.

2. The inspection was a "programmed" inspection, meaning that it was randomly scheduled among active construction sites in the area.

3. The site of the inspection was a warehouse belonging to Chugach Electric Association. There were several

contractors working at the site including Contestant. Contestant's responsibility was to install roofing and insulation on the roof of the warehouse (see Exhibit 2).

4. According to Kukowski and Sanchez, the roof was approximately 20 feet high, 125-150 feet wide, and 200-300 feet long. The roof was flat and had a parapet about one foot high around the perimeter. Insulation materials were stacked at the edge of the roof near the ladder. There was no snow or ice build-up on the roof.

5. During the inspection, Sanchez climbed the ladder to the roof and observed Contestant's employees working on the roof about 30-40 feet from the edge. Compliance officer Kukowski remained on the ground.

6. Kukowski and Sanchez did not see any motion-stopping system, warning lines, or a safety observer on the roof to provide fall protection for employees. Contestant's superintendent Glen Smart, who was not present during the inspection, contended there was a safety "spotter" on the roof at all times. However, Contestant presented no evidence to support this claim, such as the identity of the spotter or the spotter's testimony at the hearing. Moreover, Contestant's foreman at the site, Lee Hendricks, admitted to Kukowski that there was no safety observer for the roofing work.

7. Contestant was also operating a tar kettle approximately 10-15 feet from the warehouse building. Kukowski

estimated its size at between 150-350 gallons. He did not see any fire extinguisher at or near the kettle.

8. Contestant's kettle man, Daryl Halsing, confirmed there was no fire extinguisher at the kettle and went to a truck approximately 200 feet away to get a fire extinguisher. He returned with an extinguisher that Kukowski estimated was rated at 8-10 pounds.

9. Glen Smart admitted there was no fire extinguisher at the kettle. He stated Contestant's normal practice was to have fire protection powder available which he felt was sufficient fire protection in the event of a kettle fire. However, neither inspector saw or was shown a bucket of fire powder near the kettle.

10. The Department presented the testimony of Paul Riley, a local roofing contractor who has been involved in roofing work since 1973. Riley testified it was normal practice to keep both fire protection powder and a fire extinguisher near the tar kettle. For most small kettle fires, powder and/or water are sufficient to put out the fire, but for more serious fires an extinguisher is necessary. Riley also testified the stacks of insulation at the edge of the roof were not an adequate or acceptable barrier to provide fall protection for employees.

11. Citation 1 was classified as "serious" because of the likelihood of serious injury or death in the event of a fall from the roof. The initial penalty of \$1,000 was reduced by the

maximum credit of 80 percent for Contestant's small company size, good faith in abating the violation, and lack of recent history of similar violations.

12. Citation 2 was classified as "other than serious" since there was an insufficient likelihood of serious injury or death in the event of a kettle fire. No monetary penalty was assessed.

CONCLUSIONS OF LAW

Citation 1

Construction Code 05.240(d)(1) provides:

General Provisions. During the performance of built-up roofing work on low pitched roofs with a ground-to-eave height greater than 16 feet (4.9 meters), employees engaged in such work shall be protected from falling from all unprotected sides and edges of the roof as follows:

(A) By the use of a motion-stopping-safety system (MSS system); or

(B) By the use of the warning line system erected and maintained as provided in paragraph (d)(3) of this section and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system or, where mechanical equipment is not being used or stored, by the use of a safety monitoring system; or

(C) By the use of a safety monitoring system on roofs 50 feet (15.25 meters) or less in width (see Appendix A), where mechanical equipment is not being used or stored. When a safety monitoring system is used, the person doing the monitoring must be

on the same roof as and within visual sighting distance of the employees, and must be close enough to verbally communicate with the employees.

It is undisputed that Contestant did not use either a motion-stopping safety system or a warning line system to protect employees from falling. An alternative option permitted by the Code is the use of a safety observer on roofs 50 feet or less in width. Even though neither compliance officer saw a safety observer on the roof and Contestant's foreman admitted there was no such observer, Contestant insisted there was an observer on the roof at all times (see Contestant's letter of contest dated January 5, 1990.) The evidence clearly does not support such a claim.^{1/}

However, we need not resolve this dispute of fact. The uncontroverted evidence indicates the roof in question was 125' 150 feet wide, well over the maximum allowable width where a safety observer could be used. Therefore, as a matter of law, it is irrelevant whether or not there was an observer on the roof since the Code does not permit an observer under these circumstances.

Contestant argues that the parapet around the perimeter of the roof, as well as the insulation materials stacked near the ladder, offered adequate and sufficient fall protection.

^{1/} In an effort to impeach Glen Smart's credibility, the Department sought to offer evidence of prior contractor licensing violations involving his contractor's license. However, such evidence was excluded as irrelevant and prejudicial. The Board's decision in this matter is in no way based on any contractor licensing violations or proceedings brought against Glen Smart.

Contestant further argues that during the inspection his employees were working near the center of the roof where there was no danger of falling. We are unpersuaded by these arguments. Even though at the time of the inspection Contestant's employees may have been working primarily at the center of the roof, the evidence indicates they were working on the entire roof area and had to walk to and from the edge of the roof to ascend and descend the ladder and use the insulation material stacked near the edge. In addition, we do not believe the foot-high parapet around the perimeter of the roof offered adequate fall protection. In most cases, the parapet would not prevent an employee who lost his balance from falling and in fact might actually pose a tripping hazard.

Since Contestant failed to provide adequate fall protection as specified in the Code and its employees were exposed to the hazard of falling from the roof, we conclude that Contestant has violated Construction Code 05.240(d)(1). Furthermore, since there is a substantial probability that a fall from a 20-foot-high roof could result in serious injury or death, we conclude the violation was properly classified as "serious." With respect to the proposed penalty of \$200, we note the Department has already given Contestant the maximum allowable reduction for size, good faith and history. We find no basis to reduce the penalty further.

Citation 2

Construction Code 05.240(a)(6) provides:

A dry chemical or other approved fire extinguisher rated at least 16:B.C. shall be kept near all kettles with a capacity from 150 to 350 gallons at all times the kettle burners are being operated. For smaller kettles an extinguisher with at least an 8:B.C. rating shall be provided and for kettles larger than 350 gallons, extinguishers shall have at least a 20:B.C. rating.

Contestant admits it had no fire extinguisher near the tar kettle. It contends, however, that it had a bucket of fire powder readily available and that such powder is normally sufficient to put out a kettle fire. Nevertheless, regardless of the effectiveness of fire powder in putting out kettle fires, the Code explicitly requires that fire extinguishers be kept nearby. The Code does not permit contractors to substitute their own judgment as to alternative fire protection materials. Moreover, the fire extinguisher kept on Contestant's truck did not meet the Code's rating requirements was too far away from the kettle to be readily available in the event of a serious kettle fire. Accordingly, we conclude that Contestant was in violation of Construction Code 05.240(a)(6).^{2/}

^{2/} We find no merit in Contestant's additional argument that the citations are invalid because the Department failed to obtain a search warrant for the inspection. There is no evidence that the Department was denied entry into the worksite or that objection was made at the time of the inspection. Where an employer fails to timely object to a safety inspection, it is deemed to have consented to the inspection and to have waived its right to object. See generally Rothstein, Occupational Safety and Health Law § 229 (3d ed. 1990).

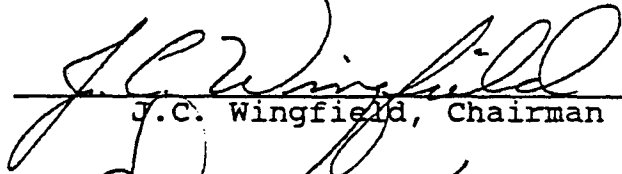
ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED as follows:

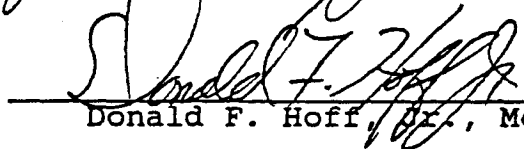
1. Citation 1 is affirmed as a "serious" violation.
2. Citation 2 is affirmed as an "other than serious" violation.
3. The proposed penalty of \$200 is affirmed.^{3/}

DATED this 21ST day of December, 1990, at Anchorage, Alaska.

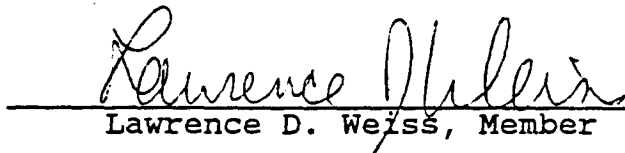
ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD



J.C. Wingfield, Chairman



Donald F. Hoff, Jr., Member



Lawrence D. Weiss, Member

^{3/} Board member Hoff concurs with the decision but would increase the penalty by \$100 as a result of Contestant's cavalier attitude toward employee safety.


**OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD
P.O. BOX 21149
JUNEAU, ALASKA 99802-1149**

NOTICE TO ALL PARTIES

A person affected by an Order of the OSH Review Board may obtain a review of the Order by filing a complaint challenging the Order in Superior Court. The affected person must file the complaint within 30 days from the date of the issuance of the Order by the OSH Review Board. After 30 days from the date of the issuance of the Order, the order becomes final and is not subject to review by any court. AS 18.60.097(a).

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Alaska Department of Labor vs. Glen Smart dba General Roofing and Riteway Roofing J.V., Docket No. 90-813, filed in the office of the OSH Review Board at Juneau, Alaska, this 21st day of December, 1990.



Mary Jean Smith
OSH Review Board

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