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

STATE OF ALASKA, DEPARTMENT OF LABOR, Complainant, vs. ELLIS LAW OFFICES, INC., Contestant.	)

Docket No. 90-815
Inspection No. HU-9505-283-89

DECISION AND ORDER

On December 4, 1989, the State of Alaska, Department of Labor ("Department"), conducted an occupational safety and health inspection of a worksite under the control of Ellis Law Offices, Inc. ("Contestant"). As a result of the inspection, the Department cited Contestant for several violations of Alaska occupational safety and health codes.

Citation 1a alleges Contestant violated Construction Code 05.090(a)(2)(A) by operating a table saw with no upper guard in place covering the exposed part of the saw blade. Citation 1b alleges that Contestant violated Construction Code 05.090(a)(2)(B) by operating a table saw without a guard enclosing the belt and drive assembly. Both alleged violations were grouped into a single "serious" citation and a monetary penalty of $200 was assessed.

Citation 2 alleges a violation of Construction Code 05.110(f)(2)(B) for failure to cover exposed live electrical wires in three panel boxes. The violation was classified as "serious" and a monetary penalty of $200 was assessed.

Citation 3, item 1, alleges a violation of Construction Code 05.110(e)(6)(F) for using an extension cord that was not properly grounded. Citation 3, item 2, alleges a violation of 8 AAC 61.950 for failure to display the required job safety and health poster at the worksite. Citation 3, item 3, alleges a violation of Construction Code 05.030(b)(2)(A)(ii) for failure to display a code of safe practices at the worksite. These three alleged violations were classified as "other than serious" and no monetary penalty was assessed.

Contestant timely challenged the Department's citation and filed an answer raising a variety of affirmative defenses. A hearing was held before the full Board in Ketchikan on September 20, 1990. The Department was represented by Assistant Attorney General Lisa M. Fitzpatrick. Contestant was represented by its owner, Peter R. Ellis. The parties presented evidence and made oral arguments to the Board. 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 December 4, 1989, Department compliance officer Cliff Hustead conducted an occupational safety inspection of a construction worksite under Contestant's control at 851 Forest Avenue, Ketchikan, Alaska.

2. The project under construction was the residence and law offices of Peter Ellis, Contestant's owner. Ellis had hired approximately six employees to work on the project, including a contractor from California who served as construction foreman. In addition to hiring his own employees, Contestant had also hired plumbing and electrical subcontractors.

3. The inspection was a "programmed" inspection, meaning that it was routinely scheduled for inspection from a list of active construction sites in the area. Compliance officer Hustead testified he normally obtained lists of building permits and construction sites from local building officials as well as from plumbing and electrical inspectors. This information would be forwarded to the main OSHA office in Anchorage, which would then schedule construction site inspections. At the time of his inspection of Contestant's worksite, the Anchorage office had directed Hustead to inspect all known construction sites in Ketchikan. Hustead was unaware of any prior electrical or plumbing inspections of the worksite and had not spoken to plumbing or electrical officials regarding possible safety violations.

4. During the inspection, Hustead saw Contestant's employees using a Craftsman table saw without a protective guard over the saw blade (see Exhibit 1). Hustead also noticed the belt and drive assembly on the table saw were not protected or guarded (see Exhibit 2). According to Hustead, Contestant's employees were "ripping" two-by-four pieces of wood while standing next to the table saw.

5. Peter Ellis admitted the table saw was in use without the required protective guards. He indicated the saw had been in the Ellis family for years and had been furnished by his father for use on the project. If the saw had any protective guards, his father had probably removed them a long time ago. Ellis asserted the table saw was being used primarily to cut lor pieces of wood, minimizing any safety hazard since employe would not have to stand right next to the saw blade or belt assembly. However, two of Contestant's employees interviewed by Hustead admitted they were using the saw to cut lumber crosswise and were standing next to the table saw while it was in operation.

6. The two violations in Citation 1 were grouped into a single citation due to their similarity. The citation was classified as "serious" because of the probability of serious injury in the event of an accident. The unadjusted monetary penalty of $1,000 was reduced by the maximum credit of 80 percent

for Contestant's small company size, good faith in promptly abating the hazard, and no history of prior violations.

7. Hustead also observed electrical panel boxes in the garage and second floor areas that were lacking inside or outside covers (see Exhibits 3 and 4).

8. Channel Electric was the electrical subcontractor responsible for working on the panel boxes. However, since neither Channel Electric nor any of its employees were present at the worksite during Hustead's inspection, Channel Electric was not cited for the panel box violation. Contestant was cited for the violation because several of its employees were working in areas near the panel boxes.

9. Citation 2 was classified as a "serious" violation because of the potential shock hazard to employees in the event of accidental contact with the uncovered panel boxes. The unadjusted monetary penalty of $1,000 was reduced by the maximum credit of 80 percent for Contestant's company size, good faith in abating the hazard, and no history of prior violations.

10. Hustead further observed an extension cord in use at the worksite that was missing a ground prong. Contestant admitted the extension cord was not grounded but insisted there was no shock hazard since the power tool used with that cord was double-insulated and self-grounding. Hustead responded that even when a self-grounding tool is used with an ungrounded extension cord, there is still a shock hazard because the absence of a

continuous ground means that the circuit breaker protection will not function properly. Moreover, the Code explicitly requires that the path to ground must be "permanent and continuous," requiring that extension cords as well as power tools be properly grounded. However, because Contestant's power tools appeared to be in good condition and the worksite was dry, the violation was classified as "other than serious" and no monetary penalty was assessed.

11. Hustead also cited Contestant for not displaying the Department's job safety and health poster at the worksite and for not adopting and posting a code of safe practices applying to its operations. Hustead did not see and was not shown either of the required posters. Because in his opinion there was only low probability of serious injury or death resulting from the failure to display either of the required posters, these violations were classified as "other than serious" and no monetary penalty was assessed.

12. In response to Contestant's argument that warnings should have been given instead of citations, Hustead explained that the Department's enforcement policy requires all observed violations to be cited, even if they are immediately abated. Compliance officers do not have the authority to merely issue warnings. However, the employer's prompt correction of a violation may be taken into account as a sign of good faith to reduce any monetary penalties assessed.

CONCLUSIONS OF LAW

Citation 1

Construction Code 05.090(a)(2)(A) provides:

> When power operated tools are designed to accommodate guards, they shall be equipped with such guards when in use.

Construction Code 05.090(a)(2)(B) provides:

> Belts, gears, shafts, pulleys, sprockets, spindles, drums, flywheels, chains, or other reciprocating, rotating or moving parts of equipment shall be guarded if such parts are exposed to contact by employees or otherwise create a hazard. Guarding shall meet the requirements as set forth in ANSI B15.1-1953 (R 1958), Safety Code for Mechanical Power-Transmission Apparatus.

It is undisputed the table saw in question had no protective guards covering either the saw blade or the belt and drive assembly. Contestant argues the saw was furnished without charge by a third-party owner and came without protective guards. Contestant further argues that employee exposure to the table saw was minimal since they were mostly cutting long pieces of wood and were not in close proximity to the saw's moving parts.

We are unpersuaded by these arguments. Under Alaska's occupational safety and health law, AS 18.60.010-.105, an employer must do everything necessary to protect the life, health and safety of its employees. See AS 18.60.075. It is irrelevant that a third party may have furnished the table saw at Contestant's worksite; once Contestant's employees began using the saw, Contestant had a legal obligation to make sure all

equipment was operated in compliance with applicable safety a health requirements. This is particularly true with respect to "plain view" hazards such as missing guards for saw blades or other moving parts.

Moreover, there is evidence that employees were using the saw in close proximity to the saw blade and other moving parts. We conclude that employees using the saw were well within the "zone of danger" created by the failure to provide protective guards. See generally Rothstein, Occupational Safety and Health Law § 103 (3d ed. 1990). Further, we believe the hazard created was properly classified as "serious" since there was a substantial likelihood of serious injury in the event of an accident involving the saw. For these reasons, we conclude th Department has made out a prima facie case of violation.

Citation 2

Construction Code 05.110(f)(2)(B) provides:

> Covers and canopies. All pull boxes, junction boxes, and fittings must be provided with covers. If metal covers are used, they must be grounded. In energized installations, each outlet box must have a cover, face plate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass must be provided with bushings designed for the purpose or must have smooth, well-rounded surfaces on which the cords may bear.

It is undisputed three panel boxes at the worksite contained live electrical parts that were not properly covered as

required by the Code. Contestant argues it should not be held responsible for a hazard caused or created by the electrical subcontractor. However, OSHA law makes clear that each employer at a multi-employer worksite has a separate and independent responsibility to protect its own employees from safety hazards even if caused or created by another contractor. See generally Rothstein, supra, at § 166.

In this case, Contestant was acting as its own general contractor and had control over the entire worksite. Its employees had access to the entire worksite. Therefore, Contestant had a responsibility to exercise reasonable diligence to locate and correct any safety hazards to which its employees might be exposed, even if such hazards were caused or created by a different contractor. Further, Contestant easily could have taken measures to protect its employees, such as cordoning off the area around the panel boxes or warning employees to stay out of those areas.

Because Contestant took no steps to protect its employees from live electrical parts in the open panel boxes, we conclude that this violation was properly cited. We further conclude the citation was properly classified as "serious" in view of the potential for a serious shock injury in the event of accidental contact with any of the exposed electrical parts. Accordingly, the Department has made out a prima facie case of violation.

Citation 3

Construction Code 05.110(e)(6)(F) provides:

> Grounding Path. The path to ground from circuits, equipment, and enclosures must be permanent and continuous.

The evidence establishes that one extension cord at the worksite was missing a ground prong and was therefore improperly grounded. Even though the power tool used with the extension cord may itself be double-insulated and self-grounding, the Code requires that the grounding path must be "continuous." There is no exception for self-grounding or double-insulated tools. Moreover, the compliance officer testified there is still a potential shock hazard even if a self-grounding tool is used with an improperly-grounded extension cord. Contestant offered no persuasive evidence to rebut this proposition. Accordingly, I conclude a prima facie case of violation has been established.

8 AAC 61.950 provides:

> Each employer shall post and keep posted a notice or notices, to be furnished by the Department, informing employees of the protections and obligations provided for in AS 18.60.010-AS 18.60.105. The notice or notices must be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to ensure that the notices are not altered, defaced, or covered by other material.

Construction Code 05.030(b)(2)(A)(ii) further provides:

> The employer shall adopt a code of safe practices and procedures which applies to his operation and which embraces the applicable

> provisions of these regulations. The employer shall post the code of safe practices in a conspicuous location at each job site office.

The evidence establishes that neither the required job safety and health poster nor a code of safe practices were displayed at the worksite. These requirements are more than mere bureaucratic regulations. They are designed to inform employees of all applicable safety rules, practices and procedures. The information required to be displayed is critical to the effectiveness of any employer job safety program.

Contestant argues it was the Department's duty to furnish the required safety posters and code of safe practices. This argument ignores the plain language of the cited provisions, which clearly place the primary burden of compliance on the employer. The Department's responsibility is to supply the required safety poster or a sample code of safe practices upon an employer's request. There is no evidence Contestant ever made such a request or attempted to comply with the Code. Accordingly, we conclude a prima facie case of violation has been established.

Affirmative Defenses

In answer to the Department's citations, Contestant raised 11 separate affirmative defenses. Once the Department has established a prima facie case of violation, the burden of proof as to any affirmative defenses shifts to the employer. See

Rothstein, supra, at § 109. We will consider each Contestant's affirmative defenses in turn.

> 1. The failure of the State of Alaska to have an inspector available for information and assistance at an earlier construction stage and during the six-month period prior to the inspection date was prejudicial and discriminatory with reference to the construction of a residence which commenced in May of 1989.

Under the Department's voluntary compliance program, an employer may request information, training and a voluntary inspection of its workplace without fear of any resulting enforcement proceedings. There is no evidence, however, that Contestant requested a voluntary compliance inspection prior to the enforcement inspection which is the subject of this proceeding. Without such a request, the Department has no legal obligation to provide information or assistance from its voluntary compliance program. Accordingly, we can find no prejudice or discrimination against Contestant as a result of this enforcement inspection.

> 2. The penalties imposed are excessive for a first-inspection, immediate correction violation.

This defense is without merit. On both Citations 1 and 2, Contestant was given the maximum penalty reduction of 80 percent for its small company size, good faith in immediately correcting the violations, and no history of prior violations.

> 3. The violations charged are based on discriminatory and selective enforcement of OSHA regulations as to this particular job site.

We find no basis to conclude that the inspection in this matter was prompted by discrimination or selective enforcement. Compliance officer Hustead explained the procedure for gathering information on local construction sites from local government officials and forwarding this information to the main OSHA office in Anchorage. The Anchorage office had directed Hustead to inspect all known active construction sites in Ketchikan. There is no evidence that Contestant was singled out for harassment or selective enforcement. See Rothstein, supra, at § 124; see also Beiro Construction Co. v. OSHRC, 746 F.2d 894 (D.C. Cir. 1984).

> 4. The penalties imposed are excessive and disproportionate in terms of other Ketchikan area employer citations contemporaneously issued over the 12 months preceding the 12-04-89 inspection date and the 12-26-89 citation date.

Contestant has offered no evidence of OSHA penalties assessed against other Ketchikan area employers during the time period in question. Contestant has thus failed to meet its burden of proof on this issue.

> 5. A warning violation only should have been sufficient due to the fact of immediate correction, and the penalty imposed for a warning violation is inappropriate.

The Alaska OSHA law contains no requirement that the Department must give warnings for first-time violations or violations that are immediately corrected. As explained by Hustead, the Department's policy is to cite all observed violations. However, if a violation is a first-time offense and/or is immediately

corrected, these factors may be taken into account in reduc[illegible] any monetary penalties. See 8 AAC 61.140.

> 6. The employer is not responsible for the assessment of a violation penalty as a result of an electrical subcontractor's errors or omissions.

See discussion of Citation 2, supra.

> 7. The power-operated table saw furnished on the site was so furnished gratuitously and without charge by the third-party owner who furnished the same without guards for blades or belts but in the belief that its availability would be helpful to construction endeavors.

See discussion on Citation 1, supra.

> 8. Owner-builder construction sites are exempt from the imposition of OSHA requirements applicable to general contractors.

The Alaska OSHA law contains no exemption for owner-builders long as they have at least one employee. The definition of "employer" covers any private or public sector employer with one or more employees. See AS 18.60.105(a)(5).

> 9. A grounding path is not required for self-grounding tools or uses.

See discussion of Citation 3, supra.

> 10. Safety posters, notices and practice codes were not supplied or previously furnished by the Department for use by employer, and if so furnished would have obviated the need for citation issuance.

See discussion of Citation 3, supra.

> 11. Within 30 days of the receipt of the notice of contest, which was filed in accordance with section 150 of this chapter,

the Department failed to file with the Board, or its designated agent, a complaint.

8 AAC 61.170(b) provides that the Department will file its complaint with the Board within 30 days of receipt of the employer's notice of contest. The record shows that the Department received Contestant's notice of contest on January 26, 1990, and subsequently filed its complaint on March 1, 1990, 34 days later. While we do not condone the Department's slight delay in complying with its own procedural guidelines, we conclude as a matter of law that the 30-day complaint filing requirement is directory rather than mandatory. See Copper River School District v. State, 702 P.2d 625, 627 (Alaska 1985). We further find the Department was in substantial compliance with this requirement and that no prejudice resulted to Contestant from the filing of the Department's complaint four days after the 30-day deadline. Accordingly, this defense must also be rejected.

Penalties

The Department allowed Contestant the maximum 80 percent reduction on the penalties assessed for Citation 1 and Citation 2. We believe these penalty assessments are reasonable and find no basis to reduce them further.

ORDER

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

1. The violations cited by the Department are affirmed as cited.

2. The Department's total penalty assessment of $400 is also affirmed.

DATED this 21st day of December, 1990.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

J.C. Wingfield, Chairman

Donald F. Hoff, Jr., Member

Lawrence D. Weiss, Member