

STATE OF ALASKA

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DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

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STATE OF ALASKA,)
 DEPARTMENT OF LABOR,)
)
 Complainant,)
)
 vs.)
)
 STATE OF ALASKA, DEPARTMENT)
 OF TRANSPORTATION AND PUBLIC)
 FACILITIES,)
)
 Contestant.)

Docket No. 90-836
Inspection No. Ca-7806-082-90

DECISION AND ORDER

On May 8, 1990, the State of Alaska, Department of Labor (DOL) conducted an occupational safety and health inspection of a maintenance shop in Anchorage operated by the State of Alaska, Department of Transportation and Public Facilities (DOTPF). As a result of the inspection, DOL cited DOTPF for several violations of Alaska occupational safety and health codes.

DOTPF timely contested DOL's citations. A hearing was held before the Board in Anchorage on April 24, 1991. DOL was represented by OSH chief of compliance Dennis Smythe. DOTPF was represented by equipment manager Keith Nelson.

At the outset of the hearing, the parties stipulated that only Citation No. 1 was in contest and that DOTPF wished to withdraw its contest of the other citations issued by DOL. Accordingly, both parties presented evidence and arguments only as to Citation No. 1.

Citation No. 1 is classified as "serious" and alleges two related code violations. Item 1a alleges that DOTPF violated General Safety Code 01.0704(n)(3)(F) by permitting the operator of an overhead crane to crawl under a suspended street sweeper vehicle to perform repair work. Item 1b alleges that DOTPF violated General Safety Code 01.0704(n)(3)(J) by allowing the overhead crane operator to leave his position at the controls while the sweeper vehicle was suspended. A monetary penalty of \$900 was assessed for Citation No. 1.

FINDINGS OF FACT

1. On May 8, 1990, DOL compliance officer Chuck Cain conducted an inspection of DOTPF's maintenance shop at 4801 Boniface Parkway in Anchorage.

2. Cain is primarily an occupational health inspector but has been cross-trained to perform safety inspections as well.

3. The maintenance shop inspection was prompted by a complaint regarding indoor air quality. DOL inspection guidelines, however, authorize compliance officers to note any other occupational hazards at the worksite, particularly serious violations, that may be in plain view during the inspection.

4. Cain was accompanied on his inspection by federal OSHA compliance officer Peter Brown, who was in Alaska as part of a federal team monitoring the Alaska OSHA program. Like Cain, Brown is primarily an industrial hygiene compliance officer but has been cross-trained to recognize safety hazards.

5. During the inspection, Brown observed a DOTPF employee in a nearby area of the shop who appeared to be working under a street sweeper vehicle. The front end of the sweeper had been hoisted about a foot off the floor by an overhead crane. Brown saw no one at the controls of the crane. He notified Cain, who went over to look at the situation. See Exhibit 1.

6. According to Brown and Cain, they went over to the sweeper and saw the employee working underneath the vehicle using a creeper cart to slide in and out. Brown testified that the employee's entire torso was underneath the vehicle and that he appeared to be doing repair work on the underside. Cain indicated that he saw at least half of the employee's body under the vehicle and that the engine was running. He also corroborated Brown's observation that there was no operator at the controls of the overhead crane. Neither inspector saw any jackstands or other supports under the sweeper.

7. Cain and Brown believed that the employee working under the sweeper was in a hazardous situation due to the potential for injury in the event of a crane cable failure or if someone were to operate the crane while the employee was still under the sweeper. They notified DOTPF supervisors of their concern and

recommended that jackstands or other supports be placed underneath the sweeper.

8. According to testimony from DOTPF personnel, the employee working on the street sweeper was in fact the overhead crane operator. He was re-installing sheet plates on the sweeper that had become bent during operation. To do this, the end of the vehicle had to be lifted sufficiently so that the plates could be straightened and fitted back into place. The crane operator would raise the end of the vehicle, slide the plates into position, then use the crane again to lower the vehicle onto the plates. DOTPF insisted that at no time during this procedure was the employee's body underneath the sweeper. Rather, all that was necessary was for him to lay alongside the vehicle to slide the plates into place. DOTPF supplied a number of photos taken after the inspection to illustrate the normal procedure for installing the plates. See Exhibits A-H.

9. DOTPF personnel also testified that there was little chance of injury from the sweeper because the sides of the vehicle are tapered and are not low enough to touch or injure an employee lying on the floor. Because of the location of the sweeper's brooms on the underside of the vehicle, there is no way for an employee's body to get underneath the sweeper unless the wheels are lifted at least five feet off the floor. To install the sweeper plates, it is only necessary for the employee to have both of his arms under the sweeper; it is not necessary to place his entire body underneath the vehicle. Moreover, since the crane

operator is normally the only person involved in the installation of the plates, there is little danger of the crane being operated inadvertently by someone else.

10. DOTPF's policy is to use jackstands or other supports whenever any employee is working under a suspended load. However, DOTPF contended that it is not practical to use jackstands to support the sweeper because it is necessary to jiggle the plates into position and then to lower the sweeper onto them. DOTPF insisted this was the only practical way of installing the plates; the only other way would involve turning the vehicle on its side. DOTPF personnel felt that using jackstands would be just as hazardous, if not more so, than its current procedure. DOL disagreed and contended that the use of jackstands was feasible, as evidenced by their use after the situation was brought to the attention of a supervisor.

11. DOL classified Citation No. 1 as a "serious" violation because it believed there was a substantial probability of serious physical injury or death in the event of an accident (i.e., the sweeper falling on an employee). Under DOL penalty calculation guidelines, the initial penalty for serious violations is \$1,000. This amount was reduced by 10 percent to \$900 because DOTPF had no recent history of OSHA violations. No reduction for employer size was given since DOTPF is a large employer with numerous employees. Further, no reduction was given for good faith because DOTPF had declined to acknowledge that the situation constituted a hazard.

CONCLUSIONS OF LAW

General Safety Code (GSC) 01.0704 sets forth standards for the safe operation of overhead cranes. GSC 01.0704(n)(3)(F) provides: "The employer shall require that the operator avoid carrying loads over people." While the obvious purpose of this requirement is to prevent overhead crane operators from moving suspended loads over other people, we agree with DOL that the standard is broad enough to apply to a crane operator who stops the crane with a suspended load and then performs work under the suspended load. In general, OSHA standards are interpreted as broadly as possible to best accomplish the OSH Act's purpose of protecting the safety and health of employees. Rothstein, Occupational Safety and Health Law, § 126 (3d ed. 1990).

The parties strongly disagree about whether the crane operator was in fact underneath the suspended load and whether he was exposed to any potential danger. Despite DOTPF's insistence that it was impossible for the operator's body to be entirely underneath the suspended vehicle, there is ample evidence from the testimony of both compliance officers that his body was at least partially, if not fully, underneath the vehicle while it was hoisted on the crane. In addition, DOTPF's own photos of the sheet plate installation procedure clearly demonstrate that the wheels and brushes of the sweeper are raised several feet into the air such that a person's body could easily fit underneath. See Exhibits E and F. The photographs also show that even if most of the operator's body is alongside the vehicle rather than under it,

at a minimum his arms are required to go underneath the vehicle to fit the plates in place. See Exhibits A, B and D. From listening to the testimony and examining DOTPF's photos, there is little doubt in our minds that the operator was close enough to the vehicle that he could have been injured had there been a crane cable failure or some other mishap causing the suspended end of the sweeper to drop to the floor.

In our view, the code provision is broad enough that if any part of his body could be injured in the event the suspended load were to fall, then the provision has been violated. We are not persuaded by DOTPF's suggestion that the operator would not have been injured even if the vehicle had fallen to the floor.

DOTPF also contends that the use of jackstands is impractical under the circumstances. We cannot agree. Impracticality or inconvenience does not excuse DOTPF from complying with the code provision. This defense has rarely been accepted by the federal OSHA review commission or the courts. See Rothstein, supra, at § 119-120. We believe that jackstands or other means of supporting the vehicle should have been used even if inconvenient or impractical. Employee safety must be the first priority.

DOTPF argues that using jackstands or other means of supporting the suspended vehicle would have created an even greater hazard. Under OSHA law, the employer bears the burden of proof as to this affirmative defense. See Rothstein, supra, at § 121. However, DOTPF failed to demonstrate that the hazards of compliance

would be greater than the hazards of noncompliance. Mere conclusory statements to that effect are insufficient. Further, DOTPF failed to show that there were no alternative means of protecting employees under the circumstances and that a variance application would have been inappropriate. See Noblecraft Industries, Inc. v. Secretary of Labor, 614 P.2d 199, 205 (9th Cir. 1980).

DOTPF acknowledged liability as to the violation alleged in Item 1b of Citation No. 1. There is no dispute that the crane operator left his position at the controls while the vehicle was suspended. Accordingly, we further conclude that the violation alleged in Item 1b has been proved by DOL.

Finally, DOTPF presented no specific objections or arguments concerning the proposed monetary penalty. We find that the penalty amount was properly calculated under DOL's compliance manual guidelines. We have no basis to make any further adjustments to the penalty.


ORDER

Based on the foregoing findings of fact and conclusions of law, the Board determines as follows:

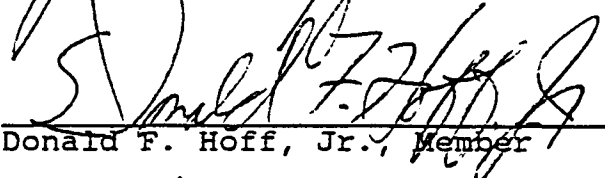
1. Citation No. 1 and the proposed penalty of \$900 are AFFIRMED.
2. The remaining citations and penalties issued by DOL in this matter are also AFFIRMED based on DOTPF's withdrawal of contest.

DATED this ____ day of _____, 1991.

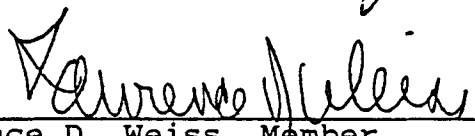
ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD



J.C. Wingfield, Chairman



Donald F. Hoff, Jr., Member



Lawrence D. Weiss, Member

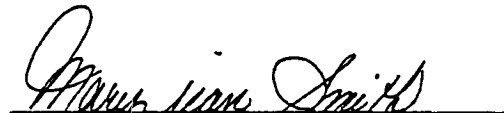
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NOTICE TO ALL PARTIES

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. State of Alaska-Department of Transportation and Public Facilities, Docket No. 90-836, filed in the office of the OSH Review Board at Juneau, Alaska, this 17th day of July, 1991.



Mary Jean Smith
OSH Review Board

OSH:12