

BEFORE THE ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

STATE OF ALASKA, DEPARTMENT OF LABOR )  
AND WORKFORCE DEVELOPMENT, DIVISION )  
OF LABOR STANDARDS & SAFETY, )  
OCCUPATIONAL SAFETY & HEALTH SECTION, )  
Complainant, )

v. )

IHS CONSTRUCTION, INC., )  
Contestant. )

) Docket No. 09-2243  
) Inspection No. 310853940  
) OAH No. 09-0340-OSH



**DECISION and ORDER**

**I. Introduction**

This matter arises from several citations issued by the Alaska Department of Labor and Workforce Development, Division of Labor Standards & Safety, Occupational Safety and Health Section (Division) to IHS Construction, Inc. (IHS) on April 2, 2009. IHS contested only the citation alleging an improper modification to a forklift. The specific allegation is that IHS violated 29 CFR §1926.602(c)(1)(ii). This standard states, in part:

No modifications or additions which affect the capacity or safe operation of the equipment shall be made without the manufacturer's written approval.

The Division classified this as a repeat violation<sup>1</sup> and assessed a monetary penalty of \$2,000.

A hearing was held before the Alaska Occupational Safety and Health Review Board on November 17, 2009. The Division was represented by Assistant Attorney General Erin A. Pohland. IHS was represented by its President, Charles Morris. Both parties had an opportunity to present witness testimony, documentary evidence, and oral argument. The Division called as witnesses Chief Enforcement Officer Steven Standley and Safety Compliance Officer Dana Chapman. Charles Morris testified on behalf of IHS.

After considering the evidence and arguments of the parties, the Board concludes that IHS is liable for violation of an applicable safety standard, but that no penalty should be

<sup>1</sup> Ex. 1, p. 13. See AS 18.60.095(a).

imposed. This decision sets forth our findings of fact and conclusions of law in the matter, and we issue an order disposing of the case.

## II. Findings of Fact

On April 2, 2009, Safety Compliance Officer Dana Chapman observed a forklift<sup>2</sup> being operated by IHS employees at 6400 South Airpark Road, in Anchorage, Alaska. The forklift in question was being used to hold a work platform on which employees were working approximately 25 feet above the ground. Officer Chapman returned to the work site on a subsequent date to take photographs of the forklift. At that time she noticed that holes had been cut in the tines of the forklift. Officer Chapman issued a citation for a violation of 29 CFR §1926.602(c)(1)(ii).

Cascade Corporation, a major domestic manufacturer of forklift tines, will, at the request of a customer, provide a forklift with drilled holes in the tines.<sup>3</sup> Cascade's specifications call for a hole of up to 25% of the blade width, with the hole center located from 75 to 300 mm from the tip.<sup>4</sup> Use of a forklift with properly located and sized holes, cut by means of a drill, is not inherently unsafe in normal forklift lifting operations, in which a load is seated against the back of the fork, where it places relatively little stress at the tip end.<sup>5</sup> However, use of such holes as a means of placing a hook or other attachment for lifting a load requires establishing a new load capacity and load center.<sup>6</sup>

The forklift that IHS was using was leased by IHS from another company. The holes in the tines were there when the forklift was acquired by IHS. The holes were not created by the manufacturer or by an IHS employee. One of the holes exceeds 25% of the tine width. Whether the holes had been centered and located in accordance with the manufacturer's specifications is unknown. Moreover, the holes had not been drilled, or fabricated by the manufacturer. Rather, they had been cut by using a cutting torch. Using a cutting torch subjects the surrounding metal to very high temperatures which can affect the integrity of the tine. The metal can lose strength or become brittle which in turn increases the risk of bending or breaking. A forklift with a bent

<sup>2</sup> A forklift is one type of Powered Industrial Truck, generally subject to the safety standard at 29 C.F.R. §1910.178. When used in construction, such trucks are subject to the safety standard at 29 C.F.R. §1926.602(c).

<sup>3</sup> [Opp. to] Motion for Judgment on the Pleadings, Cascade Corporation "Fork Facts" [available online at [www.cascorp.com/americas/en/forks](http://www.cascorp.com/americas/en/forks) (Fork Facts Book, page 27)].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; Ex. 1, p. 86 (Letter, J. Riggs, P.E., to C. Morris; May 16, 2006).

<sup>6</sup> *Id.*

tine can be hazardous when used. A forklift tine that is brittle or not at full strength creates a potential hazard.

Approximately three years earlier, IHS had been issued a citation by the Division for using a different forklift that had holes in its fork tines.<sup>7</sup> After receiving that earlier citation, IHS obtained a structural engineer's report indicating the forklift was safe to operate in normal use even with the hole in the tine.<sup>8</sup> IHS did not contest the citation, but entered into a settlement agreement. The citation was not dismissed, but no sanction was imposed on IHS and a period of time was provided for abatement. IHS submitted the engineer's report to the Division, and the case was closed with no further enforcement action.<sup>9</sup> Because no sanction had been imposed after the time for abatement had terminated and the engineering report had been submitted, IHS believed that the Division had accepted the engineering report as an abatement, and it continued using forklifts with holes cut in the fork tines.

### III. Discussion

#### A. Violation of Standard

The Division has the burden of proof in contested cases.<sup>10</sup> To show a violation of 29 C.F.R. §1926.602(c)(1)(ii), the division must show that the fork tine was modified, that the modification was not approved by the manufacturer, and that the modification affected the capacity or safe operation of the forklift.

##### 1. *The Forklift Was Modified Without Approval*

IHS argues that the engineer's report that it submitted to the Division in 2006 is equivalent to written approval by the manufacturer of the forks at issue in this case, asserting that it could not contact the manufacturer of the forklift. Where the manufacturer of equipment is no longer available to authorize modification, written approval by a qualified engineer may be sufficient.<sup>11</sup> Indeed, even a negative response from the manufacturer could result in a finding of a *de minimus* violation if the employer has obtained prior approval from a qualified engineer addressing the issues identified by the manufacturer.<sup>12</sup> However, the engineer's report that was submitted by IHS addresses a different model of forklift and does not address the use of a torch

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<sup>7</sup> Ex. 1, p. 92.

<sup>8</sup> Ex. 1, p. 86.

<sup>9</sup> See Ex. 1, pp. 60 (March 1 citation: violation must be abated by April 17); 58 (March 17 informal settlement & disposition of citations: abatement date extended to May 15); 92 (case closed April 20).

<sup>10</sup> 8 AAC 61.205(i).

<sup>11</sup> See OSHA Interpretive Letter, April 11, 1997 (accessed at [www.osha.gov/dcp/index.html](http://www.osha.gov/dcp/index.html), April 27, 2010).

<sup>12</sup> See OSHA Interpretive Letters, July 3, 2002 & October 22, 1999 (accessed at [www.osha.gov/dcp/index.html](http://www.osha.gov/dcp/index.html), April 27, 2010).

rather than a drill as the means of cutting the hole. The engineer's report is not equivalent to written approval from the manufacturer for the holes for which IHS was cited in this case.

## 2. *The Modification Affected Capacity or Safe Operation*

IHS argues that the holes in the fork tines did not affect the capacity or safe operation of the equipment. Mr. Morris testified that some modifications occur frequently, such as the addition of lights or a heating system to keep the hydraulic oil warm in cold weather. These appear to be permitted modifications because they do not affect safety. Moreover, the engineering report submitted by IHS is evidence that holes in the tines of a forklift do not necessarily affect the capacity or safe operation of the forklift.

But the engineer's report says nothing about the manner in which holes were cut into the tines, and the Division offered persuasive testimony that holes cut in the tines of a forklift by means of a torch, rather than by a drill, affect the capacity or safe operation of a forklift. Both Mr. Standley and Ms. Chapman testified, based on professional training, review of the Division's technical research library, experience in the field, and expertise in metallurgy,<sup>13</sup> that cutting a hole in a fork tine with a cutting torch affects the strength of the metal, and thus the capacity or safe operation of the forklift.

Mr. Morris argued that the holes would not in practice affect the safe operation of the forklift, because IHS only uses the forklift to raise a fabricated basket that holds workers. The basket is loaded on the fork tines behind the hole so that the weight is placed on the section of the tine not affected by heating. But 29 C.F.R. §1926.602(c)(1)(ii) precludes any modification that affects capacity or safe operation, regardless of the manner in which the equipment is generally used. Even if IHS anticipates that the forklift will only be used to lift the personnel basket, it is possible that on some occasion an IHS employee might use the lift for other purposes, such that the capacity of the lower end of the tines would be a significant issue. Moreover, because of the holes the forklift would be more easily adapted for use of a front end attachment or to facilitate "free rigging" that would affect the forklift's capacity or safe operation even if the holes had been cut with a drill.<sup>14</sup> In addition, because the holes had been cut with a

<sup>13</sup> Ms. Chapman is a former ironworker, and she provided highly persuasive testimony on this subject. Mr. Standley's testimony was also persuasive.

<sup>14</sup> See OSHA Interpretive Letter, July 3, 2002 ("A front-end attachment would generally be an 'addition within the meaning of §1910.178(a)(4)... Before a non-factory-installed attachment may be used...the use most comply both with (a)(4), by obtaining the truck manufacturer's written approval, and with (a)(5), by having the truck appropriately marked.") (accessed at [www.osha.gov/dcp/index.html](http://www.osha.gov/dcp/index.html), April 27, 2010); OSHA Interpretive Letter, October 22, 1999 ("Free rigging is the direct attachment to or placement of rigging equipment...onto the tines of a powered industrial truck for a below-the-tines lift....Although free rigging is a common practice, it could affect the

torch, the risk that the fork tips would bend or shear was increased. For these reasons, we conclude that the Division has shown, by a preponderance of the evidence, that the modification affected the capacity or safe operation of the forklift, and was in violation of 29 C.F.R. §1926.602(c)(1)(ii).

3. *IHS's Use of the Forklift Was In Violation of an Applicable Standard*

The holes in the forklift tines were there when IHS acquired the forklift, and none of its employees actually performed the modification at issue. IHS did not itself, therefore, violate 29 C.F.R. §1926.602(c)(1)(ii). Nonetheless, the use of equipment that has been modified in violation of 29 C.F.R. §1926.602(c)(1)(ii) is prohibited by the general safety standard, at 29 C.F.R. § 1926.20(b)(3),<sup>15</sup> and a renter of modified equipment is not relieved of liability for its use simply because it receives the equipment in an unsafe condition.<sup>16</sup> The citation's reference to §1926.602(c)(1)(ii) provided IHS with clear notice of the specific non-compliant condition affecting the equipment that was at issue. IHS contested the citation on the grounds that the modification had been approved or was not unsafe; it did not assert that it was absolved of liability because its employees had not cut the holes. Because there is no dispute that IHS actually used the equipment in its modified state, and we have found that the modification was in violation of 29 C.F.R. §1926.602(c)(1)(ii), IHS's use of the forklift was in violation of 29 C.F.R. §1926.20(b)(3). In the absence of any prejudice to IHS, the citation may be amended, *sua sponte*, to reference the general standard in addition to the specific.<sup>17</sup>

B. Penalty

An employer who receives a citation for a repeat violation of AS 18.60.010 – 18.60.105 or of a standard or regulation adopted under AS 18.60.010 – 18.60.105 may be assessed a civil

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capacity and safe operation of a power industrial truck.”) (accessed at [www.osha.gov/dcp/index.html](http://www.osha.gov/dcp/index.html), April 27, 2010).

<sup>15</sup> “The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such machine, tool, material, or equipment shall either be identified as unsafe by tagging or locking the controls to render them inoperable or shall be physically removed from its place of operation.” *Id.*

<sup>16</sup> See OSHA Interpretive Letter, March 27, 2009 (accessed at [www.osha.gov/dcp/index.html](http://www.osha.gov/dcp/index.html), April 27, 2010).

<sup>17</sup> We have authority to modify a citation. AS 18.60.095(c). Amendment to a citation is governed by Civil Rule 15, pursuant to 18 AAC 61.170(a). We have previously permitted the post-hearing amendment of a citation on motion at the hearing by the Division. See In Re Cook Inlet Aquaculture Association, OSHRB Docket No. 89-781 at 14-16 (October 3, 1990). The federal rule is that “[a]mendments to a complaint, including *sua sponte* amendments, are routinely permissible where the amendment merely adds an alternative legal theory but does not alter the essential factual allegations contained in the complaint.” Secretary of Labor v. Southern Pan Services Company, OSHRC Docket No. 98-0635 at 7 (1998).

penalty of up to \$70,000 for each violation.<sup>18</sup> When the Division assesses a penalty, it must give due consideration to the employer's size, the gravity of the violation, the good faith of the employer, and the history of previous violations.<sup>19</sup> The Division relies on the Field Inspection Reference Manual to calculate penalties.<sup>20</sup> The Division proposed a penalty of \$2,000 for this violation, which the Division classified as a repeat violation. The Board is not bound by the Division's assessment when the Board is evaluating the classification of a violation or the assessment of a penalty.<sup>21</sup>

The Board has considered the following in its review of the proposed \$2,000 penalty:

1. The employer's size. IHS is not a large company.<sup>22</sup>
2. The gravity of the violation. The testimony and the evidence indicate that the risk of harm resulting from the violation was low or nonexistent as long as the equipment was operated in accordance with proper operating standards.<sup>23</sup>

3. The good faith of the employer. IHS exhibited good faith by cooperating with the inspector and promptly admitting the underlying facts relevant to the violation. The Board also notes that the Division's witnesses testified that it is common in Alaska for employers to use forklifts modified in this manner. That the modification affected the fork tine's capacity and safety is not something that would be obvious to the employer.

4. The history of previous violations. This was a repeat violation. However, in connection with the prior violation IHS had obtained an engineer's report indicating that it is safe to use a forklift with holes in its tines in normal operating conditions, and the Division did not pursue any enforcement action after receiving that report. IHS relied upon the Division's inaction as tantamount to acceptance of the engineer's report.<sup>24</sup>

After considering the foregoing factors, and in particular in view of IHS's reliance on the Division's prior receipt of the engineer's report without further enforcement action, the Board concludes that an adjustment of the penalty amount is justified. The Board exercises its

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<sup>18</sup> AS 18.60.095(a).

<sup>19</sup> AS 18.60.095(h).

<sup>20</sup> 8 AAC 61.140(c).

<sup>21</sup> 8 AAC 61.140(h).

<sup>22</sup> The Division's calculation of penalties provided a 60% reduction in the penalty amount, based on the size of the employer.

<sup>23</sup> The primary concern expressed by the Division's witnesses was that because the holes had been cut with a torch, there is an increased risk that the tines would bend or shear at the tip. As pr

<sup>24</sup> See notes 11, 12, *supra*.

discretion and reduces the total penalty amount for the single violation at issue in this case from \$2,000 to zero dollars.

#### IV. Conclusions of Law

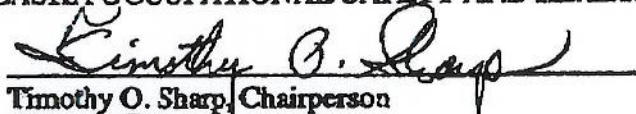
IHS's use of a forklift that had been modified in violation of 29 CFR §602(c)(1)(ii) was a violation of 29 CFR §1926.20(b)(3), and IHS is subject to imposition of a penalty pursuant to AS 18.60.095.

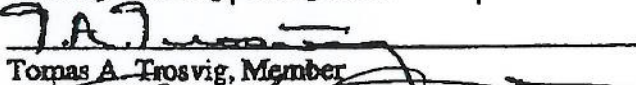
#### V. Order

1. The Citation 2, Item 2 is **AMENDED**, *sua sponte*, to reference 29 C.F.R. §1926.20(b)(3) in addition to 29 C.F.R. §1926.602(c)(1)(ii).
2. As amended, Citation 2, Item 2 is **AFFIRMED**.
3. No penalty is imposed for the violation set forth in Citation 2, Item 2.

DATED: \_\_\_\_\_

By: ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

  
\_\_\_\_\_  
Timothy O. Sharp, Chairperson

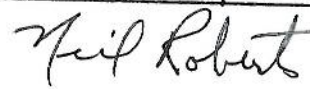
  
\_\_\_\_\_  
Tomas A. Trosvig, Member

  
\_\_\_\_\_  
James Montgomery, Member

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

\_\_\_\_\_  
Sharon Busch, OSH Board  
\_\_\_\_\_  
Charles Morris, IHS Construction

\_\_\_\_\_  
Erin Portland, AAG

Signature  Date 8/27/10

#### RIGHT TO APPEAL [AS 18.60.097]

A person affected by an order of the Occupational Safety and Health Review Board may obtain judicial review of the order by filing a notice of appeal in the Superior Court as provided in the Alaska Rules of Appellate Procedure. The notice of appeal must be filed in the Superior Court within 30 days from the date that the decision appealed from is mailed or otherwise distributed to the appellant. If a notice of appeal is not timely filed, the order becomes final and is not subject to review by any court.