

SA dec. file
RECEIVED
Department of Law

DEC 5 1988

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD, Attorney General

P. O. BOX 1149, JUNEAU, ALASKA 99802 Anchorage Branch Anchorage, Alaska

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
Complainant,)
vs.)
LOCKHEED SUPPORT SYSTEMS,)
INC.,)
Contestant.)

Docket No. 87-714
Inspection No. RU-2218-470-87

DECISION AND ORDER

Introduction

This matter came before the board for a hearing on May 26, 1988 in Anchorage, Alaska. The State of Alaska, Department of Labor, Division of Labor Standards and Safety, Occupational Safety and Health Section (hereafter "the Department") was represented by Assistant Attorney General Jan Hart DeYoung. Lockheed Support Services, Inc., ("the contestant") was represented by Steven Kreger. The record was deemed closed at the conclusion of the hearing.

At issue before the Board are two "SERIOUS" citations issued by Compliance Officer Mike Russell during the course of an inspection which he performed on July 20, 1987 at a worksite which was under the control of the contestant at Elmendorf Air Force Base. Citation #1 recites a violation of Alaska General Safety Code 01.1102 and charges that the contestant failed to

furnish facilities for safe access to a C-Ban antenna which was under repair. Citation #2 recites a violation of Alaska General Safety Code 01.1103(c)(1) and alleges that the catwalk on the C-Ban antenna was not equipped with a standard guardrail or its equivalent. The department proposed a penalty of \$640.00 for Citation #1 and \$210.00 for Citation #2.

Contestant's primary defense is that it did not have authority or control over the worksite and, therefore, should not be cited for non-compliance. The contestant also challenges the jurisdiction of the State of Alaska over the worksite in question.

Summary of Evidence and Testimony

On July 19, 1987, Kenneth Miller, an employee of the contestant, fell to his death while performing maintenance and repair for the contestant on a C-Ban antenna tower at Elmendorf Air Force Base, Alaska. In response to the fatality call, Compliance Officer Russell was dispatched to Elmendorf Air Force Base to perform a fatality inspection. Russell discovered that the contestant had nineteen (19) employees on the jobsite in question. On the day of his inspection, (which was the date following the fatal accident) Russell observed three (3) employees working on the C-Ban antenna tower. Russell testified that he "felt" that the fall protection given to those employees was not adequate to prevent serious injury or death from occurring in the event of a slip and fall from the work stations on the tower. Furthermore, Russell testified that th

guardrails on the catwalk were very loose and would not have held any person who fell into them.

Russell was not permitted to take photographs at the accident scene because of airforce security regulations. However, airforce photographers did take photographs and those photographs were provided to Russell and subsequently introduced as Exhibits 1 through 21 at the hearing.

Russell testified that in the course of his investigation he learned that the deceased employee was not tied off at the time he fell to his death. According to witness statements provided to Russell, the deceased apparently felt that the equipment which had been provided to him by the contestant did not allow him enough freedom of movement to perform his job in a satisfactory manner. During his testimony, Russell offered his opinion that several methods of fall protection would have been feasible at this jobsite, most specifically, a rope grab. However, at the time of his inspection, the only protection which the contestant had provided to its employees were safety belts and lanyards -- devices which were not acceptable under the code according to Russell. Russell stated that while the lanyards might possibly have been deemed "adequate fall protection" had they always been used and enforced on the jobsite, he felt that that system was not widely employed by employees because its existing double belt mechanism was too slow, too cumbersome and too tedious to work with.

Russell also testified that while employees were constantly on and off the catwalk, he did not observe any satisfactory guardrail or equivalent on the catwalk. The rope tie off which was present was not taut and would not have broken or prevented a fall.

(In attempting at the hearing to dramatize the situation which existed, Russell admitted that he himself scaled the tower without adequately protecting himself a fall. As discussed below, we are greatly troubled by this fact.)

The Department also presented the testimony of Compliance Supervisor Dennis Smythe who confirmed that he received a telephone call from Don Peterson, the wing safety officer at Elmendorf, advising that a fatality had occurred. In response, he dispatched Russell to the site.

Bill Massie, the site supervisor at Elmendorf Air Force Base at the time of the inspection, testified that the Air Force had determined prior to the time of the accident, that the existing system being utilized by the contestant should be replaced. He stated that contestant's employees had been given belts and had been told to always tie off while working on the antenna. They were forbidden to tie off on cables. Massie stated that all employees had been instructed in proper climbing technique and had been issued climbing belts, hardhats, lanyards, and safety toed shoes which they were required to use on the site. A policy of reprimand followed by termination was applied to discipline any employees who ignored safety instructions. But

he admitted that no one was ever terminated at the Elmendorf site, even though he was "vaguely aware" that some employees were not complying with standard operating procedures. He stated that he has prepared several letters of reprimand.

Under cross-examination by the Board, Massie acknowledged that lead men and company safety inspectors have authority to either red tag violations or to discipline employees on the spot.

Daniel Mesche was a general mechanic for the contestant at the time of the inspection. (He had been promoted to senior technician by the time of the hearing.) Mesche testified that he was required to climb on the antenna, was provided training and mandatory equipment, and was advised by the contestant to "either follow the rules or lose your job." He affirmed Massie's testimony regarding general disciplinary procedures. According to Mesche, the fall protection system which was in place was cumbersome, but was workable with practice. He stated that he never became frustrated to the point of not using the equipment nor did he ever observe any employees not tying off.

In its closing statement, the Department argued that the contestant did have control over its employees, that the Air Force did not exercise exclusive control over the jobsite and exercise of control by contestant would not have interfered with the goals and mission of the Air Force. Further, the Department contended that the equipment was not adequate because it was simply too cumbersome to be practical. Concerning the catwalk,

the Department argued that the rope guardrails were not adequate and that the lanyards which were provided to the employees were not a sufficient "back up system."

In its own closing argument, the contestant asserted that the Department does not have jurisdiction over this jobsite and that the citations which the Department issued exceeded the scope of any authority granted to it by the Air Force.

Findings of Fact and Conclusions of Law

There is no doubt in our minds that the deceased employee did disregard specific safety instructions which were given to him and all employees by the contestant. However, we are equally convinced, notwithstanding what Mesche testified to, that many of the employees on the job either circumvented or totally disregarded the safety program which was in place. Furthermore, we find ample evidence in the testimony presented to us that the deceased employee (who was already known to be a type of "rebel") was not adequately supervised or observed by the contestant. We seriously doubt that this tragic incident was an isolated incident of noncompliance. Furthermore, even if it was, we find that the system which was in place was inadequate in light of the regulatory mandate set forth in GSC 01.1102. Under the terms of that provision, an employer is required to insure that any persons working on tower structures of the type at issue here, must be properly protected against falling. We believe -- and we find -- that the lanyard and belt system employed here was not adequate to effectively protect the employees. For a single

example, it was clearly established at the hearing that the employees were issued the wrong size belt hooks, even though it was obvious that the whole system was set up to fit a different size belt hook.

Concerning Citation #2, we believe that resolution of the dispute hinges upon the question of degree. Certainly a rope guardrail may be adequate in certain situations and not in others. However, given the obvious danger of serious bodily harm or death which existed at the jobsite in question and given further our customary deference to the experience and judgment of the Department's compliance officers on the scene, we are unconvinced based on the record presented that the rope guard rails which were in place were sufficient to break or completely arrest a fall from the catwalk. Accordingly, we conclude that Citation #2 should be affirmed.

We deny the contestant's motion to dismiss based on lack of jurisdiction. We have reviewed the basis for the exercise of jurisdiction by state agencies over private contractors operating on federal lands. We are convinced that the State of Alaska possesses concurrent jurisdiction with the federal government in such circumstances except where state law interferes with federal government activities. Furthermore, the United States Air Force has specifically and expressly recognized that Alaska Occupational Safety and Health laws apply to its operations because Alaska's state plan has been approved by the U.S. Occupational Safety and Health Administration. Since the

Department's actions in enforcing guardrail and fall protection standards do not impinge upon or frustrate the goals and missions of the Air Force, we conclude that the State properly exercised authority over the violations in question.

We wish to add a final comment concerning the behavior of the Department's compliance officer during the course of his inspection. He was dispatched to investigate a fatal accident. Upon arriving at the scene, he learned almost immediately that the fatality occurred because an employee failed to properly tie off on the tower. Yet, incredibly, armed with knowledge of that precise fact, the inspector nevertheless disregarded proper safety practice and himself climbed the tower without first tying off. We are greatly concerned that such a cavalier attitude by the compliance officer not only sets a poor example and undercuts the credibility of the Department, but seemingly makes a mockery of the very system of rules and regulations which the compliance officers are charged with enforcing. We admonish the compliance officer and the Department to insure that such haphazard behavior does not occur again.

ORDER

1. Citation #1 is affirmed as issued.
2. Citation #2 is affirmed as issued.
3. Penalty of \$640.00 for Citation #1 is affirmed.
4. Penalty of \$210.00 for Citation #2 is affirmed.

DATED at Juneau, Alaska this 21ST day of November, 1988

OSHA REVIEW BOARD

By: Guy Stringham
Guy Stringham, Chairman

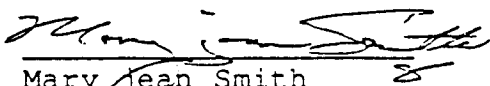
By: Donald F. Hoff, Jr.
Don Hoff, Jr., Member

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. Lockheed Support Services, Inc., Docket No. 87-714, filed in the office of the OSH Review Board at Juneau, Alaska, this 21st day of November, 1988.


Mary Jean Smith
OSH Review Board

MJS:kms
1161

Alaska Department of Labor

Division of Labor Standards and Safety
Occupational Safety and Health Section

P.O. Box 7022
Anchorage, AK 99503

EXHIBIT A

3. Issuance Date 08/20/87	4. Inspection Number 103668257
5. Reporting ID 1050210	6. CO ID R2218
7. Optional Report No. 470-87	8. Page No. 1 of 1

Citation and Notification of Penalty

The violation(s) described in this Citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below.

1. Type of Violation(s)	2. Citation Number
Serious	01

10. Inspection Date(s):

7/20/87 - 7/27/87

11. Inspection Site:

C-Band Antenna site
Elmendorf AFB, AK 99506

9. To:

Lockheed Support Services, Inc.
and its successors
P.O. Box 818
Elmendorf AFB, AK 99506

Penalties Are Due Within 15 Working Days of Receipt of This Notification Unless Contested

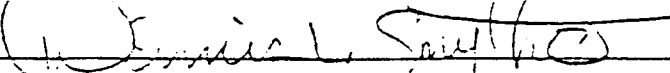
(See enclosed Booklet)

This Section May Be Detached Before Posting

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and State holidays) whichever is longer.

This Citation describes violations of the AS 18-60. The penalty(ies) listed below are based on these violations. You must correct the violations referred to in this Citation by the date listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and State holidays) from your receipt of this Citation you mail a notice of contest to the Alaska Department of Labor Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

12. Item Number	13. Standard, Regulation or Section of the Act Violated	14. Description	15. Date by Which Violation Must Be Abated	16. Penalty
	202: Any person employing or directing another to perform work of any kind in the erection, demolition, repairing, altering, painting, cleaning or paint of a building or structure shall furnish and erect, or cause to be furnished and erected for the performance of such labor, such scaffolding, hoists, stays, ladders, slings, chokers, blocks, pulleys, braces, irons, ropes and other mechanical contrivances necessary and which shall be so constructed, placed and erected as to give proper protection to all persons so employed or directed.		Immediately Upon Receipt	640.00
<p>For example: The employer did not furnish facilities for safe access to the C-band antenna under repair, as evidenced by the following: a. Fixed ladders did not afford access to all areas where employees were required to work, b. Portable ladders, scaffolds, or powered platforms were not provided. c. The structural upright being used for employee access to the work area did not meet specifications for ladders or stairs. d. Safety belts and lanyards were not compatible with the fixed ladders climbing device.</p>				

17. Chief 

18. \$640.00

NOTICE TO EMPLOYEES — The law gives an employee or representative the opportunity to object to any abatement rate set for a violation if he believes the date to be unreasonable. The contest must be mailed to the Alaska Department of Labor Office at the address shown above within 15 working days (excluding weekends and State holidays) of the receipt by the employer of this citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL — The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Law. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the Alaska Department of Labor Office at the address shown above.

Total Penalty for This Citation
Make Check or Money Order Payable to: "DOL-LS&S"
Indicate Inspection Number on Remittance

EMPLOYER RESPONSIBILITIES AND COURSES OF ACTION — The enclosed booklet outlines employer responsibilities and courses of action and should be read in conjunction with this notification.

Alaska Department of Labor
 Division of Labor Standards and Safety
 Occupational Safety and Health Section

EXHIBIT A

P.O. Box 7022
 Anchorage, AK 99503

3. Issuance Date 08/20/87	4. Inspection Number 103668257
5. Reporting ID 1050210	6. CO ID R2218
7. Optional Report No. 470-87	8. Page No. 1 of 1

Citation and Notification of Penalty

The violation(s) described in this Citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below.

1. Type of Violation(s) Serious	2. Citation Number(s) 02
------------------------------------	-----------------------------

10. Inspection Date(s):
7/20/87 - 7/27/87

11. Inspection Site:
C-Band Antenna site
Elmendorf AFB, AK 99506

9. To:
Lockheed Support Services, Inc.
and its successors
P.O. Box 818
Elmendorf AFB, AK 99506

Articles Due Within 15 Working Days of Receipt of This Notification Unless Contested (See enclosed Booklet) This Section May Be Detached Before Posting

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and State holidays) whichever is longer. This Citation describes violations of the AS 18-60. The penalty(ies) listed below are based on these violations. You must correct the violations referred to in this Citation by the date listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and State holidays) from your receipt of this Citation you mail a notice of contest to the Alaska Department of Labor Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

12. Item Number	13. Standard, Regulation or Section of the Act Violated	14. Description	15. Date by Which Violation Must Be Abated	16. Penalty
	C 01.1103(c)(1): Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing [or the equivalent as specified in 01.1103(e)(3)] on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder.		Immediately Upon Receipt.	1.00
	For example: The catwalk on the C-band antenna was not equipped with a standard guardrail or equivalent, as it consisted of rope which was not taut and of structural members at varying heights.			

17. Chief *[Signature]*

18. \$ 210.00

NOTICE TO EMPLOYEES — The law gives an employee or representative the opportunity to object to any abatement date set for a violation if he believes the date to be unreasonable. The contest must be mailed to the Alaska Department of Labor Office at the address shown above within 15 working days (excluding weekends and State holidays) of the receipt by the employer of this citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL — The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Law. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the Alaska Department of Labor Office at the address shown above.

Total Penalty for This Citation
 Check Payable to DOL-LS&S
 Indicate Inspection Number on Remittance

EMPLOYER RESPONSIBILITIES AND COURSES OF ACTION — The enclosed booklet outlines employer responsibilities and courses of action and should be read in conjunction with this notification.