

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD  
P.O. BOX 21149  
JUNEAU, ALASKA 99802

STATE OF ALASKA, )  
DEPARTMENT OF LABOR, )  
Complainant, )  
v. )  
GITTINS CONSTRUCTION, INC. )  
Contestant. )

Docket No. 88-766  
Inspection No. Ca-7806-046-88

DECISION AND ORDER

This matter arises from citations and penalties issued by the State of Alaska, Department of Labor ("the Department") to Gittins Construction, Inc. ("Gittins") for safety and health violations following an inspection of Gittins' worksite at Elmendorf Air Force Base on September 16, 1988.

The Department's citations were issued on November 17, 1988. Gittins filed a timely notice of contest dated December 8, 1988, contesting all the citations and penalties. A hearing was held before the Board on June 27, 1989, in Anchorage. The Department was represented by Assistant Attorney General Lisa Fitzpatrick. Gittins was represented by Attorney Grant Watts of Wade & DeYoung. Both parties presented arguments and evidence in the form of witness testimony and documentary exhibits. The record was deemed closed at the conclusion of the hearing.

At the hearing, the Department dismissed Items #1 and #2 of Citation #10 and moved to amend Citation #2 to allege a different code provision. There was no objection to these requests. For its part, Gittins stipulated to the existence of all the code violations alleged by the Department and indicated its intent to contest only the proposed monetary penalties.

Citation #1 alleges a violation of Construction Code 05.110(d)(9)(B)(i) for failure to guard live electrical parts in two electrical junction boxes. The violation was classified as "serious" and a penalty of \$640 was proposed.

Citation #2, as amended, alleges a violation of Construction Code 05.090(a)(2)(A) for failure to equip a table saw with a proper saw guard. The violation was classified as "serious" and a penalty of \$200 was proposed.

Citation #3 contains two violations which were grouped because they involved similar or related hazards. Item #1a alleges a violation of Construction Code 05.120(b)(1)(D) for erecting a scaffold more than six feet off the ground without guardrails. Item #1b alleges a violation of Construction Code 05.120(b)(1)(K) for failure to fully plank a scaffold. Both of these items were grouped as a "serious" violation with a proposed penalty of \$150.

Citation #4 alleges a violation of Construction Code 05.045(e)(1) for failure to establish a regulated work area where asbestos-containing material was to be removed. This violation was classified as "serious" with a proposed penalty of \$200.

Citation #5 alleges a violation of Construction Code 05.050(b)(1) for failure to provide hearing protection to an employee using a floor and hand grinder. The violation was classified as "serious" and a penalty of \$150 was proposed.

Citation #6 alleges a violation of Hazard Communication Code 15.0101(i)(1) for failure to provide an adequate safety education program. This violation was classified as "serious" and a penalty of \$200 was proposed.

Citation #7 alleges a violation of Construction Code 05.040(f)(2) for failure to use proper protective measures or controls to prevent employees from being overexposed to silica dust. This violation was classified as "serious" and a penalty of \$400 was proposed.

Citation #8 alleges a violation of General Safety Code 01.0403(a)(2) for failure to establish a proper respiratory protection program. This violation was classified as "serious" and a penalty of \$150 was proposed.

Citation #9 alleges a violation of Construction Code 05.030(b)(2)(A)(i) for failure to have an adequate accident prevention program including a daily inspection of all job equipment and activities by persons knowledgeable in the field of safety and health. This violation was also classified as "serious" and carried a proposed penalty of \$200.

Citation #10 alleges eight "other" (non-serious) violations. However, the only items carrying a proposed monetary penalty were Items #1 and #2 which were dismissed by the Department at the hearing. Since Gittins contests only the monetary penalties proposed by the Department, the remaining

"other" violations in Citation #10 are deemed final and not subject to review.

#### Findings of Fact

1. On September 16, 1988, industrial hygienist Charles Cain conducted a safety and health compliance inspection of Gittins' worksite at Hangar 3 at Elmendorf Air Force Base in Anchorage. Gittins Construction was the prime contractor on the Hangar 3 renovation project.

2. Following the Department's standard procedure, Cain began his inspection by holding an opening conference with Ed Elkinton, the job superintendent and highest-ranking Gittins official at the worksite. Cain explained the purpose and scope of his inspection, then proceeded to conduct the walkaround portion of the inspection.

3. Cain spent approximately 3 hours during his inspection of the Gittins worksite on September 16. At the end of his inspection that day, Cain held an informal conference with Les Boczonadi, Gittins' construction manager, during which Cain discussed the code violations observed that day.

4. Over the next six weeks, Cain returned to the Hangar 3 project about 6 or 7 times to complete his inspection of the Gittins worksite and that of several subcontractors on the project. Cain testified that it was not unusual on large construction projects like Hangar 3 for an inspector to visit the job site several times over a period of time, especially for industrial hygiene inspections where air sampling or monitoring must be performed.

5. During the course of his inspection, Cain documented the safety and health code violations which were to form the basis for the citations issued by the Department.<sup>1</sup> Upon completing the inspection on November 2, 1988, Cain held a formal closing conference with Les Boczonadi and further explained what code violations had been documented. Cain also spoke 2 or 3 times with company owner Tom Gittins about the inspection in response to the latter's inquiries.

6. In assembling his inspection report, it was Cain's duty to calculate the proposed monetary penalty for each violation in accordance with the guidelines in the Department's

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<sup>1</sup>Since Gittins contests only the penalties proposed by the Department and has stipulated to the existence of the safety and health violations, it is unnecessary to set forth in detail the substance of each alleged violation.

compliance manual. The compliance manual sets forth a number of criteria which must be assigned numerical ratings to determine an initial penalty amount. These criteria include the number of employees exposed to the hazard observed, the frequency of their exposure, their proximity to the danger, stress factors, the probability of an accident occurring, and the likely severity of any illness or injury should an accident occur. Once an initial penalty amount has been determined, it may be reduced by several adjustment factors such as small company size, demonstrated good faith in correcting the violation, and prior history of safety and health violations. According to Cain, the maximum allowable reductions in each category were 40% for size, 30% for good faith and 10% for history.

7. Using the compliance manual guidelines, Cain calculated the adjusted monetary penalties for each violation. On reviewing his calculations at the hearing, Cain noted that Gittins had been given a 30% reduction for company size on all penalties except for Citations #1 and #7. He acknowledged that this inconsistency was an oversight and that Gittins should have been given a 30% size reduction on those two penalties as well.

8. Cain also explained that normally it takes about 10-30 days after an inspection is finished for all the paperwork to be completed and any citations to be issued. The citations do not become "official" until they are issued by the Department although an inspector typically will discuss observed violations with the employer during the inspection closing conference. In this case, the closing conference took place on November 2, 1988 and the Department's citations were issued on November 17, 1988.

9. Les Boczonadi, Gittins' construction manager, testified that he was not present during the inspection as his office was located away from the Elemndorf worksite. He first learned that the Department might issue safety citations during the closing conference with Cain on November 2. The job superintendent, Ed Elkinton, never advised him that serious safety hazards had been observed by Cain during the inspection. If the Department had notified top management persons at Gittins sooner, the violations could have been corrected immediately.

10. Winfield Scott testified that he was the current president of the corporation and that he had purchased the business from Tom Gittins on May 10, 1989. At the time of the transfer, Scott was not aware of the pending safety citations and penalties issued in this matter.

### Conclusions of Law

Upon reviewing the citations issued in this case, it is apparent to us that the Gittins worksite at Hangar 3 was riddled with serious safety and health hazards. We believe there was a high potential for accidental injury or illness to employees. In this light we have examined the penalty calculations for each violation cited and we are satisfied that the penalties were properly calculated and appropriately reflect the seriousness of each violation. The only correction warranted by the evidence is a 30% size reduction for Citations #1 and #7, consistent with the company size reductions for the other serious violations. This would reduce the penalties for Citations #1 and #7 to \$400 and \$250 respectively.

Gittins makes a number of arguments in support of its contention that the penalties should be eliminated or significantly reduced: 1) top management at Gittins was not promptly notified of the violations; 2) job superintendent Elkinton attempted to "cover up" the violations and the company should not be held responsible for his misconduct; 3) the penalties are not justified by the facts; and 4) because of the change in ownership of the company, the new owner should not be held responsible for the safety violations of its predecessor. We have considered these arguments and we find no merit in any of them.

First, we disagree that Gittins was not promptly notified of the observed violations. Compliance officer Cain conducted the inspection between September 16 and November 2, 1988 and the citations were issued on November 17, 1988. This time lapse is well within the 180-day time frame to issue citations allowed by AS 18.60.091(c). In addition, Cain conferred with Boczonadi regarding the violations he had noted on the first day of his inspection, and also spoke to owner Tom Gittins regarding the inspection.

Second, any lack of communication or "cover up" by job superintendent Elkinton regarding the inspection and the violations found is the responsibility of the company, not the Department. Cain properly gave notice of his inspection to Elkinton, who was the highest-ranking company official at the worksite. The Department is under no legal obligation to confer with or notify other management officials who may be off the job site.

Third, as noted above, we believe that the penalties assessed are more than justified by the nature and gravity of the hazards existing at the Gittins worksite. In fact, had the "non-serious" violations been contested before us in this proceeding, we would not have hesitated to impose additional monetary penalties for such items as lack of eye protection or improper

asbestos disposal which we believe are serious hazards.

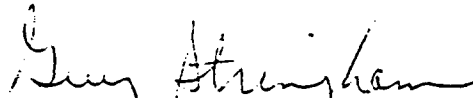
Fourth, there is no merit in the contention that Gittins should be relieved of any liability for the citations and penalties by virtue of the transfer of the company to new ownership. Under federal OSHA law (on which Alaska law is based), a change in an employer's ownership or company organization does not relieve the successor owner of liability for OSHA citations and penalties. See Rothstein, Occupational Safety and Health Law, Sec. 12 (2nd ed. 1983 and 1988 Pocket Part).

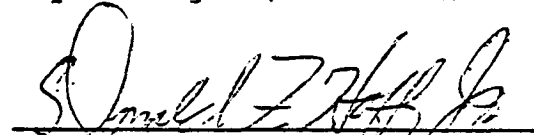
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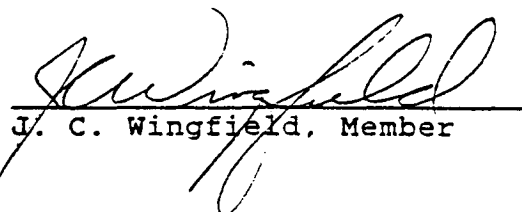
For the foregoing reasons, we affirm the monetary penalties issued by the Department of Labor, except that the penalties for Citations #1 and #7 are reduced to \$400 and \$250 respectively. Accordingly, the total penalty amount to be paid by Gittins is \$1900.

DATED this \_\_\_\_ day of \_\_\_\_\_, 1989.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

  
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