

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

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

Docket No. 90-817
Inspection No. WI-3924-698-89

DECISION AND ORDER

This case arises from a citation issued by the State of Alaska, Department of Labor ("DOL") to the State of Alaska, Department of Transportation and Public Facilities ("DOT/PF") following an inspection of DOT/PF's maintenance camp at Coldfoot, Alaska, on December 11, 1989.

The citation alleges that DOT/PF violated Construction Code 05.110(d)(9)(B)(i) by failing to properly guard live electrical wires in the generator room of the maintenance camp. The violation was classified as "other than serious" and no monetary penalty was assessed.

DOT/PF contested the citation by letter dated January 8, 1990, bringing the matter within the Board's jurisdiction. A hearing was held before the full Board in Fairbanks on September

17, 1990. DOL was represented by Dennis Smythe, Chief Compliance. DOT/PF was represented by Mick Hotrum, Regional Safety Officer. Evidence was presented in the form of witness testimony and documentary exhibits, and the parties also 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 11, 1989, DOL compliance officer Ferd Wilkins conducted a programmed inspection of DOT/PF's maintenance camp at Coldfoot, Alaska. DOT/PF employs approximately five persons at the maintenance camp. Wilkins was accompanied during the inspection by Albert Reichow, a DOT/PF mechanic.

2. As part of the inspection, Wilkins went into the generator room, which contained three generators for the camp (see Exhibit 1). DOT/PF is responsible for the operation of the generator room.

3. In the generator room, Wilkins observed an open electrical junction box with two wires leading from it (see Exhibit 2). One of the wires was for a shop light; the other wire had its bare ends exposed. Both wires were resting on top of an open box containing nylon parachute material.

4. Wilkins tested the exposed wire using an electrical tester and found it was energized with a current of 110 volts. Reichow confirmed this through his own test.

5. The exposed electrical wires were located approximately four to five feet from the walkway used by DOT/PF employees to inspect the generators. DOT/PF personnel inspected the generators every day and would have to walk near the parachute box on which the live wires were resting. DOT/PF employees would spend up to 20 minutes each day in the generator room depending on how much generator maintenance was required. The door to the generator room normally was not locked, although at the time of Wilkins' inspection the room was locked.

6. Reichow indicated he was aware of the exposed wires but did not know they were energized until the safety inspection. He believed the situation may have been caused several months earlier by University of Alaska personnel who connected certain hardware to the junction box as part of research tests on the heat recovery system at the maintenance camp (see Exhibit 3 and Exhibit A).

7. The electrical hazard was immediately abated by DOT/PF prior to the end of Wilkins' inspection.

8. The citation was classified as "other than serious" because of the relatively brief and infrequent exposure of DOT/PF employees to the hazard. No monetary penalty was assessed.

9. At the hearing, the parties stipulated that DOT/PF generally had a good safety program. There was no evidence of prior safety violations at the Coldfoot maintenance camp. DOT/PF

holds safety meetings there approximately once a month. However, the exposed electrical wire hazard had not been noticed or discussed.

CONCLUSIONS OF LAW

Construction Code 05.110(d)(9)(B)(i) provides as follows:

Except as required or permitted elsewhere in this section, live parts of electric equipment operating at 50 volts or more must be guarded against accidental contact by cabinets or other forms of enclosures.

It is undisputed there were live exposed electrical wires in DOT/PF's generator room that were not properly guarded against accidental contact. However, DOT/PF contends the citation was unwarranted for the following reasons: the hazard was created by University of Alaska personnel; no DOT/PF employees were significantly exposed to the hazard; and DOT/PF had no knowledge of the hazard prior to the safety inspection.

After examining the evidence and listening to the witness testimony, we conclude that none of DOT/PF's defenses are well taken. On the issue of employee exposure, the evidence makes clear that DOT/PF employees were well within the "zone of danger" created by the hazard since they had to walk within five feet or less of the hazard in order to perform maintenance on the generators. It is well established in OSHA law that "actual exposure" of employees to a hazard need not be shown as long as

there is evidence that employees had access to the general area where the hazard is located. See Rothstein, Occupational Safety and Health Law § 103 (3d ed. 1990). Moreover, the fact that DOT/PF personnel only worked in the generator room for brief periods every day does not serve to excuse the violation, although such evidence may be considered in classifying the violation or assessing a monetary penalty.

Furthermore, the fact that DOT/PF may not have created the hazard does not excuse the violation. OSHA liability is established where an employer has control over a work area, its employees have access to a hazard within that area, and the employer knew or should have known of the presence of the hazard. See Rothstein, supra, at § 166. Thus, DOT/PF may be held legally responsible for the safety violation even if the hazard was created by University of Alaska personnel.

DOT/PF's third defense, that it was unaware of the hazardous condition, is also without merit. While it is true that DOL has the burden of proving employer knowledge to support a violation, OSHA case law has established that constructive knowledge exists whenever an employer fails to exercise reasonable diligence in detecting hazardous conditions, particularly "plain view" hazards. See Rothstein, supra, at § 105. In this case, the evidence establishes that DOT/PF mechanic Reichow was aware of the electrical wires but did not know they were energized. A simple electrical test would have


confirmed that the wires were live. Because DOT/PF employees regularly walked past the location of the hazard, and because the condition was in plain view, we conclude that DOT/PF with the exercise of reasonable diligence should have known that the wires were energized. Its failure to exercise such diligence cannot serve to excuse a potentially dangerous situation. It is essential that DOT/PF's safety program at Coldfoot include examination of all open and obvious conditions such as this one to determine whether there is a safety hazard present. If DOT/PF had done this, the electrical hazard would have been noticed and abated long before the inspection.

ORDER

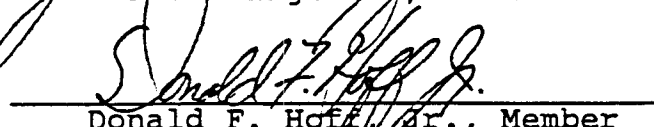
Based on the foregoing findings of fact and conclusion of law, IT IS HEREBY ORDERED that the Department of Labor's citation is affirmed.

DATED this 21ST day of December, 1990.

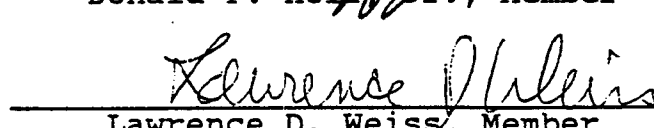
ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD



J.C. Wingfield, Chairman



Donald F. Hoff, Jr., Member



Lawrence D. Weiss, Member

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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. 90-817, filed in the office of the OSH Review Board at Juneau, Alaska, this 21st day of December, 1990.

Mary jean Smith
OSH Review Board

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