

WALTER J. HICKEL, GOVERNOR

**DEPARTMENT OF LABOR**

P.O. BOX 21149  
JUNEAU, ALASKA 99802-1149  
PHONE: (907) 465-2700

**OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD**

FAX: (907) 465-2784

J. C. WINGFIELD  
CHAIRMAN  
DONALD F. HOFF, JR.  
LAWRENCE D. WEISS  
  
ROBERT W. LANDAU  
HEARING OFFICER

**RECEIVED**  
DEC 15 1991  
Law Offices of Robert W. Landau

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

Docket No. 91-875  
Inspection No. Ni-6959-190-91

DECISION AND ORDER

This matter arises from an occupational safety and health inspection conducted by the State of Alaska, Department of Labor (DOL) on April 12, 1991 at a worksite at Milepost 137 of the Glenn Highway near Glennallen, Alaska.

As a result of the inspection, DOL issued a citation to the State of Alaska, Department of Transportation and Public Facilities (DOTPF). The citation alleged that DOTPF violated Alaska Construction Code 05.070(b)(1)(A) by failing to adequately protect employees at the worksite from a hazardous condition on the highway adjacent to the worksite. The citation was classified as "other than serious" and no monetary penalty was assessed.

Upon the filing of a notice of contest by DOTPF, a hearing was held before the Board in Fairbanks on October 17, 1991. Both parties presented witness testimony, documentary evidence and arguments at the hearing. Upon review and consideration, the Board makes the following findings of fact, conclusions of law and order in this matter.

#### FINDINGS OF FACT

1. On April 12, 1991, DOL compliance officer John Nielson conducted an occupational safety inspection of a worksite at Milepost 137 of the Glenn Highway near Glennallen, Alaska.

2. The worksite was located adjacent to the Glenn Highway near where it crosses over the Little Nelchina River. There are long approaches to the worksite on the highway from either direction. On the day of the inspection, there was melting snow on the road. Visibility was good. The surface of the highway was asphalt; there was a pavement break of approximately 200-300 feet adjacent to the worksite.

3. The principal employer at the worksite was Summit Paving and Construction, Inc. (Summit), which was removing earth from a slide area near the river. Summit employees were loading earth onto trucks and then transporting the material to another location down the highway. Summit employees were working on the ground adjacent to the highway as well as driving trucks along the highway to and from the loading area.

4. During his inspection, Nielson observed that Summit's trucks were tracking soft clay mud onto the highway, creating what he believed were slippery road conditions that exposed employees at the worksite to danger from passing motorists. Even though there were road construction warning signs on either side of the worksite advising motorists to reduce speed to 40 miles per hour, Nielson observed passing traffic at speeds in excess of 40 m.p.h. He was concerned that the warning signs were insufficient to protect employees at the worksite and that a flagman was necessary. Nielson took photographs at the worksite to document the potentially hazardous condition. See Exhibits P1-P10.

5. Nielson attempted to test the slippery road conditions on the highway adjacent to the worksite by suddenly braking his car (a Plymouth K-Car) at a speed of 40 m.p.h. His car slid and only slowed slightly. Nielson estimated the length of the slippery zone to be approximately 1/4 mile. Apart from the sudden braking test, Nielson performed no other test of highway driving conditions.

6. There was one DOTPF employee at the worksite during Nielson's inspection: Ken Shrewsbury, the assistant project engineer. Shrewsbury was sitting in his parked pickup off the highway where he was observing and documenting Summit's performance at the worksite. Nielson saw Shrewsbury driving his pickup truck on and off the slippery section of the highway and also saw him on foot talking to Summit's supervisor at the worksite.

7. Nielson spoke to Shrewsbury about the slippery conditions on the highway. Together they went to speak to Summit's supervisor at the worksite about using a flagman to provide additional protection for employees working on or near the highway. Summit refused to provide a flagman and maintained that DOTPF was responsible for providing any additional highway traffic protection.

8. Shrewsbury declined to take any enforcement action against Summit without first talking to DOTPF project engineer Larry Coxey who was away from the worksite. He agreed there were slippery conditions on the highway adjacent to the worksite but felt they were no more dangerous than on any other portion of the highway. Shrewsbury indicated that normally he would park his truck well away from the highway and would monitor the contractor's activities from his parked truck. Occasionally, he would walk through the worksite to speak to Summit's supervisor or another of Summit's employees. DOTPF had no employees at the worksite other than the project engineers who were monitoring the progress of the work.

9. When project engineer Larry Coxey returned to the worksite and learned of the situation, he ordered Summit to use a scraper and remove as much of the clay mud from the roadway surface as possible. The remainder was then covered with granular material from the nearby earth pit. Compliance officer Nielson also contacted the State Troopers regarding the hazardous highway

condition on the day after his inspection, but it does not appear the Troopers took any action regarding the situation.

10. According to Ron Tanner, DOTPF's traffic safety officer, contractors on state highway projects are liable for providing appropriate warning signs for motorists. DOTPF has the contractual right to shut down a job if the contractor fails to provide appropriate signage or protection such as a flagman. From a technical standpoint, Tanner did not believe a flagman was necessary at Summit's worksite because visibility was good and there were long approaches to the worksite from both directions. He noted that flagmen are used mainly for lane reductions or lane blockage, neither of which existed at the worksite. Further, using a flagman could even be more dangerous than having no flagman at all since it directly exposes the flagman to oncoming traffic.

11. As a result of the inspection, both Summit and DOTPF were cited for failing to provide a flagman or additional traffic controls to protect employees working near the highway. The citation against Summit was classified as "serious" because of the number of its employees exposed and their proximity to the zone of danger. The citation against DOTPF was classified as "other than serious" because there was only a single DOTPF employee exposed (Shrewsbury) and he was at some distance from the zone of danger. The citation against Summit was ultimately resolved by means of a settlement agreement with the State.

CONCLUSIONS OF LAW

Construction Code 05.070(b)(1)(A) provides:

When operations are such that signs, signals, and barricades do not provide the necessary protection on or adjacent to a highway or street, flagman or other appropriate traffic controls shall be provided.

DOL's factual example of how the above provision was allegedly violated by DOTPF states as follows:

Due to slippery conditions caused by clay mud being tracked onto the highway by trucks and scrapers, there was a hazard to employees driving said vehicles from being struck by passing traffic. Signs on the site were not providing adequate protection.

Although the above example appears to allege a hazard to Summit's employees driving trucks on and off the highway, DOL clarified at the hearing that the reason DOTPF was cited was due to its failure to protect its own employee, not Summit's employees. (

DOTPF objects to the citation on the grounds that (1) there was no actual hazard at the worksite; (2) the compliance officer used an improper and unsafe method to test slippery conditions on the highway; (3) even if there was a hazard, DOTPF's lone employee at the worksite was insufficiently exposed to the hazard; and (4) DOTPF did not create the hazard and lacked sufficient control over the contractor to require abatement of the hazard.

We conclude that DOL has not met its burden of proof to demonstrate by a preponderance of the evidence that DOTPF violated the cited code provision. First, we note that the code provision is expressed in relatively subjective terms (i.e., how much is

"necessary protection"?) which allows for differing interpretations. Compliance officer Nielson essentially made a judgment call that a hazard existed based on his visual observation of clay mud on the highway, the fact that passing motorists were driving at speeds in excess of 40 m.p.h., and by using a sudden braking test to determine the slipperiness of road conditions. Second, we note that Nielson -- even by his own admission -- is not an expert on highway traffic safety or traffic controls. Third, while we do not question Nielson's visual observations, we note that melting snow conditions existed along the entire highway and there is no evidence that the portion adjacent to the worksite was any more slippery or hazardous than any other stretch of the highway. Fourth, we believe that the braking test used by Nielson was neither appropriate nor particularly useful under the circumstances. 8 AAC 61.020(d) requires that DOL employ "reasonable investigative techniques" to establish safety or health violations. The same braking test conducted on any other stretch of the highway probably would have yielded the same results. Moreover, by braking suddenly at a speed of 40 m.p.h. on a muddy/snowy/icy highway, Nielson endangered not only himself but anyone else who might have been nearby. We are not aware of any safety code or inspection procedure that permits this kind of test. In fact, there is evidence that if the State Troopers had observed Nielson performing the braking test, he would have been cited for a traffic violation. See Exhibit C.

We further conclude that even if a hazard could be shown to exist on the highway adjacent to the worksite, there was insufficient exposure to DOTPF employees to warrant the issuance of a citation. DOTPF's only employee at the worksite was the assistant project engineer, whose primary function was to monitor the contractor's performance on the job. The engineer spent most of his time sitting inside his pickup truck parked well off the highway. He was not involved in loading the trucks or driving them on and off the highway. We do not think the DOTPF engineer was sufficiently exposed to the alleged "zone of danger." While DOL's citation against Summit may have been appropriate due to the number of their employees as well as their activities adjacent to the highway, we believe it would be unreasonable and inappropriate to require DOTPF to provide a flagman solely for the protection of a single project engineer who spent most of his time in a parked truck off the highway.

On the issue of DOTPF's control and responsibility, we find that DOTPF had sufficient contractual authority over the contractor to require abatement of any hazards and to shut down the job to enforce compliance. Had we concluded that an actual hazard had been proved and that DOTPF employees were sufficiently exposed to the hazard, we would not hesitate to find that DOTPF had sufficient control and responsibility over the contractor's activities to be liable for any safety violations.



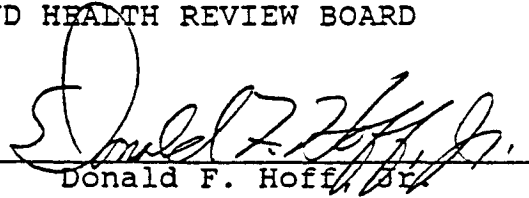
ORDER

Based on the foregoing findings of fact and conclusions of law, the Board orders that Citation 1 is DISMISSED.

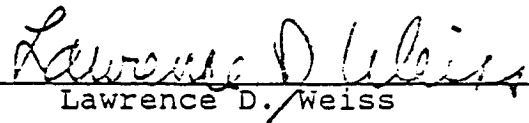
DATED this 12<sup>th</sup> day of December, 1991.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

By:

  
Donald F. Hoff, Jr.

By:

  
Lawrence D. Weiss

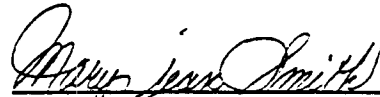
OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD  
P.O. BOX 21149  
JUNEAU, ALASKA 99802-1149

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/Public Facilities, Docket No. 91-875S, filed in the office of the OSH Review Board at Juneau, Alaska, this 12th day of December, 1991.



---

Mary Jean Smith  
OSH Review Board

OSH:12