

STATE OF ALASKA

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DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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STATE OF ALASKA,)
 DEPARTMENT OF LABOR,)
)
 Complainant,)
)
 v.)
)
 BOURNE CONTRACTING,)
)
 Contestant.)

Docket No. 93-1010
Inspection No. Fr-4341-239-93

DECISION AND ORDER

Bourne Contracting (Bourne) contests citations issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection at Bourne's worksite at Eielson Air Force Base, Alaska, on July 1, 1993.

As a result of the inspection, the Department issued two citations alleging violations of Alaska occupational safety and health codes. Citation 1 alleges a violation of Construction Code 05.240(e)(1) for allowing employees to work at a height in excess of 16 feet on a roof with a slope greater than 4:12 without fall protection or a catch platform. Citation 2 contains two items: Item 1a alleges a violation of General Safety Code 01.1109(a)(3)(E) for allowing employees to work on a scaffold that was not fully

planked; Item 1b alleges a violation of General Safety Code 01.1108(b)(3) for failing to ensure that the scaffold was properly equipped with guardrails and toe boards. Each of the two citations issued by the Department was classified as "serious" and carried a proposed monetary penalty of \$1,500.

Bourne timely contested the Department's citations. In its contest letter dated October 19, 1993, Bourne requested that Citation 1 be withdrawn because the roof in question did not have a slope greater than 4:12 and therefore the code provision cited did not apply. Bourne further requested that the monetary penalty for Citation 2 be reduced because it immediately took down the scaffolding while the Department's compliance officer was still at the worksite.

On February 9, 1994, almost four months after receiving Bourne's contest letter and one month before the scheduled Board hearing, the Department moved to amend Citation 1 to change the code provision cited. The Department's motion was served on Bourne but no opposition to the motion was filed. On March 2, 1994, the Board's hearing officer duly granted the Department's motion to amend Citation 1.

The Board hearing in this matter was held in Fairbanks on March 11, 1994. The Department was represented by Assistant Attorney General Toby N. Steinberger. Bourne Contracting was represented by its owner, Darrell Bourne. At the hearing Bourne objected to the Department being allowed to amend Citation 1. After deliberation, the Board sustained Bourne's objection and

denied the Department's motion to amend Citation 1, whereupon the Department dismissed the citation. The remainder of the hearing was devoted to Bourne's contest of Citation 2. Both parties presented witness testimony, documentary evidence and oral argument. Upon consideration of the evidence and arguments submitted, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. On July 1, 1993, Department compliance officer Carl Francis conducted an occupational safety and health inspection of a construction project at Building 1622, Eielson Air Force Base, Alaska.

2. Bourne was a subcontractor on the project and was responsible for installing metal siding and roofing on the building. The general contractor on the project was Alcan Builders.

3. Francis observed several employees working on a four-tier scaffold that was approximately 28 feet high with each tier about seven feet apart. See Exhibit 1. The work surfaces on which the employees were standing were not fully planked along the entire width of the scaffold. Francis also observed that the scaffolding did not have guardrails or toe boards on all open sides of the scaffold more than six feet above the ground.

4. Francis determined that at least three of Bourne's employees were using the scaffolding.

5. The scaffolding had originally been obtained by Alcan Builders. Prior to the inspection, however, Bourne had taken over the rental of the scaffolding. As soon as the compliance officer noted the code violations, Bourne immediately removed the scaffolding and used a forklift/manbox to finish the job.

6. In calculating the proposed penalty for the violations, Francis determined that the probability and severity of injury resulting from the violations was high and therefore the violations were classified as "serious." The unadjusted penalty of \$5,000 was reduced by 60% due to Bourne's small company size and by 10% because there was no history of prior violations. No reduction was given for good faith because Bourne did not present evidence of a written safety program. After the penalty reductions, the final proposed penalty for Citation 2 was \$1,500.

7. The general contractor, Alcan Builders, was separately cited by the Department for the scaffolding violations but ultimately reached a settlement agreement with the Department. Alcan Builders required Bourne as its subcontractor to pay \$750 toward Alcan's penalty obligation to the Department.

8. Bourne has had little work during the winter of 1993-94 and is experiencing financial difficulties. Bourne submitted documentation indicating a net loss of over \$8,000 since the beginning of 1994. Bourne's balance sheet as of the date of the hearing indicates that it had a total of \$61.58 in its business bank account.

CONCLUSIONS OF LAW

Motion to Amend Citation 1

Citation 1 alleges a violation of Construction Code 05.240(e)(1) which applies only to roofs having a slope greater than 4:12. Before issuing this citation the Department failed to ascertain whether the roof in question had a slope greater than 4:12. It was Bourne who, after being cited, promptly notified the Department that the roof slope was not greater than 4:12 and therefore the cited code provision did not apply. Despite Bourne's prompt notification of the Department's error, the Department waited almost four months until shortly before the hearing to request permission to amend Citation 1.

Under these circumstances, we think it is unfair and prejudicial to allow the Department to change its citation against Bourne. Bourne is a small business in financial difficulty and is not in a position to afford legal representation to respond to the Department's changing theories of liability. We find that Bourne's failure to timely oppose the Department's motion is excused by its business circumstances. We also find that Bourne would be prejudiced in having to defend against a different code provision when it acted promptly to notify the Department of its citation error.

We further note that the Department's citation error could have been prevented by minimal investigation before the citation was issued. The Department's enforcement staff is presumed to be trained in the correct application of occupational

safety and health codes. Because of the serious consequences that can result from an occupational safety and health citation, particularly for a small employer, we believe the Department should have cited the correct code provision in the first place.

For the foregoing reasons, the Department's motion to amend Citation 1 is denied.

Citation 2

The evidence conclusively establishes, and Bourne does not seriously dispute, that (1) the code provisions in Citation 2 apply to the worksite in question; (2) Bourne failed to comply with the cited standards; (3) Bourne had one or more employees exposed to the conditions cited; and (4) Bourne knew or should have known of the cited conditions with the exercise of reasonable diligence. See Rothstein, Occupational Safety & Health Law, § 102, at 138-39 (3rd ed. 1990). Moreover, the gravity of the violations clearly supports the Department's classification of Citation 2 as "serious."

The only remaining issue is whether Bourne should be granted any relief from the \$1,500 penalty proposed for Citation 2. We note Bourne's good faith in immediately abating the hazard in the presence of the compliance officer. We also note that although Bourne may not have had a written safety program, there was evidence that the company conducted regular safety meetings and distributed safety information to its employees. Furthermore, we accept Bourne's documentation of its present financial

difficulties. We find that the proposed penalty would impose undue financial hardship on the company. Finally, we note that Bourne has already paid \$750 for the citations issued to the general contractor.¹

For the foregoing reasons, we believe the proposed penalty for Citation 2 should be reduced to \$0.

ORDER

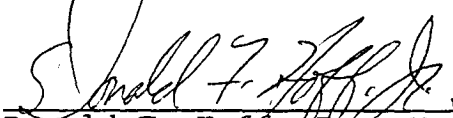
1. Citation 1 is DISMISSED.
2. Citation 2, Items 1a and 1b, are AFFIRMED as "serious" violations.
3. The proposed penalty for Citation 2 is reduced to \$0.

DATED this 20th day of MAY, 1994.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD



Wayne A. Gregory, Chairman



Donald F. Hoff, Jr., Member

¹ We strongly disapprove of a general contractor such as Alcan Builders using its contractual leverage to force a subcontractor like Bourne Contracting to pay part or all of an OSHA fine assessed against the general contractor. We believe such a practice contravenes the public policy in the OSHA Act requiring employers to be primarily responsible for the safety and health of their own employees. See AS 18.60.075(a)(4).