

against sliding or collapse. This item was classified as a “serious” violation with a proposed penalty of \$1,500.

Citation 2, Item 1, alleges a violation of AS 18.60.058(a) for failure to report a fatal accident and provide certain required information within eight hours after the employer learned of the accident. This item was classified as “other than serious” with a proposed penalty of \$1,500.

ArcTech contested the Department’s citations and penalties. A hearing was held before the Board in Kenai on November 5, 2004. The Department was represented by Assistant Attorney General Toby N. Steinberger. ArcTech was represented by its president, Kathryn Thomas. Each party presented witness testimony, documentary evidence and oral argument. Upon consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. ArcTech Services, Inc. is a business based in Kenai, Alaska, and is owned by Kathryn Thomas, President, and her husband, Bill Joyce, Vice-President. ArcTech provides construction, maintenance and trucking services, including logging and log transportation. At the time of the accident which is the subject of this case, ArcTech had approximately 14 employees. (Testimony of Kathryn Thomas; Ex. 7; OSHA-1 Form.)

2. As part of its logging business, ArcTech maintains a log storage yard in Homer, Alaska. ArcTech transports logs from its storage yard to log barges that

arrive weekly to take the logs to market. To accomplish the weekly barge loadings, ArcTech would rent flatbed trailers from various companies. When the barge loading operations were finished, ArcTech would return the rented trailers to their owners. (Testimony of Kathryn Thomas, Steve Standley.)

3. The rented flatbed trailers, known as “floats,” are commonly used in the oilfield service industry to carry heavy loads. Floats are intended primarily for use off the public highways and are exempt from the requirement to have emergency brakes known as “maxi-brakes.” (Testimony of Steve Standley.)

4. Upon the completion of a barge loading operation on April 7, 2002, ArcTech assigned one of its drivers, John Robinson, to return two floats rented from Peak Oilfield Services (Peak) from Homer to Peak’s yard in Nikiski, Alaska. ArcTech had hired Robinson as a truck driver and equipment operator approximately one month earlier, on or about March 12, 2002. Robinson had previous experience as a truck driver and equipment operator in Alaska and Arizona, and held an Alaska Commercial Driver’s License. (Testimony of Kathryn Thomas; Ex. 18.) According to one of the other ArcTech drivers who road tested Robinson, Robinson was a good driver and a fast learner. (Ex. 9.)

5. The two flatbed trailers that Robinson was assigned to drive from Homer to Peak’s yard in Nikiski were loaded one on top of the other. This type of load is referred to as “decked” or “piggyback” trailers. (Diagram 1.) The bottom trailer (T-135) was attached to the tractor, which was owned by ArcTech. (Ex. 3 at p. 1.) The top trailer (T-134) was stacked on top of the bottom trailer facing

backwards, meaning that the rear end of the top trailer was above the front end of the bottom trailer and the front end of the top trailer was above the rear end of the bottom trailer. (Testimony of Steve Standley; Diagram 1.)

6. The front end of each flatbed trailer was supported by two retractable legs known as "landing gear," one on each side. When the landing gear legs are extended, they are held in place by a leg brace which fits into a bushing on the frame of the trailer. The end of each brace has a hole which fits into a hole in the bushing and is designed to be held in place with an L-shaped steel pin inserted into the hole. The pins, which are about the thickness of a finger and approximately 8" long, are attached to the trailer frame by a chain. The end of each pin has a smaller hole through which a safety lock or clip, known as a "keeper," can be inserted to prevent the pin from sliding out. There are several styles of pin locks and clips available at local hardware stores for approximately \$2. (Testimony of Steve Standley; Diagrams 2, 3, 4; Ex. 15, 17d.) The keepers or safety clips are usually attached to the trailer on a separate chain. (Testimony of Skip Bush.)

7. After ArcTech completed its barge loading operations on April 7, 2002, four sets of decked trailers were loaded and prepared for the return trip to the Kenai area. The loading and securing of the decked trailers was supervised by Loren Pagel, who was working for ArcTech as an independent contractor but later became an employee. Pagel was supervising one ArcTech employee who was using a loader to lift the top trailers onto the bottom trailers, and two other ArcTech employees who were securing the trailers with chains and straps. The rear end of

the top trailer was chained along each side to the front end of the bottom trailer. The front end of the top trailer was chained to the rear end of the bottom trailer using a “crisscross” pattern. The chains were tightened and loosened with a device known as a chain binder. Typically the chain binders were placed near the edge of the bottom trailer so that they could be accessed from the ground. However, depending on the length and configuration of each chain, sometimes it was necessary to place the binders near the middle of the trailer and employees would have to climb onto the bottom trailer to reach the binders. In addition to chains, ArcTech used nylon straps to fasten the two trailers together. (Testimony of Loren Pagel; Ex. 6, 8, 9, 12; Diagram 5.)

8. The decked trailers assigned to Robinson were not equipped with maxi-brakes. Prior to his departure from Homer, it is undisputed that the wheels of the top trailer were not blocked in place with blocks or chocks. The landing gear on the top trailer was extended, but it is unknown whether the pins were in place securing the landing gear to the frame of the trailer. Loren Pagel believed the pins were in place when the trailers left the yard in Homer. He admitted, however, that there were no safety clips or keepers on the landing gear pins of the top trailer. (Testimony of Loren Pagel; Ex. 6, 12.)

9. John Robinson was not involved in the loading or securing of the decked trailers. While the trailers were being prepared, Robinson was assigned to perform cleanup work at the dock facility. Although Robinson was an experienced truck driver and had been road tested by ArcTech, he had not previously driven a

load of decked trailers for ArcTech. Before leaving Homer with the decked trailers, it is unknown whether Robinson inspected his load to make sure it was secure. There is evidence that just prior to his departure, Robinson spoke to another driver, Donald McNeeley, about where to park the trailers at Peak's yard in Nikiski, but otherwise he had no questions or concerns about transporting the trailers. (Testimony of Kathryn Thomas; Ex. 7, 9, B.)

10. Robinson left Homer with his load at approximately 4:30 p.m. on April 7. The trip from Homer to Nikiski normally takes about three hours, meaning that he should have reached Peak's yard at about 7:30 p.m. It is unknown what route Robinson took from Homer to Nikiski, whether he encountered any problems along the way, or what time he arrived at Peak's yard in Nikiski. Neither Don McNeeley nor any other ArcTech drivers saw Robinson on the road, nor did anyone see Robinson when he arrived at Peak's yard. (Testimony of Kathryn Thomas; Ex. 9.)

11. Several hours later, at approximately 12:45 a.m. on April 8, 2002, one of Peak's employees arrived for work at the Peak yard and noticed an ArcTech truck running with its lights on and the driver's side door open. When he went to investigate, he found Robinson's body lying on the bottom trailer pinned by one end of the top trailer which had collapsed on him. The Peak employee checked for a pulse but found none, and immediately called 911 for assistance. (Ex. 4, 5, 12.)

12. The Troopers arrived at Peak's yard at approximately 1:10 a.m. and began investigating the accident. The Troopers interviewed several Peak employees at the scene, took photographs, and made diagrams of the accident

scene. (Ex. 3, 4.) At about 1:40 a.m., Kathryn Thomas was notified of the accident and made immediate plans to travel from Homer to the Kenai area. (Testimony of Trooper Robert Hunter, Kathryn Thomas.)

13. According to the accident reports prepared by the Troopers and Peak Oilfield Services, the accident occurred when Robinson climbed onto the bottom trailer to release the binders on the crisscross chains. The binders were located near the middle of the trailers, meaning that Robinson could not reach them from the ground and had to climb up onto the bottom trailer to reach them. When the tension on the crisscross chains was released, the top trailer rolled backwards about four feet and its landing gear collapsed, causing one end of the trailer to fall on Robinson and kill him. (Testimony of Trooper Robert Hunter, Skip Bush; Ex. 3, 4, 5, 12.)

14. The accident reports determined that prior to releasing the tension on the crisscross chains at the rear of the decked trailers, Robinson had removed the chains at the front end of the trailers; the chains were found lying on the ground next to the truck. In addition, Robinson had released and removed the nylon straps fastening the two trailers together. (Ex. 3, 4, 5, 12.)

15. The accident reports also determined that when the accident happened, the landing gear on the top trailer did not have the steel pins inserted. Both pins were found attached to their chains, lying on the bed of the bottom trailer. Neither of the landing gear pins had any locking clips or keepers attached. There were no scratches on the pins that might indicate pin failure. In addition, the accident reports found no evidence that the wheels of the top trailer were blocked to

prevent them from moving or rolling. (Ex. 3, 4, 5, 12.)

16. The parties disagree about what time ArcTech notified the Department of the fatality. According to Kathryn Thomas, she called the Department's OSHA office on its toll-free number from her daughter's phone in Soldotna at around 8:00-8:30 a.m. on April 8. Thomas testified that the clerk who answered the phone did not want to take a message and told Thomas to call back later. Later that day, at approximately 2:00-3:00 p.m., Thomas again contacted OSHA and this time spoke to Enforcement Officer Dwayne Houck about the accident. Houck testified that Thomas called him and reported the accident at approximately 2:30 p.m. on April 8. After Thomas told Houck that she had called earlier, he checked with the clerk who said someone had called around 9:30-10:30 a.m. but had not left their name or any information. The telephone records for OSHA's toll-free number show that a call was made from Thomas' daughter's phone number to OSH at 11:04 a.m. on April 8, lasting 54 seconds. The records further show calls from Thomas to OSHA on April 8 at 2:23 p.m., lasting 7 minutes and 24 seconds, and at 3:19 p.m., lasting 3 minutes and 18 seconds. (Testimony of Kathryn Thomas, Dwayne Houck; Ex. 14.)

17. Enforcement Officer Houck was assigned to investigate the fatality. He conducted an on-site inspection of the flatbed trailers at Peak's yard in Nikiski on April 10, 2002. For safety reasons, the top trailer had been lifted off the bottom trailer and both trailers were parked side by side. During his inspection, Houck did not see any keepers or safety clips for the landing gear pins on the top trailer (T-134). Although one of the pins was slightly bent, there was no sign of damage and

both pins appeared usable. Houck also did not see any blocks or chocks that could have been used to block the wheels on the top trailer. Houck interviewed witnesses and took photographs of the trailers and the accident scene. (Testimony of Dwayne Houck; Ex. 6, 7, 8, 9, 15.)

18. The Department issued Citation 1, Item 1, based on ArcTech's failure to properly secure the top flatbed trailer with (1) locking clips or keepers on the landing gear pins and (2) blocks or chocks to hold the wheels of the trailer in place. Due to the occurrence of an accident and the resulting fatal injury, this violation was classified as "serious." Using its penalty calculation guidelines, the Department calculated an initial penalty of \$5,000 for the violation. This amount was reduced by 60% for ArcTech's small company size and 10% for no history of prior violations. No reduction for good faith was awarded due to the severity of the accident. After applying the total reduction of 70% to the initial penalty of \$5,000, the final adjusted penalty assessed by the Department was \$1,500. (Testimony of Dwayne Houck.)

19. The Department issued Citation 2, Item 1, based on ArcTech's failure to report the fatality within eight hours after learning of the accident. This violation was classified as "other than serious." Following similar penalty calculations as for Citation 1, the Department assessed a penalty of \$1,500 for this violation. (Testimony of Dwayne Houck.)

III. CONCLUSIONS OF LAW

A. Standard of Proof

To prove a violation of an occupational safety and health standard, the Department must demonstrate by a preponderance of the evidence that (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) one or more employees were exposed or had access to the violative condition; and (4) the employer knew or could have known of the existence of the violative condition with the exercise of reasonable diligence. See Mark A. Rothstein, *Occupational Safety and Health Law*, § 102 (4th ed. 1998) (hereinafter "Rothstein"); see also 8 AAC 61.205(i) (the burden of proof for citations and penalties is on the Department by a preponderance of the evidence; the burden of proof as to any affirmative defenses is on the employer by a preponderance of the evidence).

B. Citation 1, Item 1

29 CFR 1910.176(b) provides:

Secure Storage. Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

The Department contends that ArcTech failed to properly secure the top trailer by not using safety locks or keepers for the landing gear pins, and by not using blocks or chocks to prevent movement of the wheels. In response, ArcTech argues that John Robinson failed to follow the proper procedures for unloading the decked trailers, and also disregarded company rules and U.S. Department of Transportation (DOT) regulations requiring commercial drivers to make sure their loads are secure.

After reviewing the evidence, we conclude that the Department has

established the elements of a prima facie violation as described in Part A above. First, there is no dispute that the cited standard applies to ArcTech's transportation of the decked trailers. The standard requires that employers must secure stored materials -- for example, a flatbed trailer in transport -- to avoid shifting, sliding or collapse.

Second, there is no question that there was a failure to comply with the cited standard. When Robinson released the tension on the rear chains of the decked trailers, the wheels of the top trailer were not blocked and the trailer rolled approximately four feet. This caused the landing gear, which was not secured with steel pins and locking clips, to collapse on top of Robinson.

Third, it is undisputed that one or more of ArcTech's employees was exposed to the hazardous condition created by the failure to properly secure the top trailer when the chains were released.

Fourth, the evidence establishes that ArcTech knew or could have known of the hazard created by the failure to properly secure the top trailer. Loren Pagel, who supervised the loading of the decked trailers for ArcTech, testified that he was aware that there were no locking clips or keepers for the landing gear pins. Pagel also was aware that the wheels of the top trailer were not secured with blocks or chocks.

ArcTech's primary defense is that it should not be held responsible for this violation due to Robinson's failure to follow proper procedures when he attempted to drop off the decked trailers at Peak's yard. Among other things, ArcTech argues that (1) Robinson did not park his truck in a level area at Peak's yard; (2) Robinson

did not wear his hard hat when he got out of the truck to unhook the trailers; (3) Robinson failed to inspect his load to make sure the landing gear pins were in place prior to releasing the chains; (4) Robinson released the chains and straps in reverse order, undoing the front straps and chains before releasing the rear crisscross chains; and (5) Robinson could have used a block of wood from Peak's yard to block the wheels of the top trailer.

Under OSHA law, unpreventable employee misconduct is recognized as an affirmative defense on which the employer has the burden of proof. To establish the employee misconduct defense, an employer must prove that (1) it had established work rules designed to prevent the violation; (2) it had adequately communicated these rules to its employees; (3) it took adequate steps to discover violations; and (4) it effectively enforced the rules whenever violations were discovered. See Rothstein, §117 at 176-81; see also *Jensen Construction Co.*, 7 OSHC 1477 (OSHRC 1979) (adopting the four-part employee misconduct test).

We conclude that ArcTech fails to meet the requirements of the employee misconduct defense. ArcTech has an employee safety manual which states in relevant part:

Loads must be safely landed, stable, and secured against movement before unhooking. Chocks, blocks or other means must be used to prevent movement of materials while hooking or unhooking.

...

Machinery being transported on a float or any other vehicle must be securely blocked and tied down to prevent movement.

(Ex. 21 at pp. 33, 38).

The evidence shows that ArcTech failed to follow its own safety rules by not using blocks or chocks to prevent movement of the top trailer during transportation and hooking/unhooking of the chains. ArcTech's suggestion that Robinson could have used a block of wood lying around Peak's yard to block the wheels is unpersuasive. Peak's safety engineer Skip Bush testified that the wood blocks at Peak's yard were too large for blocking the wheels of a trailer and were not intended for that purpose. Equally important, ArcTech failed to use or provide locking clips or keepers for the landing gear pins on the trailers. Although it is unknown whether the landing gear pins vibrated out of their holes during transport or whether the pins simply were not inserted during the loading in Homer, it is uncontroverted that there were no locking clips or keepers available to secure the pins in place. We believe it is not enough for an employer merely to have written work safety rules; the employer must also provide appropriate safety equipment and ensure that such equipment is used. Because ArcTech failed to provide the necessary safety equipment to ensure compliance with its own written safety rules (and OSHA requirements), it does not satisfy the first element of the employee misconduct defense.

Moreover, the evidence persuades us that the chain binders were improperly placed near the middle of the trailers, meaning that Robinson had to climb onto the bottom trailer to reach the binders. If the binders had been placed closer to the sides of the trailer so that they were accessible from the ground, Robinson would not have had to climb onto the bottom trailer. We believe that the improper placement of the binders was another contributing factor to the fatal accident. Because Robinson

was not involved in the placement of the binders, he cannot reasonably be held responsible for employee misconduct on this point.

Further, ArcTech has failed to prove that it adequately communicated its safety rules or procedures to Robinson. Robinson was a new employee and had not previously driven a load of decked trailers for ArcTech. There is no evidence that Robinson was given ArcTech's safety manual or that he was trained in the correct procedures for parking the truck in a level area or for unhooking the chains on a decked trailer. Loren Pagel, who supervised the loading of the trailers, testified that he never saw ArcTech's safety manual until after the fatal accident. Under these circumstances, we cannot find that Robinson was culpable for not following ArcTech's safety rules or procedures.

Finally, we reject ArcTech's arguments that Robinson failed to comply with hard hat requirements and DOT regulations requiring commercial drivers to make sure their loads are secure. The OSHA standard cited in this case imposes a legal duty on the *employer* to make sure that loads are properly secured, regardless whether a particular employee complied with other safety standards or regulations. Therefore, Robinson's compliance with the hard hat requirement or DOT regulations is immaterial to the issue of whether ArcTech was in compliance with the cited OSHA standard.

C. Citation 2, Item 1

Alaska Statute 18.60.058(a) provides:

Reporting of injuries and illnesses. In the event of an employment accident that is fatal to one or more employees or that results in the in-patient hospitalization of one or more employees, the employer shall report the accident orally by telephone or in person to the nearest office of the division of labor standards and safety or by telephone to the federal toll-free number provided by the division. The report must relate the name of the establishment, the location of the accident, the time of the accident, a contact person and a telephone number of the contact person, a brief description of the accident, the number of fatalities or hospitalized employees, and the extent of any injuries. The report must be made immediately but in no event later than eight hours after receipt by the employer of information that the accident has occurred. However, if the employer first receives information of a fatality or in-patient hospitalization of one or more employees eight or more hours after the accident, but within 30 days after the accident, the employer must make the report within eight hours after receiving information of a fatality or in-patient hospitalization. This subsection does not apply to an employer that first receives information of a fatality or in-patient hospitalization more than 30 days after the accident.

ArcTech learned of the fatal accident at approximately 1:40 a.m. on April 8 when Kathryn Thomas spoke to the Troopers. Thomas testified that she called the Department's toll-free number to report the accident around 8:00-8:30 a.m. on April 8 but was told by a clerk to call back later. Because Thomas' recollection of the time was admittedly imprecise, we believe the Department's telephone records are the best evidence of when Thomas called to report the accident. The records show a brief call from Thomas' daughter's number at 11:04 a.m., which was more than eight hours after Thomas learned of the accident. The records further show two longer phone calls from Thomas at 2:23 p.m. and 3:19 p.m., which are consistent with

Dwayne Houck's recollection of when Thomas reported the details of the accident to him. Under these circumstances, we conclude that ArcTech did not meet the eight-hour notification requirement in the Alaska Statutes.

D. Classification of Violations and Penalty Assessment

ArcTech did not challenge the classification of Citation 1 as a "serious" violation or Citation 2 as an "other than serious" violation. Upon review, we find no reason to disturb the Department's classification of either violation.

The Department may assess a monetary penalty of up to \$7,000 for each serious or other than serious violation. AS 18.60.095(b) and (c). In calculating a penalty, the Department must give due consideration to the employer's size, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. AS 18.60.095(h). To calculate monetary penalties, the Department relies on the guidelines set forth in the U.S. Department of Labor Field Inspection Reference Manual (FIRM). 8 AAC 61.140(c). The Review Board, however, is not bound by the FIRM guidelines in deciding the appropriate penalty for a violation. 8 AAC 61.140(h).

We conclude that Citation 1 is one of those rare instances where the facts warrant a penalty amount higher than that proposed by the Department. Our federal counterpart, the U.S. Occupational Safety and Health Review Commission, has consistently recognized that an appropriate penalty in a given factual situation may well exceed the penalty proposed by the Secretary of Labor. See Rothstein, §339, quoting *Allied Structural Steel Co.*, 2 OSHC 1457 (OSHRC 1975); *accord*,

Hackensack Steel Corp., 20 OSHC 1387 (OSHRC 2003). This approach has been supported by the federal appellate courts, including the Ninth Circuit which covers Alaska. *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986 (9th Cir. 1975). Here, we find that ArcTech's failure to secure the landing gear pins with locking clips or keepers, and its failure to secure the wheels of the top trailer with blocks or chocks, were egregious deficiencies that directly contributed to the fatal accident. We believe that if locking clips or keepers had been used to keep the landing gear pins in place, or if the top trailer wheels had been blocked to prevent movement, this accident would not have happened. Accordingly, we exercise our discretion to raise the monetary penalty from \$1,500 to \$5,000.

Regarding Citation 2, we find that certain mitigating factors exist that warrant a reduction in the proposed penalty. Kathryn Thomas was notified of the accident in the middle of the night. It was not unreasonable for Thomas to believe that she could wait until business hours the next morning to report the accident to OSHA. Although we find that Thomas did not report the details of the accident as required by law until the afternoon of April 8, we believe she made a good faith effort to contact the Department in a reasonably prompt manner. We also note that any delay in reporting the accident did not impede the Department's on-site investigation which did not occur until two days later on April 10. Accordingly, we exercise our discretion to reduce the monetary penalty for Citation 2 from \$1,500 to \$500.

