

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
P.O. BOX 21143
JUNEAU, ALASKA 99802

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
vs.)
)
CHUCK'S BACKHOE, INC.,)
)
Contestant.)

Docket No. 88-727
Inspection No. Ko-1791-879-87

DECISION AND ORDER

This matter came before the Board for a hearing on March 15, 1989, in Anchorage, Alaska. The State of Alaska, Department of Labor (hereinafter "the Department") was represented by Assistant Attorney General Mary Pinkel. Chuck's Backhoe, Inc. (hereinafter "the Contestant") was represented by its owner, Chuck Ferrell. Evidence was submitted in the form of witness testimony and documentary exhibits, and the record was deemed closed at the conclusion of the hearing.

In contest before the Board is one citation issued by the Department following a safety compliance inspection of Contestant's worksite on Carla Street in Eagle River on September 23, 1987. Citation #1 alleges that Contestant violated Alaska Construction Code 05.160(c)(1) by failing to adequately slope, shore or otherwise protect the banks of an excavated trench. The alleged violation was classified as "serious" and a penalty of \$640 was assessed.

Summary of the Evidence

Compliance officer Bill Kober testified that on September 23, 1987, he conducted a safety inspection of Contestant's worksite on Carla Street in Eagle River. Contestant was a subcontractor on a water and sewer installation project. Kober observed an excavated trench which he estimated was about 10 feet deep and 7 feet wide, with an overhang of 1-2 around the sides. He also noticed that some of the surrounding soil was sloughing into the trench. He took several photographs of the scene which were admitted into evidence.

Kober did not see anyone working in the trench but he spoke to two men who indicated they were working for Contestant and had been in the trench. He also spoke to employees of the prime contractor (Herman Brothers Construction) who stated that they had seen Contestant's owner and one of his men working in the ditch. Finally, Kober explained how the proposed penalty was calculated and indicated that the violation was classified as "serious" because of the likelihood of serious bodily harm in the event of a cave-in or ground movement.

The Department also presented the testimony of Casey Smoot, a construction foreman for Herman Brothers. Smoot confirmed Kober's measurements of the dimensions of the trench and noted that the trench walls were nearly vertical. In his opinion, the trench was in an unsafe condition. He also stated that he saw Contestant's owner and another man (who he assumed was Contestant's employee) working in the ditch with tools.

In addition to the above witnesses, the Department also submitted an affidavit from Mark Moffitt which was admitted as corroborative hearsay evidence. Moffitt states that he was a ditch digger for Herman Brothers on the water line project and also saw Contestant's owner and one of his men working in the ditch for at least 10 minutes.

Chuck Ferrell testified on behalf of his company. He stated that he did not have any employees working in the ditch and that a second man was merely handing tools to him from outside the trench. He acknowledged that the trench was not in compliance with code requirements but said he was unable to comply because of "neighborhood conditions." He also felt the inspector had treated him unfairly by asking other people about his operation and then failing to indicate that some of these other people had not seen any of Contestant's employees working in the ditch.

Findings of Fact and Conclusions of Law

After reviewing the testimony and documentary evidence submitted by the parties, we find that the trench was not properly sloped, shored or protected as required by the code. The photographs taken by the inspector clearly show that the trench walls were nearly vertical, that there was a significant overhang of rocks and earth around the edge of the trench, and that there was some sloughing of material into the trench. The soil composition in our opinion appears to be a fairly typical mix of dirt and rocks, which would require adequate sloping.

We also find that in the event of a cave-in or ground instability, any employee working in the ditch would likely suffer serious bodily injury and, therefore, the violation was properly classified as "serious."

Although there is some doubt as to whether Contestant had any employees exposed to the hazardous condition, we find by a preponderance of the evidence that Contestant had at least one employee working in the ditch for a period of time. On this issue, we believe the testimony of the Herman Brothers employees -- who are presumed to be disinterested -- is more reliable than Contestant's own self-serving testimony. We know from our own experience that normally at least two persons are required to insulate a water pipe and we believe it is more likely than not that Contestant had one of his men helping him in the ditch.

We also find no merit in Contestant's argument that it would have been difficult or impossible to comply with the code requirements. This defense is only rarely upheld and the burden of proof is squarely on the employer. See Rothstein, Occupational Safety and Health Law § 118-19, at 150-51 (2nd ed. 1983). We find that Contestant has failed to meet its burden of proof on this issue.

Finally, with respect to the proposed penalty, we have not been presented with any evidence that the amount is unreasonable or that it was improperly calculated. Accordingly, we affirm both the citation and the penalty as issued.

Order

1. Citation #1 is affirmed as a "serious" violation.
2. The assessed penalty of \$640 for citation #1 is also affirmed.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

/s/
Guy Stringham, Chairman

/s/
Donald F. Hoff, Jr., Member

/s/
J.C. Wingfield, Member

