

STATE OF ALASKA

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

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STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
Complainant,)
v.)
ROSS SERVICES,)
Contestant.)

Docket No. 91-893
Inspection No. Ho-6338-224-91

RECEIVED
MAR 25 1992
Law Offices of Robert W. Landau

DECISION AND ORDER

This matter arises from an occupational safety and health inspection conducted by the State of Alaska, Department of Labor (Department) on August 13, 1991 at a worksite under the control of Ross Services located near the intersection of Trading Bay Road and Granite Point Street, Kenai, Alaska.

As a result of the inspection, the Department issued a citation to Ross Services alleging four separate violations of the Alaska Construction Code. Item 1a alleges a violation of Construction Code 05.162(a)(1) for allowing an employee to work in a trench without adequate cave-in protection. Item 1b alleges a violation of Construction Code 05.161(j)(2) for failing to place excavated material at least two feet from the edge of an

excavation. Item 1c alleges a violation of Construction Code 05.161.(c)(2) for failing to provide a ladder or other safe means of egress for an employee working in a trench. Item 1d alleges a violation of Construction Code 05.050(a)(1) for failing to require that employees wear protective helmets while working near an operating backhoe. The four alleged violations were grouped into a single "serious" citation and a monetary penalty of \$200 was assessed.

Ross Services timely contested the citation. A hearing was held before the Board in Kenai on December 3, 1991. The Department was represented by Assistant Attorney General Toby Steinberger. Ross Services was represented by its owner, Byron Ross. The parties presented witness testimony, documentary evidence and arguments. 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 August 13, 1991, Department compliance officer Dwayne Houck was on his way to work when he saw a trench being excavated near the intersection of Trading Bay Road and Granite Point Street, Kenai, Alaska.

2. Under OSHA's national emphasis program on trenches and excavations, compliance officers are required to stop and inspect any excavations or trenches they observe at any time.

3. The excavation in question was located near the center of Granite Point Street in front of the Peninsula Clarion Building. Ross Services had excavated a trench for the installation of a water line and had backfilled the trench after the installation was completed. However, a leak developed in the water line and Ross Services was required to re-excavate some of the previously backfilled areas in an effort to find the leak.

4. Ross Services was using a backhoe to make the excavation observed by Houck. When Houck arrived, he saw an employee of Ross Services (later identified as David Ross) emerge from the trench. The employee had gone into the trench to determine the location of a utility cable approximately four feet down. After the cable had been located, the employee came out of the trench and the backhoe continued to dig under the cable for several more feet until the water line was located.

5. There were three employees of Ross Services at the worksite: the backhoe operator (Jeff Stout) and two other employees (David Ross and Bob Harrison). Houck asked to borrow a tape measure to measure the dimensions of the trench. Harrison offered to assist and went toward the trench. As Harrison stepped near the edge of the trench, the side caved in and he started to fall into the trench. Houck grabbed Harrison's coat and prevented him from falling in any further.

6. The top width of the trench was irregular and ranged from approximately 10-14 feet. The trench was approximately 15 feet long. The sides of the trench were sloped very slightly or

not at all, except the side nearest the backhoe, which had a more gradual slope of approximately 35-40 degrees as a result of the backhoe pulling excavated material toward it. See Exhibits 2, 4 and 5. There was no shoring or other cave-in protection provided.

7. According to Houck, the soil in the trench was sandy and had little cohesion, classifying it as "Type C" soil under the Construction Code. Soil information prepared by engineers for the City of Kenai confirmed that the soil in the area of the excavation consisted of sandy, loose gravel on top of layers of loose to medium density sand down to a depth of at least eight feet. See Exhibit 3.

8. Regarding Item 1b, Houck testified that spoil piles of excavated material had been placed less than two feet from the edge of the trench. See Exhibit 2. However, this contention was denied by Byron Ross and Bob Harrison, who maintained that it was not the company's practice to place spoil piles right at the edge of excavations.

9. Regarding Item 1c, Houck testified that he saw no ramp, ladder or other means of safe egress from the trench that had been re-excavated to find the water line leak. He noted that David Ross had to "scramble" when he climbed out of the trench after locating the utility cable.

10. Regarding Item 1d, Houck noted that David Ross and Bob Harrison were both working near the backhoe without any hard hat protection. Ross Services had several hard hats available in a nearby vehicle. In Houck's opinion, both men were working within

the swing radius of the backhoe and could have been injured by flying or falling material. In addition, he observed David Ross walking over to talk to the backhoe operator at one point while the backhoe was in operation. Ross Services denied that either employee was within the swing radius of the backhoe or that there was any danger from its operation.

11. Houck classified the violation pertaining to the unsloped trench (Item 1a) as "serious" because of the substantial probability of serious injury or death in the event of a cave-in. He classified the spoil pile violation (Item 1b), the safe egress violation (Item 1c) and the hard hat violation (Item 1d) as "other than serious" violations. Because all four violations pertained to the same excavation, they were grouped into a single "serious" citation.

(12. Under the Department's penalty calculation guidelines, the unadjusted penalty for a serious citation is \$1,000. The unadjusted penalty was reduced by a maximum of 80 percent due to the company's small size, good faith in abating the violations, and no history of prior violations, resulting in a final penalty assessment of \$200.

CONCLUSIONS OF LAW

Item 1a

Construction Code 05.162(a)(1) provides:

Each employee in an excavation must be protected from cave-ins by an adequate protective system designed in accordance with (b) or (c) of this subsection except when:

(A) Excavations are made entirely in stable rock; or

(B) Excavations are less than four feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Ross Services does not dispute that the soil in the excavation was Type C soil under the Code. Nor does Ross Services dispute that the sides of the trench were not sloped to the required angle of 1-1/2:1 or otherwise protected from cave-ins. Ross Services argues, however, that sloping or shoring was not required under the Code because the trench was less than four feet deep when its employee briefly entered it to determine the location of a utility cable. Consequently, Ross argues, the trench was exempt from the Code requirements under subsection (B) quoted above.

From the limited documentation provided by the parties, we are unable to determine whether the trench was more or less than four feet deep from the top to the utility cable. However, we need not decide the exact depth of the trench for the purposes of resolving this alleged violation because we conclude that Ross Services does not qualify for the exemption from the Code's cave-in protection requirements under subsection (B). Specifically, Ross Services failed to demonstrate that a "competent person" as defined in Construction Code 05.160(b)(6) examined the trench and found no indication of a potential cave-in. This must be shown by an employer in order to be exempt from the Code requirements under subsection (B). Moreover, the fact that one of Ross' employees

nearly fell into the trench when the ground gave way beneath him is further evidence that the cave-in potential of the trench was not properly evaluated. Thus, even if the trench was less than four feet deep at the time Ross' employee was in it, Ross Services would still not qualify for an exemption from the Code's sloping/shoring requirements. Accordingly, the violation in Item 1a must be affirmed.

Item 1b

Construction Code 05.161(j)(2) provides:

Employees must be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection must be provided by placing and keeping such materials or equipment at least two feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The documentation of this alleged violation is seriously deficient. The four photographs offered by the Department (three of which were actually taken by Ross Services) do not significantly help us in determining whether the spoil piles were less than two feet from the edge of the trench. Two feet is not a long distance. Moreover, Ross Services vigorously denied this allegation and supported its position with credible employee testimony. We are thus left with the conflicting testimony of the compliance officer and the employer's witnesses, with no conclusive demonstrative evidence to resolve this conflict.

As with all alleged OSHA violations, the burden of proof and production of evidence is on the Department. Rothstein, Occupational Safety and Health Law § 408, at 409 (3d ed. 1990). When the Board is unable to determine whether a violation has been established -- either because of deficient documentation or for some other reason -- it has little choice but to dismiss the particular violation. Accordingly, because the Department failed to demonstrate by a preponderance of the evidence that spoil piles were placed less than two feet from the edge of the excavation, we must dismiss the violation alleged in Item 1b.

Item 1c

Construction Code 05.161(c)(2) provides:

Means of egress from trench excavations. A stairway, ladder, ramp or other safe means of egress must be located in trench excavations that are four feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

In order to prove a violation of this provision, the Department must prove by a preponderance of the evidence that the trench in question was at least four feet deep while an employee was inside of it. However, as noted during our discussion of Item 1a, we are unable to determine from the limited documentation and the conflicting testimony whether the trench was more than four feet deep at the time Ross' employee went into it to locate the utility cable. The photographs taken by Ross Services immediately after the inspection (Exhibit 4) suggest that the depth of the trench down to the utility cable was slightly less than four feet.

Because the Department has not met its burden of proof to show that the trench was four feet or more at the time an employee was inside of it, we must conclude that the safe egress requirement did not apply to Ross Services under these circumstances and therefore we dismiss Item 1c.

Item 1d

Construction Code 05.050(a)(1) provides:

Employees working in areas where there is a danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The principal dispute between the Department and Ross Services on this alleged violation was whether or not the affected employees were within the "swing radius" of the backhoe. Ross Services argues that neither employee was sufficiently close to the backhoe while it was in operation to be in any danger from falling or flying debris. However, it is not necessary for the Department to establish that employees were actually working within the "zone of danger" created by the backhoe. The Department need only prove that employees had actual or potential access to an area of potential danger. See Donovan v. Adams Steel Erection, Inc., 766 F.2d 804 (3d Cir. 1985); Rothstein, supra, § 103, at 141-42.

There is sufficient evidence to conclude that both of Ross Services' employees on foot had access to the "zone of danger" created by the backhoe. In particular, there is evidence that one of the employees jumped into the trench to locate the utility cable

while the backhoe was digging in the trench. Furthermore, the same employee went up to the backhoe while it was in operation to speak to the operator. Under these circumstances, we conclude that sufficient employee exposure has been demonstrated. In addition, Ross Services had several hard hats available in a vehicle at the worksite but has offered no explanation why employees were not required to wear them for excavation work with a backhoe. Accordingly, we conclude that a preponderance of the evidence establishes the violation alleged in Item 1d.

Classification Of Violations And Assessment Of Penalty

Under AS 18.60.095(b), a violation is considered "serious" if the violation creates in the place of employment a substantial probability of death or serious physical harm. Decisions of the federal OSHA Review Commission and the federal courts have consistently held that it is not necessary to prove that there is a substantial probability that an accident will occur. It is only necessary to prove that an accident is possible and that death or serious physical harm could result. See Rothstein, supra, § 313, at 333.

In the event of an accident involving the two code violations affirmed herein -- i.e., a trench cave-in or an employee without a hard hat injured by flying or falling material -- we agree with the Department that there is a substantial probability that serious physical harm or even death could result. For this reason, we believe the citation was properly classified as serious.

With regard to the Department's penalty assessment, we find that Ross Services was given the maximum reduction for company size, good faith and no prior history of violations. Accordingly, we find the assessed penalty of \$200 to be appropriate under the circumstances and find no reason to adjust it further.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board orders as follows:

1. Items 1a and 1d are AFFIRMED as a single "serious" citation.
2. Items 1b and 1c are DISMISSED.
3. The assessed monetary penalty of \$200 is AFFIRMED.

DATED this ____ day of _____, 1992.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: _____

Donald F. Hoff, Jr.
Donald F. Hoff, Jr.

By: _____

Lawrence D. Weiss
Lawrence D. Weiss

Board Chairman J.C. Wingfield did not participate in this decision.

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD
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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. Ross Services, Docket No. 91-893, filed in the office of the OSH Review Board at Juneau, Alaska, this 20th day of March, 1992.


Mary Jean Smith
OSH Review Board

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