

**STATE OF ALASKA
DEPARTMENT OF LABOR**

**OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
P.O. BOX 21149
JUNEAU, AK 99802**

STATE OF ALASKA, DEPARTMENT OF)	
LABOR AND WORKFORCE DEVELOPMENT,)	
DIVISION OF LABOR STANDARDS AND)	
SAFETY, OCCUPATIONAL SAFETY AND)	
HEALTH SECTION,)	
)	
Complainant,)	Docket No. 01-2171
)	Inspection No. 303696934
v.)	
)	
CHUCK'S BACKHOE, INC.,)	
)	
Contestant.)	
)	
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DECISION AND ORDER

I. INTRODUCTION

This matter involves occupational safety and health inspections at a worksite under the control of Chuck's Backhoe, Inc., in Anchorage, Alaska, on May 22 and May 23, 2001. As a result of the inspections, the State of Alaska, Department of Labor and Workforce Development (Department) issued two citations to Chuck's Backhoe, one for the May 22 inspection and one for the May 23 inspection, alleging violations of occupational safety and health standards and assessing monetary penalties.

Chuck's Backhoe contested both of the Department's citations and penalty assessments. The two citations were consolidated for hearing. A hearing was held before the Board in Anchorage on May 14, 2002. The Department was represented by Assistant Attorney General Toby N. Steinberger. Chuck's Backhoe was represented by Attorney M. Gregory Oczkus. At the outset of the hearing, Chuck's Backhoe gave notice that it was withdrawing its contest of the May 22 inspection (Docket No. 01-2170) and would pay the assessed penalty of \$1,500. Chuck's Backhoe also indicated that it still wished to contest the citation and penalty arising from the May 23 inspection (Docket No. 01-2171). Accordingly, the Board hearing addressed only the alleged violations and penalties related to the May 23 inspection.

The Department's citation contains four occupational safety and health code violations that were grouped together into a single "willful" violation with a proposed penalty of \$42,000. Item 1a alleges a violation of 29 CFR 1926.652(a)(1) for failure to provide adequate cave-in protection for employees working in a trench. Item 1b alleges a violation of 29 CFR 1926.651(j)(2) for failure to place excavated material at least two feet from the edge of a trench. Item 1c alleges a violation of 29 CFR 1926.651(j)(1) for failure to adequately protect employees from loose rocks or soil that could pose a hazard by falling or rolling into a trench. Item 1d alleges a violation of 29 CFR 1926.651(k)(1) for failure to have a competent person inspect excavated areas and protective systems prior to employee exposure.

At the Board hearing, both parties 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. On May 22, 2001, Department enforcement officer Dwayne Houck was assigned to conduct an occupational safety and health inspection of excavation work being performed by Chuck's Backhoe, Inc., at a residence located at 3913 Boniface Parkway, Anchorage, Alaska.

2. Chuck's Backhoe, Inc., is an excavation contractor and is owned by Chuck Ferrell. According to Ferrell, the well at the residence had gone dry and he had been hired to excavate a trench and install a copper water pipe to connect the water main on Boniface Parkway with the water line coming from the house. The total cost of the job was \$4,152.50. (Ex. H.) Chuck's Backhoe employed three persons to work on this project: Chuck Ferrell; Lorn Struthers, the excavator operator; and Eggley Masseuli, a laborer.

3. When Houck arrived at the work site, a trench had already been excavated by Chuck's Backhoe. The trench went from the water main on Boniface Parkway, under a concrete block wall, and then made a dogleg right turn to the area in front of the house where the well head was located and the water line came out of the house. The trench could not be dug in a straight line because there was a large boulder in the way. (Exs. 1, 2, 12, and E.)

4. The trench was approximately 60 feet long and up to 9 ½ feet deep in the area where the well head was located. Houck measured the vertical slope of the

trench walls at several places in this area and found the slope to be 86 degrees, 76 degrees and 73 degrees.

5. Houck observed laborer Masseuli working in the trench. Excavator operator Struthers was also present. Chuck Ferrell, the company owner, was not present when Houck arrived. According to Houck, there was no cave-in protection for anyone working in the trench. Houck described the soil in the trench as Type A or Type B and not stable rock. He noted that the area of the trench where the well head was located had previously been excavated. He also observed that the spoil piles of excavated material had been placed right up to the edge of the trench and there were loose rocks on the sides of the trench. (Exs. 1, 12.)

6. Based on his evaluation of the hazards in the trench, Houck issued a "red tag" notice prohibiting any further work in the trench until adequate cave-in protection was provided. Houck then went to inspect the work of a roofing contractor at the same location.

7. Sometime later, Chuck Ferrell returned to the work site and spoke to Houck about what precautions needed to be taken before work could resume in the trench. Houck said that additional shoring or shielding of the trench walls was necessary before work could continue. In Houck's opinion, sloping the sides of the trench was not an option because there were too many obstructions. Ferrell said that he had a trench box available and would use it in the trench. Houck left his card and told Ferrell to call him when the trench box was installed.

8. Later in the afternoon of May 22, Houck drove by the work site on his

way home. He saw that a metal trench box had been placed in the long end of the trench nearest to Boniface Parkway. (Ex. 1, Photos 22-24.) Chuck Ferrell was not at the work site. There was a ladder going into the trench outside one end of the trench box. Houck told the excavator operator that the ladder should be placed inside, not outside, the trench box. Due to the use of the trench box, Houck believed that there was no longer an imminent danger to employees working in the trench and therefore he removed the red tag notice.

9. Houck returned to the work site on the following day, May 23, 2001. When he arrived, both Ferrell and Masseurli were working in the well head area of the trench without any cave-in protection. (Ex. 2, Photos 1-4.) The trench box Houck had seen in the long part of the trench on the previous day would not fit in the well head area of the trench. Houck also did not see any removal of the spoil piles or loose rocks from the edge of the trench. (Ex. 2, Photos 5-12.) When he asked Ferrell why there was no cave-in protection in the well head area of the trench, Ferrell did not have an explanation and left the work site. Houck then left the work site for lunch and returned about 30 minutes later. When he returned, he saw that several plywood sheets had been placed along the inner walls of the trench and were braced with wooden beams. Ferrell was back in the trench, working on the water pipe connection. (Ex. 2, Photos 13-24.)

10. In Houck's opinion, the plywood shoring system used by Chuck's Backhoe was inadequate to meet safety code requirements because there were not enough cross-braces to support the plywood sheets and none of the cross-braces

were nailed to the plywood. Houck also believed there was a continuing danger from the accumulated spoil piles and loose rocks near the edge of the trench, although he did not observe any actual sloughing of this material into the trench. Houck cautioned Ferrell about continuing to work in the trench, but permitted him to finish the job as long as no other employees were allowed in the trench. This was based on Ferrell's representation that the corporation had been dissolved, meaning that Ferrell would be considered an owner/operator and not an employee protected by OSHA coverage. However, the tax records submitted by Chuck's Backhoe at the hearing indicate that the company was incorporated during 2001. (Exs. C and G.)

11. Chuck Ferrell has excavated in the Boniface Parkway area for more than 40 years and has done over 100 excavations in the area. According to Ferrell, the soil in the Boniface area is mostly compacted "hardpan" soil. He acknowledged that an engineer had tested the soil in the well head area of the trench and found it to be Type A and Type B soil. Regarding the spoil piles and loose rock, Ferrell did not believe these were dangerous because he had seen no sloughing of this material into the trench.

12. The Department grouped the alleged trenching violations into a single "willful" violation because they involved similar or related hazards that could increase the potential for injury resulting from an accident. The monetary penalty was assessed using the Department's penalty calculation guidelines. The violation was considered to be of "high gravity" based on a greater rather than lesser probability of an accident occurring and the high severity of an injury in the event of an accident.

This determination produced an initial unadjusted penalty of \$70,000. This amount was then reduced by 30% for employer size and by 10% for no history of prior violations in the preceding three years, resulting in a final assessed penalty of \$42,000. (Ex. 7 at 17-18.)

13. Chuck's Backhoe submitted income tax returns and other information regarding its financial condition. For the tax year 2000, Chuck's Backhoe had a taxable income of \$34,951. For the tax year 2001, Chuck Backhoe reported a loss of \$37,948, resulting in no taxable income.

III. CONCLUSIONS OF LAW

A. Proof of Violations

To establish a violation of an occupational safety and health standard, the Department must prove 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 violative condition with the exercise of reasonable diligence. See Mark A. Rothstein, *Occupational Safety and Health Law* §102 at 152 (4th ed. 1998); see also 8 AAC 61.205(i) (burden of proof for citations and penalties is on the Department by a preponderance of the evidence).

1. Item 1a

29 CFR 1926.652(a)(1) states:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section

except when:

- (i) Excavations are made entirely in stable rock; or
- (ii) Excavations are less than five feet (1.52m) in depth and examination of the grounds by a completion person provides no indication of any potential cave-in.

The OSHA excavation standard classifies soil in four categories in decreasing order of stability: stable rock, Type A, Type B and Type C. "Stable rock" means natural solid mineral matter that can be excavated with vertical sides and remain intact while exposed; no shoring or cave-in protection is required. However, Type A, Type B and Type C soils all require a cave-in protection system if the slope of the side walls exceeds the maximums specified in the standard.

Chuck's Backhoe argues that the trench was excavated in "stable rock" and therefore no special cave-in protection was required. It notes that the sides of the trench remained solid and intact during excavation, as illustrated by the excavator "teeth marks" on the trench walls. However, the weight of the evidence persuades us that the soil in the trench was mostly Type A and Type B soil requiring cave-in protection. Chuck Ferrell acknowledged that an engineer had examined the soil in the trench and found it to be Type A and Type B. Also, the hardpan soil described by Ferrell in the Boniface area is considered to be Type A. See 29 CFR 1926, Appendix A to Subpart P (Soil Classification). Moreover, if the soil has previously been disturbed, as was the case here in the well head area of the trench, it is classified as Type B or Type C soil. *Id.* There is no dispute that the trench walls exceeded the maximum allowable slopes under the excavation standard. See 29

CFR 1926, Table B-1 in Appendix B to Subpart P (Sloping and Benching). Therefore, Chuck's Backhoe was required to provide adequate cave-in protection for employees working in the trench.

We conclude that Chuck's Backhoe failed to comply with the standard by not providing cave-in protection for employees working in the trench on May 22 when enforcement officer Houck first inspected the job site. Chuck's Backhoe again failed to comply with the standard on May 23 when Houck returned and found no cave-in protection for employees working in the well head area of the trench. Based on Houck's un rebutted testimony, we further conclude that the plywood shoring installed by Chuck's Backhoe on May 23 was inadequate to comply with the requirements of the excavation standard. See 29 CFR 1926, Appendix C to Subpart P (Timber Shoring for Trenches). There is no dispute that one or more employees of Chuck's Backhoe were working in the well head section of the trench and were exposed to the hazards created by the code violations. It is also uncontroverted that Chuck Ferrell was an experienced excavation contractor and was aware of the OSHA excavation standards. For the foregoing reasons, we conclude that the Department has proved the violation alleged in Item 1a of the citation.

2. Items 1b and 1c

29 CFR 1926.651(j)(2) states:

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or

equipment at least 2 feet (.61m) 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.

Similarly, 29 CFR 1926.651(j)(1) states:

Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

The Department's photographs clearly illustrate that there were spoil piles and loose rock within two feet from the edge of the trench. (Ex. 1, Photos 1, 9, 13-16, 25, 27 and Ex. 2, Photos 5-12.) Chuck's Backhoe argues that the spoil piles and any loose dirt or rocks were not dangerous because there was no observed sloughing of these materials into the trench. The excavation standard, however, does not require actual sloughing of spoil pile materials or loose rock to establish a violation. The standard is meant to prevent hazards from being created. The fact that there was no observed sloughing of materials into the trench does not excuse an employer from the requirements of the standard. Accordingly, we conclude that the Department has proved the violations alleged in Items 1b and 1c of the citation.

3. Item 1d

29 CFR 1926.651(k)(1) states:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person

for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

A “competent person” means “one who is capable of identifying existing and predictable hazards in the surroundings, of working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” 29 CFR 1926.650(b). We believe that Chuck Ferrell, as the owner of Chuck’s Backhoe and an experienced excavation contractor, had the authority and knowledge to identify excavation hazards and ensure compliance with OSHA excavation requirements. Despite this, Ferrell excavated the trench without providing any type of cave-in protection before the OSHA inspector arrived. Ferrell was not even present when the inspector first arrived and saw an employee working in the unprotected trench. Even after the inspector explained the trenching violations to Ferrell, Ferrell simply installed a trench box in one section of the trench but failed to provide any cave-in protection for the well head area of the trench where employees were also working. It was only after the OSHA inspector returned on the following day (May 23) that Chuck’s Backhoe made an effort to shore up the sides of the trench in the well head area. Even this effort, as Houck explained, fell short of meeting OSHA requirements. Under these circumstances, we find that Chuck’s Backhoe failed to have a competent person perform an adequate inspection of the trench for hazardous

conditions before allowing an employee to go in the trench. Accordingly, we conclude that the Department has proved the violation alleged in Item 1d of the citation.

B. Willfulness

We next consider whether the cited violations were properly classified as “willful.” The Alaska OSHA Act, like its federal counterpart, does not define a willful violation.¹ Chuck’s Backhoe contends that the correct classification of the violation should be “serious” and not “willful.” Citing *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200 (3rd Cir. 1974), *aff’d on other grounds*, 430 U.S. 442 (1977), Chuck’s Backhoe argues that a violation is only willful if it involves an element of bad faith or a deliberate flaunting of OSHA requirements. However, we have previously rejected such a narrow interpretation of willfulness and have adopted the approach taken by the federal Occupational Safety and Health Review Commission (OSHRC) and the great majority of federal courts, including the U.S. Ninth Circuit Court of Appeals which covers Alaska.² Under the majority view we have adopted, a violation is willful

¹ AS 18.60.095(a) provides:

An employer who wilfully or repeatedly violates a provision of AS 18.60.010-18.60.105 that is applicable to the employer or a standard or regulation adopted under AS 18.60.010-18.60.105 may be assessed by the Commissioner a civil penalty of not more than \$70,000 for each violation. Except when a settlement is negotiated, the Commissioner shall assess a minimum penalty of \$5,000 for a violation under this subsection that was committed wilfully.

² See, e.g., *Ketchikan Pulp Co.*, Docket No. 94-1017, Decision and Order at 28 (Alaska OSH Rev. Bd. 1995).

if it is committed voluntarily with intentional disregard or demonstrated plain indifference to OSHA requirements. See, e.g., *National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 313-16 (9th Cir. 1979); *Asbestos Textile Co., Inc.*, 12 OSHC 1062, 1063 (OSHRC 1984); see generally Rothstein, §315 at 371-77. No showing of malicious intent is necessary. *National Steel*, 607 F.2d at 314. A conscious, intentional, deliberate or voluntary decision is properly described as willful, regardless of the employer's venial motive. *Intercounty Construction Co.*, 522 F.2d 777, 779-80 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976). Regardless of any good faith belief that the work area is safe, if an employer knowingly chooses not to comply with OSHA requirements, this is a willful action in violation of the law. *Id.*; see also, *Reich v. Trinity Industries, Inc.*, 16 F.3d 1149, 1152-54 (11th Cir. 1994).

In this case, the evidence compels us to conclude that Chuck's Backhoe knowingly and consciously disregarded OSHA requirements. On May 22, enforcement officer Houck conducted his first inspection of the work site and specifically informed Chuck Ferrell of the trenching violations and discussed options for complying with OSHA requirements. Ferrell installed a trench box in a portion of the trench nearest the street but made no attempt to provide cave-in protection for the area near the well head where he and another employee were working to connect the water pipe. This was the most hazardous area of the trench due to the previously disturbed soil. Also, Ferrell made no apparent effort to move the existing spoil piles or loose rocks away from the edge of the trench. It appears to us that

Ferrell consciously ignored the enforcement officer's instructions and took a calculated risk to continue working in the trench without adequate protection in the well head area of the trench.

We do not accept Chuck's Backhoe's contention that its use of the trench box and installation of plywood shoring amounted to good faith efforts to comply with the standard. The trench box was effective protection only in the long section of the trench and was not used in the well head area which had previously disturbed soil. Moreover, the plywood shoring was installed only after the enforcement officer's second inspection and was still inadequate to comply with OSHA requirements. We do not believe Chuck's Backhoe made a reasonable good faith effort to comply with the excavation standard and instead knowingly chose to expose employees to continued violations even after the enforcement officer had explained the OSHA requirements.

The circumstances here are similar to other OSHA trenching cases where willful violations have been found. *See, e.g., Calang Corp.*, 14 OSHC 1789 (OSHRC 1990) (employer's failure to slope or otherwise support sides of trench and failure to store excavated material at least two feet away from edge of trench were willful in view of the employer's intentional disregard of OSHA trenching standards even though the compliance officer explained the requirements of the standard before and after the trench operation began); *D.A. and L. Caruso, Inc.*, 11 OSHC 2138 (OSHRC 1984) (failure to support trench walls before allowing employees to enter trench was willful where employer had been cited previously for violation of same standard,

OSHA inspector had explained trenching requirements to employer's engineer about four months before inspection, and its job superintendent knew the requirements and the need for trench support).

For the foregoing reasons, we conclude that Chuck's Backhoe's violation of the cited standards was willful.

C. Penalty

Under AS 18.60.095(a), an employer who wilfully fails to comply with OSHA requirements may be assessed a civil penalty of at least \$5,000 up to a maximum of \$70,000 for each violation. In assessing 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 guidelines set forth in the Field Inspection Reference Manual (FIRM). 8 AAC 61.140(c). The Review Board, however, is not bound by the FIRM guidelines in reviewing a penalty assessment. 8 AAC 61.140(h).

Based on its assessment of the probability of an accident and the severity of any resulting injury, the Department judged the cited violations to be of high gravity, resulting in an initial unadjusted penalty of \$70,000. (Ex. 7 at 18.) Chuck's Backhoe was credited with the maximum reduction of 30% for small company size (1-25 employees) and an additional 10% for no prior violations in the preceding three years, resulting in a final assessed penalty of \$42,000.

Chuck's Backhoe argues that several mitigating circumstances exist to justify

reducing the proposed penalty. First, the company argues that the gravity of the violation was not great because there were only two employees exposed to the hazard for a very short time and the probability of an accident was minimal. However, we do not agree that the cited violations were of low gravity. Our review of the testimony and the photographs persuades us that there was a greater rather than a lesser probability of an accident given the depth of the trench, the previously disturbed soil, the weight of the spoil piles at the edge of the trench, the impact of the heavy equipment at the work site, the proximity of traffic on Boniface Parkway (a major road), and the fact that the trench was open for approximately 24 hours. We also agree with the Department that in the event of a trench collapse or cave-in, an employee caught in the trench would likely sustain serious bodily harm. Thus, we concur that the cited violations were of a high gravity.

Chuck's Backhoe next argues that the penalty should be reduced for its good faith efforts to comply with the compliance officer's instructions by using a trench box and installing plywood shoring in the trench. For OSHA penalty purposes, however, "good faith" refers to the overall quality of the employer's safety and health program, not to the employer's compliance with OSHA requirements after violations have been found. See Ex. 7 at 14. No adjustment is made for good faith in the event of a willful violation. *Id.* at 18. Here we do not believe that Chuck's Backhoe had a good overall safety program. One example of this is that Chuck Ferrell told inspector Houck during their first discussion that he had a trench box available parked on a nearby street, yet an employee was already working in the trench and

the trench box was not being used. The fact that Chuck's Backhoe only began to take actions to come into compliance with OSHA requirements after multiple visits by the enforcement officer does not warrant any penalty reduction for good faith.

Finally, Chuck's Backhoe asks for a penalty reduction based on its small company size and poor financial condition. Although the Department reduced the penalty by the maximum allowable amount for a willful violation under the FIRM guidelines, we believe a further penalty reduction is justified by the employer's size and financial condition. According to its tax records for 2001, Chuck's Backhoe employed only three persons and had no taxable income. While we find that the cited violations were willful and exposed employees to high severity hazards, we are also mindful of the significant impact that the assessed penalty would have on a small business like this one. Therefore, we exercise our discretion to reduce the proposed penalty from \$42,000 to \$21,000. To further lessen the financial impact, we also recommend that the Department consider a reasonable installment plan for the payment of the penalty.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that Citation 1, Items 1a through 4a are AFFIRMED as a single “willful” violation, but the proposed monetary penalty is reduced to \$21,000.

DATED this 14th day of October, 2002.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

/s/
By: _____
Carla Meek, Member

/s/
By: _____
Cliff Davidson, Member

Sharp, Chair, concurring and dissenting in part:

I concur with this decision in all respects except for the penalty reduction. The Department already reduced the proposed penalty by the maximum allowable amount under the OSHA penalty calculation guidelines. Although we are not bound by these guidelines, in my judgment no further penalty reduction is warranted by the employer’s size or financial condition.

/s/
By: _____
Timothy O. Sharp, Chair