

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

P. O. BOX 1149, JUNEAU, ALASKA 99802

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
vs.)
)
WALSKY CONSTRUCTION,)
)
Contestant.)
)

Docket No. 87-709
Inspection No. Ku-9353-383-87

DECISION AND ORDER

Introduction

This matter came before the board for a hearing on March 2, 1988 in Anchorage, Alaska. The State of Alaska, Department of Labor, Division of Labor Standards and Safety, Occupational Safety and Health Section (hereafter "the Department") was represented by Assistant Attorney General Peggy Mentele. Walsky Construction ("the contestant") was represented by its owner Hy Walsky. The record was deemed closed at the conclusion of the hearing.

Due to a prior business commitment, board member J.C. Wingfield was not present for the hearing. The parties stipulated that the matter would proceed to a decision without the participation of Member Wingfield.

At issue are two citations issued to the contestant by department compliance officer Dick Kukowski as a result of an occupational safety inspection which he performed on May 12, 1987 at an aircraft hangar on Elmendorf Air Force Base, Alaska. The contestant was engaged in retarring the hangar roof at that time. The citations allege that the contestant violated two separate provisions of the Alaska construction Code. Citation No. 1 states that the contestant failed to provide adequate fall

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protection for its employees who were working on the roof. [CC 05.240 (d)(1)] The second cited violation alleges that contestant's employees who were working with hot tar were not provided "appropriate personal protective equipment". [CC 05.030(j)(1)] Citation No. 1, cited as "Serious", carries a proposed penalty of \$300.00. There is no penalty assessed for Citation No. 2.

SUMMARY OF FACTS

Kukowski, who has been a compliance officer for the department for more than 7 years and who has conducted, by his own testimony, "more than 800 inspections", testified that during the course of a complaint inspection of the contestant's worksite he observed employees working on the barrel roof who were not protected from a fall - especially at the edge of the roof. He estimated the vertical distance from the crest of the roof to the ground to be 100 feet. According to the department adequate fall protection consists of at least one of the following: safety lines, guard rails, warning monitors, platforms, nets, or "some other recognized method of fall protection." Kukowski did not observe any of those at the worksite. He stated that he brought the subject of fall protection to the attention of Walsky at the time and that Walsky "somewhat reluctantly" agreed to erect a guard rail, which he did on the next day. It is Kukowski's opinion that any and all of the previously mentioned safety mechanisms were feasible to be installed or utilized at this particular worksite.

Kukowski also testified that he observed that none of the roofers working on the hot tar roof were wearing "appropriate" protective footgear. Two of the laborers were wearing street shoes, the third was wearing tennis shoes. The department maintains that soft, low cut shoes do not provide protection against burning by hot tar.

In addition to the testimony of the inspecting officer, the department introduced an affidavit signed by Sgt. Charles Reek, ground safety technician, USAF establishing that he, too, had observed unguarded employees working on the hangar roof. (It was apparently Sgt. Reek's observations which led to the department's "complaint" inspection.)

Finally, the department submitted photographic exhibits taken by Kukowski during his inspection. These photographs depict the hangar and the tarred roof.

Walsky vehemently objects to the department's inspection and safety enforcement procedures. He maintains that "no job is 100% violation free" and contends that his company is safer than 95% of other companies working today. Walsky testified that he has a "good safety record" and that he has "no time to read every regulation". Walsky argues, without reference to any specific case authority in support of his position, that the citations and penalties assessed in this case are unconstitutional.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

We find the evidence in support of the department's citations to be undisputed. There is no doubt, based upon the clear and convincing testimony of the inspecting officer as supported by the unchallenged affidavit testimony of Sgt. Reek and the photographic exhibits, that contestant's employees were, in fact, working on the hangar roof without either adequate fall protection or appropriate personal protection against hot tar burns. We find that the department has satisfied its burden of proof as to those factual matters by a preponderance of the credible and admissible evidence. Accordingly, we conclude that the citations at issue should be affirmed.

With respect to the penalties, we affirm the penalty which was assessed for Citation No. 1. We believe that the

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violation was properly cited as a "serious" violation and that the department properly fixed the initial, unadjusted penalty at \$600.00. We further find no grounds to take issue with the department's decision to reduce that unadjusted penalty to \$300.00 based upon the size of the contestant's company and the "good faith" which contestant exercised in promptly abating the hazard.

We are not convinced, however, that no penalty should have been issued for Citation No. 2. In our experience the hazard which exists from working on a roof with hot tar is considerable. Indeed, in our opinion, hot tar burns are precisely the type of serious bodily harm about which our legislature was concerned when it defined a "serious" violation as

Sec. 18.60.095(b) . . . For purposes of this subsection, a serious violation is considered to exist if the violation creates in the place of employment a substantial probability of death or serious physical harm. . . .

We believe the penalty assessment mechanism is one of the most effective means of insuring future attention to areas of past neglect. In this instance it would not have been at all difficult or costly for contestant to have instructed its employees to wear heavy boots or other types of footgear which would offer adequate protection from severe burning in this case of exposure to hot tar. Perhaps paying a fine now will help contestant remember to be more cautious in the future -- and in any case the penalty is smaller than the costs which the employer, or its workers' compensation carrier, would bear in the event one of contestant's employees required medical care for hot tar burns.

Concerning the contestant's other "defenses" we note two points. First, as we have previously held in numerous

instances, this board is not empowered to address the constitutionality of Alaska's Occupational Safety and Health Act and the regulations promulgated thereunder. That is a matter for the courts of this state. Second, even if we were to agree with contestant that "no job is 100% safe" -- which we most assuredly do not -- we certainly cannot condone contestant's rather cavalier attitude concerning compliance with state safety and health provisions. Contestant has -- and had -- available to it any number of ways of dealing with allegedly unfair or burdensome safety regulations. (Not the least expeditious of which is by contacting the department's own Voluntary Compliance section.) But being too busy to read the laws of the state amounts, in our opinion, to more than mere neglect. It rises to the level of callous intent.

ORDER

1. Citation No. 1 is AFFIRMED.
2. Citation No. 2 is AFFIRMED.
3. Penalty of \$300.00 for Citation No. 1 is AFFIRMED.
4. Contestant shall pay a \$100.00 penalty for Citation

No. 2.

DATED this 12th day of June, 1988.

By:

Guy Stringham
Guy Stringham

By:

Don Hoff
Don Hoff

Alaska Department of Labor
 Division of Labor Standards and Safety
 Occupational Safety and Health Section

P.O. Box 7022
 Anchorage, AK 99503

Citation and Notification of Penalty

EXHIBIT A

3. Issuance Date 05/29/87	4. Inspection Number 002524965
5. Reporting ID 1050210	6. CO ID K9353
7. Optional Report No. 383-87	8. Page No. 1 of 2

The violation(s) described in this Citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below

10. Inspection Date(s):

5/12/87 - 5/12/87

11. Inspection Site

Aircraft Hanger across from base safety office
 Elmendorf A.F.B., AK 99506

Penalties Are Due Within 15 Working Days of Receipt of This Notification Unless Contested (See enclosed Booklet)

This Section May Be Detached Before Posting

1. Type of Violation(s)	2. Citation Number
Serious	01

9. To:

Waisky Construction Company
 and its successors
 251 Post Road
 Anchorage, AK 99501

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and State holidays) whichever is longer. This Citation describes violations of the AS 18-60. The penalty(ies) listed below are based on these violations. You must correct the violations referred to in this Citation by the date listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and State holidays) from your receipt of this Citation you mail a notice of contest to the Alaska Department of Labor Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

12. Item Number	13. Standard, Regulation or Section of the Act Violated	14. Description	15. Date by Which Violation Must Be Abated	16. Penalty
	05.240(d)(1): General Provisions.	During the performance of tilt-up roofing work on low-pitched roofs with a ground to eave height greater than 16 feet (4.9 meters), employees engaged in such work shall be protected from falling from all unprotected sides and edges of the roof.	Immediately Upon Receipt	300.00
); By the use of a motion-stopping-safety system (MSS system); or		
); By the use of the warning line system erected and maintained as provided in paragraph (d)(3) of this section and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system, where mechanical equipment is not being used or stored, the use of safety monitoring system; or		
); By the use of safety monitoring system on roofs fifty feet or less in width (see Appendix A), where mechanical equipment is not being used or stored. When a		

7. Chief *[Signature]* 18. Last Pg

NOTICE TO EMPLOYEES — The law gives an employee or representative the opportunity to object to any abatement date set for a violation if he believes the date to be unreasonable. The contest must be mailed to the Alaska Department of Labor Office at the address shown above within 15 working days (excluding weekends and State holidays) of the receipt by the employer of this citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL — The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Law. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the Alaska Department of Labor Office at the address shown above.

Total Penalty for This Citation
 Make Check or Money Order Payable to: "DOL-LS&S"
 Indicate Inspection Number on Remittance

EMPLOYER RESPONSIBILITIES AND COURSES OF ACTION — The enclosed booklet outlines employer responsibilities and courses of action and should be read in conjunction with this notification.

Alaska Department of Labor
 Division of Labor Standards and Safety
 Occupational Safety and Health Section

P.O. Box 7022
 Anchorage, AK 99503

Citation and Notification of Penalty

EXHIBIT A

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5. Reporting ID 1050210	6. CO ID K9353
7. Optional Report No. 393-87	8. Page No. 2 of 2

The violation(s) described in this Citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below.

10. Inspection Date(s):

5/12/87 - 5/12/87

11. Inspection Site:

Aircraft Hanger across from base safety office
 Elmendorf A.F.B., AK 99506

1. Type of Violation(s)	2. Citation Number
Serious	01

9. To:

Walsky Construction Company
 and its successors
 251 Post Road
 Anchorage, AK 99501

Penalties Are Due Within 15 Working Days of Receipt of This Notification Unless Contested (See enclosed Booklet)
 This Section May Be Detached Before Posting

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2. Item Number	14. Description	15. Date by Which Violation Must Be Abated	16. Penalty
	<p>afety monitoring system is used, the person doing the monitoring must be on the same roof as and within visual sighting distance of the employees, and must be close enough to verbally communicate with the employees.</p> <p>For example: The employer did not provide guardrails, a motion stopping system, or a safety monitor system to protect employees from falling off the hanger roof while engaged in roofing activities.</p>		

Chief *[Signature]*

18.
\$ 300.00

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Total Penalty for This Citation
 Make Check or Money Order Payable to: "DOL-LS&S"
 Indicate Inspection Number on Remittance

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Alaska Department of Labor

Division of Labor Standards and Safety
Occupational Safety and Health Section

P.O. Box 7022
Anchorage, AK 99503

Citation and Notification of Penalty

EXHIBIT A

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5/12/87 - 5/12/87

11. Inspection Site:

Aircraft Hanger across from base safety office
Elmendorf A.F.B., AK 99506

1. Type of Violation(s)	2. Citation Number
Other	02

9. To:

Walsky Construction Company
and its successors
251 Post Road
Anchorage, AK 99501

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2. Item Number	3. Standard, Regulation or Section of the Act Violated	14. Description	15. Date by Which Violation Must Be Abated	16. Penalty
05.030(j)(1)		The employer is responsible for requiring the wearing of appropriate personal protective equipment in all situations where there is an exposure to hazardous conditions or where this subchapter indicates the need for using such equipment to reduce the hazards to the employees. For example: An employee engaged in laying roofing felt and hot asphalt was wearing soft tennis shoes.	Immediately Upon Receipt	0.00

17. Chief *Dennis L. Smith*

18. \$ 0.00

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