STATE OF ALASKA, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF LABOR STANDARDS AND SAFETY, OCCUPATIONAL SAFETY AND HEALTH SECTION,	)	
Complainant,	)	Docket No. 03-2188
	)	Inspection No. 303702369
v.	)	
PAUL WELTON,	)	
Contestant.	)	

DECISION AND ORDER

I. INTRODUCTION

This matter arises from an occupational safety and health inspection at a worksite under the control of Paul Welton (Welton) in Fairbanks beginning on August 19, 2002. As a result of the inspection, the State of Alaska, Department of Labor and Workforce Development (Department) issued a citation to Welton alleging a violation of 29 CFR 1926.652(b)(1)(I) for not adequately sloping the sides of an excavation. The alleged violation was classified as "serious" and a monetary penalty of $2,800 was assessed.

Welton contested the Department's citation and penalty assessment. A hearing was held before the Board in Fairbanks on August 12, 2004. The Department was represented by Assistant Attorney General Toby N. Steinberger. Paul Welton represented himself. 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. On August 19, 2002, Department compliance officer Patrick Laakso was assigned to conduct an occupational safety and health (OSHA) inspection of a construction worksite at 716 Loftus Road in Fairbanks, Alaska.

2. The worksite was located on property owned by Paul Welton. Welton was acting as an owner-builder and had a permit to construct a residential duplex at the site.

3. Prior to the OSHA inspection, Welton hired a subcontractor, Interior Excavation and Trucking, Inc., to excavate the site on or about August 13 in preparation for pouring a foundation. (Exhibit C.) According to Welton, the excavator operator, Roy Willis, warned him that the excavation site might be inspected by OSHA. Welton, who had previous experience with an OSHA inspection at a different location, instructed Willis to make the excavation in compliance with applicable safety codes.

4. Welton hired several day laborers to work in the excavation to build the footings for the concrete foundation. The laborers were hired by Welton through an advertisement in the newspaper. (Exhibits 11, 15 and 18.)

5. When compliance officer Laakso arrived at the worksite on August 19, he observed two of Welton's employees working in the excavation preparing the footings for the foundation near the side walls of the excavation. The excavation was approximately 60 feet long and 40 feet wide. Laakso measured the depth of the excavation at approximately 6 feet deep on the north side and approximately 8 feet deep on the south side. Using an angle finder, he measured the slopes of the excavation walls at between 60 and 70 degrees; the applicable OSHA code requires excavations to be sloped at an angle not steeper than 34 degrees from the horizontal, i.e., the bottom of the excavation. Laakso took photographs of his observations, including the employees working next to the excavation walls preparing the footings for the foundation. (Exhibits 3, 12, 17 and B.)

6. Paul Welton arrived at the worksite as Laakso was taking photographs of the excavation. Laakso informed Welton that the walls of the excavation had to be sloped to 34 degrees from the horizontal to avoid endangering the workers in the excavation. After some discussion, Welton refused to permit Laakso to continue the inspection, whereupon Laakso left the site.

7. On August 20, Welton, hired another subcontractor, Mountain Construction, to perform additional excavation work at the site. (Exhibit D.)

8. On August 21, the Department applied for and obtained an inspection warrant from Superior Court Judge Richard Savell. (Exhibit 20.) On the same date, compliance officer Laakso returned to the worksite with the warrant and attempted to continue his inspection. When Welton received the warrant, he became agitated and refused to permit inspection without the presence of his engineer, David Lanning. Laakso offered to wait for Lanning to come to the worksite, but Welton insisted that Laakso make an appointment with Lanning and refused to allow Laakso to proceed with the inspection. At this point Laakso decided to leave the worksite before the situation became confrontational. During this visit Laakso took additional photographs. (Exhibit 4.)

9. On August 22, Laakso contacted civil engineer David Lanning. Lanning told Laakso that although he had worked with Welton in the past, he was not involved in the Loftus Road project and was not in a position to approve the excavation there. Lanning had previously been asked by Welton to come to the excavation site, but Lanning told Welton that he was not sufficiently familiar with the OSHA code requirements and referred Welton to another engineer.

10. Laakso returned to the excavation site later on August 22, accompanied by Assistant Attorney General Randy Olsen. Welton was not present. Two of Welton's employees were siting on a stack of lumber in front of the trailer at the worksite, but when Laakso and Olsen arrived they quickly scrambled into the nearby woods. Since the inspection warrant was required to be executed on or

before August 22, Olsen advised Laakso to complete his inspection even though there was no employer or employee representative present. Upon observation of the excavation, Laakso noticed that additional sloping and benching had been done on the excavation but the excavation walls were still not in compliance with the 34 degree requirement in the code. Laakso measured the angle of the south wall of the excavation at between 63 and 70 degrees, and the angles of the other walls at between 40 and 45 degrees. Laakso took additional photographs to document his observations. (Exhibit 5.)

11. On August 24, Laakso received a message from the manager from the NAPA Auto Parts store adjacent to Welton's property that Welton and three employees were working in the excavation. Laakso went to the worksite where he saw employees working in the excavation and took some more photographs. (Exhibit 6.) He notified his supervisor, acting chief of enforcement Dwayne Houck, of the situation. Houck stated that because of Welton's previous refusals to cooperate in an inspection and the fact that employees were still working in the excavation, it might be necessary to obtain another inspection warrant due to an imminent danger situation. (Exhibit 12.)

12. On August 27, the Department obtained a second inspection warrant from Judge Savell. (Exhibit 12.) On the same date, the Department prepared an imminent danger "red tag" notice that no further work could be done in the excavation until the excavation walls were sloped at least 34 degrees or the

excavation was designed and approved by a registered professional engineer. (Exhibit 13.)

13. On August 28, Laakso returned to the worksite accompanied by Roman Gray, an industrial hygiene compliance officer, and Tom Scanlan, a trainee inspector. Two employees were working in the excavation, but Paul Welton was not present at the site. When Laakso asked the employees to give their names, they declined to answer and left the site shortly thereafter. Laakso and the other inspectors waited for Welton to show up at the site but he never appeared. The inspectors took additional photographs and videotaped the site. According to Laakso, the excavation walls were still not adequately sloped to meet code requirements. The forms for the footings were about one foot away from the wall on the south side of the excavation which was approximately 8 feet deep. Laakso observed footprints around the outside of the footings (i.e., in the space between the footings and the excavation walls) and also noticed that vertical steel stakes had been inserted around the perimeter of the footings. (Exhibits 7 and 9.)

14. On August 29 Laakso, accompanied by a state trooper, placed the “red tag” warning notice at the worksite. However, Laakso was unable to serve the second inspection warrant because Welton was not at the worksite.

15. On August 29, Welton contacted Clark Milne, a registered professional engineer with Nortech in Fairbanks. Based on Milne’s advice, Welton directed his subcontractor Interior Excavation to return to the worksite and perform additional dirt

removal and sloping of the sides of the excavation. (Exhibit E.)

16. In a letter dated August 30, Milne concurred with the Department's findings that the soil at the excavation should be considered Type C soil and that the slopes of the excavation were initially steeper than the regulatory requirement of 34 degrees from horizontal. However, after the additional sloping work done on August 29, Milne believed the excavation was safe for employees and gave his written professional approval of the excavation. (Exhibit 14.)

17. Compliance officer Laakso returned to the worksite on August 30 and viewed the additional sloping work on the sides of the excavation. Based on the professional approval letter from engineer Milne, Laakso determined that the excavation was now adequately in compliance with code requirements.

18. As a result of Laakso's inspection, the Department issued a citation to Welton alleging a violation of 29 CFR 1926.652(b)(1)(I) for not adequately sloping the excavation at the worksite. The violation was classified as "serious" based on the probability of an accident and the resulting severity of an injury. Laakso noted that the soil in the excavation was not particularly cohesive and that there had been some sloughing of soil on the north side of the excavation. He also noted that the footings where employees were working were very close to the walls of the excavation and in the event of a collapse, employees could be trapped between the excavation wall and the footings. Laakso further believed that the presence of standing water in the excavation made conditions more dangerous and an accident

more likely.

19. Under the Department's penalty calculation guidelines, the initial unadjusted penalty for this violation was $7,000. Welton was given the maximum 60 percent reduction for company size based on the small number of employees. Welton was not given any penalty reduction for history or good faith, due to his prior OSHA record, his failure to promptly correct or abate the excavation violation, and the quality of his overall safety program. After the penalty reduction, the Department's final assessed penalty was $2,800. (Exhibit 18.)

III. CONCLUSIONS OF LAW

A. Proof of Violation

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 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(l) (burden of proof for citations and penalties is upon the Department by a preponderance of the evidence).

29 CFR 1926.652(a)(1) states:

> *Protection of employees in excavations.* 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 competent person provides no indication of a potential cave-in.
>
> 29 CFR 1926.652(b)(1) states:
>
> *Design of sloping and benching systems*. The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3); or, in the alternative, paragraph (b)(4), as follows:
>
> *Option (1) - Allowable configurations and slopes*.
>
> (I) Excavations shall be sloped at an angle not steeper than one and one- half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.
> (ii) Slopes specified in paragraph (b)(1)(I) of this section shall be excavated to form configurations that are in accordance for slopes shown for Type C soil in Appendix B to this subpart.

Our review of the evidence leads us to conclude that the cited standard applies to Welton's excavation and that Welton failed to ensure compliance with the cited standard. As clearly demonstrated by the Department's photographs, videotape and witness testimony, the excavation was more than five feet deep and none of the walls were sloped to the required angle of 34 degrees from horizontal. On compliance officer Laakso's initial inspection, he measured the excavation walls at

angles of up to 70 degrees from horizontal, creating a significant potential for cave-in or collapse. The evidence is undisputed that the soil at the excavation was Type C soil which is the least cohesive soil under the applicable standard and requires the greatest degree of sloping. *See* 29 CFR 1926, Subpart P, Appendix B at Figure B-1.3a. (Exhibit 2 at p. 4.) Welton's own engineer concurred that the excavated soil should be considered as Type C and that the excavated slopes were steeper than the regulatory requirement of 1.5:1 (34 degrees). Moreover, the limited benching performed by Welton's excavation contractor is not acceptable for Type C soil under the applicable code requirements.

We also conclude that one or more of Welton's employees were exposed to the hazardous condition in the excavation and that Welton was fully aware of the excavation. The evidence establishes that Welton hired several day laborers to work in the excavation and set the footings for the foundation. Welton also had been warned by his excavation contractor about the possibility of an OSHA inspection. Under these circumstances, we find that the Department has met its burden of proof to establish a prima facie violation of the cited standard.

B. Employer Defenses

Welton argues that he should not be held responsible for this violation because he hired a licensed excavation contractor and instructed him to make the excavation "OSHA-proof." However, it is well established in OSHA law and in our prior decisions that where an employer has control over a worksite and has

employees exposed to violative conditions, the employer will be liable for OSHA violations even if the violations were caused or created by a subcontractor. *See, e.g.*, *Ketchikan Pulp Company*, Docket No. 94-1017, Decision and Order at 14-17 (AKOSH Rev. Bd. 7/17/95); *see generally,* Rothstein at §§ 161-169. In this case, Welton owned the property and was acting as the general contractor for the construction project. There is no question that Welton had complete authority over the entire worksite and hired employees to work in the excavation. Therefore Welton had a legal responsibility to make sure his employees were protected in compliance with OSHA requirements. Under OSHA multi-employer principles, two or more employers may liable for the same violative condition. *See* Rothstein § 162, *citing Paramount Plumbing & Heating Co.*, 5 OSHC 1459 (1977). It is irrelevant whether another employer was cited or could have been cited for the same violation. *See* Rothstein § 162, *citing Central of Georgia Railroad Co. v. OSHRC*, 576 F.2d 620, 625 (5th Circuit 1978).[1] Accordingly, an owner-builder whose employees are exposed to an OSHA violation may be liable for the violation and cannot avoid liability by delegating or contracting responsibility to another employer. If the cited employer lacks sufficient expertise to determine compliance with OSHA standards, it is incumbent on that employer to consult someone with sufficient expertise, e.g., a

[1] Compliance officer Laakso testified that Welton's excavation subcontractor was not cited for this violation because he did not see any of the subcontractor's employees in the excavation; if he had observed any of the subcontractor's employees in the excavation, the subcontractor would have been cited in addition to Welton.

registered professional engineer, to ensure compliance with applicable safety codes. Under Alaska's OSHA law, each employer has the primary responsibility to comply with applicable safety and health regulations and to provide a safe workplace for its employees. AS 18.60.075.[2]

Welton also argues that the Department violated his procedural and due process rights by conducting "secret" inspections without any employer or employee representative; by bringing a state trooper and an assistant attorney general to the worksite; and by refusing to wait until Welton's engineer could come to the worksite. We find no merit to any of these arguments. AS 18.60.087 provides that employer and employee representatives shall be given an opportunity to accompany the Department's representative during the physical inspection of the workplace. We find that compliance officer Laakso adequately complied with this provision by giving Welton and his employees ample opportunity to participate in the inspection, but Welton refused to permit the inspection to go forward on at least two occasions and his employees repeatedly left the worksite as soon as the Department's inspector appeared (presumably under Welton's instructions). Moreover, we find no improper deception by the Department. Pursuant to the inspection warrant issued by the court after Welton refused inspection, the Department's compliance officer attempted to perform his inspection during regular working hours and in a

[2] We express no opinion in this case as to whether Welton might have recourse against either of the subcontractors hired to perform excavation work.

reasonable manner. However, Welton did not cooperate with the inspection, causing the Department to obtain a second inspection warrant and issue an imminent danger "red tag" notice. Under these circumstances, it was entirely appropriate for the Department's inspector to be accompanied by a state trooper and/or an assistant attorney general to facilitate the inspection. Further, we find that compliance officer Laakso afforded Welton a reasonable opportunity to bring his engineer to the worksite by offering to wait up to one hour for the engineer to arrive. When Laakso later contacted the engineer (David Lanning), the engineer indicated that he was not involved in the excavation. For the preceding reasons, Welton's procedural arguments are not persuasive.

C. Classification of Violation and Penalty Assessment

Under AS 18.60.095(b), 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. In cases decided by the U.S. Occupational Safety and Health Review Commission and the federal courts, it has consistently been 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 at § 313.[3]

[3] The Alaska Supreme Court has stated that since the Alaska OSHA Act is based on the federal OSHA Act, consideration of federal case law is appropriate. *Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1157 n.5 (Alaska 1989).

In this case, there is ample evidence to support the classification of this violation as serious. According to an affidavit from John Stallone, the Department's assistant chief of compliance, excavation and trenching are a national emphasis target listed by federal OSHA due to the extreme danger of the work; excavation work is also on the Department's high hazard industry list for Alaska, which is based on occupational injury and illness information submitted by Alaska employers. (Exhibit 20 at p. 6.) Moreover, compliance officer Laakso testified that if Welton's excavation were to collapse or cave in, employees could be trapped between the excavation walls and the nearby footings. The severity of injury was further heightened by the vertical steel stakes around the footings since an employee could be pushed onto the stakes by a collapse of the excavation walls. Under these circumstances, we conclude that the violation was properly classified as serious.

The Department may assess a penalty of up to $7,000 for a serious violation. AS 18.60.095(b). 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. 8 AAC 61.140(c). The Review Board, however, is not bound by the Department's guidelines in evaluating the classification of a violation or the assessment of a penalty. 8 AAC 61.140(h). Here we find that the Department properly credited Welton with a 60 percent penalty reduction based on

employer size. We further find that the Department followed its guidelines by not awarding any penalty reduction for history or good faith based on Welton's previous OSHA record, his failure to immediately abate the violation, and the absence of a good overall safety program. However, we find that Welton did make some effort to comply with the standard and finally abated the hazard after a delay of several days during which employees continued to be exposed to the hazard. Accordingly, we exercise our discretion to reduce the penalty by 7.5 percent from $2,800 to $2,590.

IV. ORDER

1. Citation 1, Item 1 is AFFIRMED as a “serious” violation.

2. The proposed penalty is reduced from $2,800 to $2,590.

DATED this _18_ day of ___November_____, 2004.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

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

By:_____/s/_____
Cliff Davidson, Member

By:_____/s/_____
Thor Christianson, Member