

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
POST OFFICE BOX 21149
JUNEAU, ALASKA 99802

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
v.)
)
ANDERSON CONSTRUCTION)
COMPANY,)
)
Contestant.)
)

RECEIVED
Department of Labor
AUG 13 1990
Office of the Commissioner

Docket No. 89-799
Inspection No. Ni-6959-070-89

DECISION AND ORDER

This case arises from an occupational safety and health citation issued by the State of Alaska, Department of Labor ("Department") to Anderson Construction Company ("Anderson") following an inspection on April 12, 1989, at a construction site where Anderson was performing excavation work in Kodiak, Alaska.

The Department's citation alleges two violations of the Alaska Construction Code. Item 1a alleges that Anderson violated Construction Code 05.160(b)(13) by failing to properly slope or shore the sides of excavations adjacent to a previously backfilled excavation. Item 1b further alleges that Anderson violated Construction Code 05.160(b)(9)(A) by failing to store excavated material at least two feet or more from the edge of the excavation. The two alleged violations were grouped together into a single citation which was classified as "serious". The Department also assessed a monetary penalty of \$300 for both violations.

Anderson timely contested the citation, bringing the matter within the Board's jurisdiction. A hearing was held before the full Board in Kodiak on May 14, 1990. The hearing officer was Robert W. Landau, Esq. The Department was represented by Assistant Attorney General Toby N. Steinberger. Anderson Construction Company was represented by its owner and manager, Michael W. Anderson. At the hearing the parties presented evidence in the form of witness testimony and documentary exhibits, and also made closing arguments before the Board. The record was deemed closed at the conclusion of the hearing. Following are the Board's findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. On April 12, 1989, Department compliance officer John Nielson conducted an occupational safety and health inspection of a construction site under the control of Anderson Construction Company at the University of Alaska Fishery Tech Research Center on Near Island, Kodiak, Alaska.

2. Nielson's inspection focused on several trenches that had been excavated by Anderson. Nielson had first observed the trenches several days earlier during a prior visit to the construction site but had been unable to conduct a formal inspection because there was no representative of Anderson Construction at the site. When he returned on April 12, he met with Anderson's owner and manager, Mike Anderson, and conducted his inspection.

3. Nielson testified that the trenches excavated by Anderson were not adequately sloped or shored as required by the Construction Code to protect employees working in the trenches. In his view the soil conditions were "average," calling for a slope of 1 to 1 (a 45° angle). Nielson also noted that the trenches had been excavated in an area that previously had been excavated and backfilled, meaning that the soil was likely to be less stable. Other factors noted by Nielson included vibration from trucks passing about 10 feet from the trenches and from blasting operations approximately 1 to 1½ miles away; spoil piles that had been improperly placed close to the edge of two trenches causing additional stress on those trenches; and the fact that the trenches had been open for several days, enhancing the likelihood of spilling, sloughing of material, or a cave-in.

4. The Department submitted photographs of the trenches to illustrate Nielson's testimony. The photographs depict several of the trenches, including steel culverts that had been placed around the foundations for concrete columns to be erected. One photograph (Exhibit 3) shows what was described by Nielson as a "stabilization cloth," indicating the presence of previously backfilled material down to a depth of approximately four feet. He also described a visible "seam" separating the previously backfilled material from the original soil below. In his opinion, the soil was not solid rock, cemented sand or compacted gravel. Because of the previously backfilled material, he felt it was "average" soil.

5. Nielson was unable to take precise measurements of the excavations because he did not want to disturb what he felt were potentially unstable soil conditions in the trenches. He visually estimated the depth of the trenches at 7½ to 9½ feet deep. Since he was not equipped with an inclinometer, he was unable to obtain a precise measurement of the angle of repose of the sides of the trenches.

6. Nielson also observed a spoil pile of excavated material which had been deposited on the ridge between two trenches. (See Exhibit 6). Because the spoil pile contained large chunks of rock which could roll in on an employee working in the trenches and because the pile was situated less than two feet from the edge of the trench, Nielson also cited this condition as a code violation.

7. During his inspection, Nielson saw no employees actually working in the trenches. However, from observing the steel culverts that had been erected inside the excavations, he knew that employees had been working there.

8. The Department grouped the two code violations into a single citation. Because of the potential for serious body injury in the event of an accident, the citation was classified as "serious." The prescribed monetary penalty of \$1,000 for serious violations was reduced by 70% to \$300, based on Anderson's company size, good faith in abating the hazards, and lack of prior violations.

9. Mike Anderson testified that compliance officer Nielson told him he would be cited for the spoil pile violation but that the angle of repose on the trenches was adequate because it was "Type 2" material. According to Anderson, Nielson never warned him that the sides of the trenches were too steep nor did he request that corrective measures be taken.

10. Anderson felt that the soil in the excavation consisted of compacted gravel on top of a solid shale bedrock. He cited test results performed on the soil prior to excavation that he claimed showed a 95% compaction density; however, the test results were not produced as evidence. It was Anderson's opinion that because the backfilled material had been highly compacted, the trenches were sufficiently sloped to an angle of $\frac{1}{2}$ to 1 (approximately 63°) as required by the code for "compacted angular gravel" (see Exhibit 2 at page 6).

11. With respect to the spoil pile violation, Anderson conceded that the spoil pile had been placed less than two feet from the edge of the excavation but maintained that he had no choice because the ends of the trenches had been barricaded and he could not manoeuver his backhoe to deposit the spoil pile farther away. Even though the placement of the spoil pile may have constituted a technical code violation, he felt there was no employee exposure and no significant safety hazard had been created.

12. Bob Hatcher, a former state safety compliance officer now working as a safety consultant, testified on Anderson's

behalf. He stated that Anderson was a careful and knowledgeable contractor, had a good safety program, and had always been in compliance with trenching requirements in the past. However, Hatcher had not actually been present at the worksite in this case nor had he personally observed the excavations at issue.

CONCLUSIONS OF LAW

After reviewing the witness testimony and exhibits in this matter, we conclude that the Department has satisfied its burden of proof by a preponderance of the evidence to show that both code provisions cited were violated, and that employees were exposed to the hazardous conditions created. In addition, we find no compelling justifications or affirmative defenses to excuse the violations.

Item 1a: The Department and Anderson disagree about the soil conditions and angles of repose at the excavation site. It is unfortunate that the Department did not test the soil or use instruments (such as an inclinometer) to measure the exact dimensions of the trenches and the angles of repose.¹ It is equally unfortunate that Anderson did not submit the test results regarding compaction density to support its claims. However, we need not resolve the dispute regarding soil conditions because even if the soil is considered to be compacted gravel, we do not believe

¹ Where violations involve a compliance officer's subjective judgment on such matters as soil composition, trench dimensions, or angles of repose, we believe the Department should make an effort to obtain the most accurate and precise measurements available, if necessary using specialized instruments, laboratory test evaluation or expert witness testimony as appropriate.

from the testimony and photographs that the sides of the trenches were sloped even to an angle of $\frac{1}{2}$ to 1. It is clear to us that there was only a slight degree of sloping and in some cases the sides of the excavation appear to be almost vertical. We also place substantial weight on the fact that the area had been backfilled previously, requiring special precautions under the code, yet Anderson took no steps to further slope the sides of the trenches. Combined with other factors such as the vibration from nearby passing trucks, the 7-9 foot depth of the trenches, and the fact that they had been open for several days, we believe there was a significant safety hazard created.

The photographs also show the culverts surrounding the column foundations inside the excavated areas, from which it can be inferred that employees were working inside the trenches and thus were exposed to the hazard created.

Anderson's contention that the compliance officer failed to warn him of any violation concerning the sloping of the trenches or to require immediate corrective action is not a valid defense to this enforcement proceeding. A compliance officer is under no legal obligation to warn or advise an employer of a safety violation unless there exists an "imminent danger" posing an immediate, life threatening hazard. See AS 18.60.096. This was not the case here, although the hazard created was indeed potentially serious.

Item 1b: Anderson conceded that the spoil pile had been placed less than two feet from the edge of the excavation in

violation of the code. However, it denied that any significant hazard was created or that any employees were exposed to it. Anderson also claimed it was unable to place the spoil pile any farther away.

Although compliance officer Nielson did not see any employees working in the trench after the spoil pile had been placed near the edge, the code provision cited refers to "excavations in which employees may be required to enter," indicating that actual employee exposure need not be proved. We infer from the fact that concrete column foundations were being erected inside the trenches that employees were likely to enter those trenches. In addition, the photograph in Exhibit 6 clearly shows large rocks and loose materials capable of rolling down on top of anyone working in the trenches. Accordingly, we conclude that the Department has made out a prima facie case of violation.

We are unpersuaded by Anderson's affirmative defense that it was unfeasible or impossible to place the spoil pile farther away from the excavated area. Even if we accept Anderson's assertion that its backhoe was unable to reach out any farther from the trenches, we feel the spoil pile at the very least could have been moved farther away either manually or by other mechanical means. In our view Anderson has not met its burden of proof as to this affirmative defense. In addition, as discussed above, Anderson's contention that the compliance officer failed to advise it immediately of this violation is legally irrelevant to whether or not the safety violation has been proved by the Department.


Penalty: We acknowledge the testimony of Bob Hatcher concerning Anderson Construction's good safety record and careful work practices. We believe the Department properly took these factors into account in giving Anderson the maximum penalty reduction from \$1,000 to \$300. We believe that this is an appropriate penalty amount and find no reason to make any further penalty reduction.

ORDER


Based on the foregoing findings of fact and conclusions of law, both Items 1a and 1b in the Department's citation and the assessed penalty of \$300 are hereby AFFIRMED.

DATED this 21st day of August, 1990.

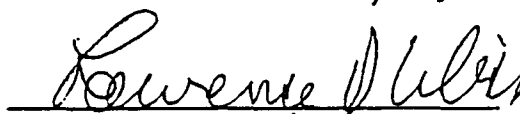
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