

have an employee use a proper connecting device for connecting the lanyard to his harness. Items 1a, 1b, and 1c were grouped together into a single violation classified as “serious” with a monetary penalty of \$1,500.

Citation 1, Item 2a, alleges a violation of 29 CFR 1926.503(a)(1) for failure to provide a training program for employees on the hazards associated with falling. Citation 1, Item 2b, alleges a violation of 29 CFR 1926.503(b)(1) for not having any written certifications of training for its employees. Items 2a and 2b were grouped together into a single violation classified as “serious” with a monetary penalty of \$1,500.

Citation 1, Item 3, alleges a violation of 29 CFR 1926.300(b)(6) for failure to have a hoist secured in place before hoisting material to the roof. This item was classified as a “serious” violation with a monetary penalty of \$1,500.

Citation 1, Item 4, alleges a violation of 29 CFR 1926.550(a)(5) for failure to have a competent person perform the required inspection of a hoist before placing it into service. This item was classified as a “serious” violation with a monetary penalty of \$1,500.

Citation 2, Item 1, alleges a violation of 29 CFR 1910.1200(e)(1) for failure to develop and implement an appropriate written hazard communication program for its employees. This item was classified as an “other than serious” violation with no monetary penalty.

Citation 2, Item 2, alleges a violation of 29 CFR 1926.20(b)(2) for failure to have a competent person inspect the guardrail/warning system before starting work on the roof. This item was classified as an “other than serious” violation with no monetary penalty.

In a letter dated October 2, 2001, JBS contested the Department's citations and penalties. A hearing was held before the Review Board in Anchorage on April 10, 2003. The Department was represented by Assistant Attorney General Robert A. Royce. JBS did not appear at the hearing and was found to be in default. Under 8 AAC 61.205(m), the Department presented witness testimony and documentary evidence in support of the alleged violations. Upon consideration of the evidence submitted, the Board makes the following findings of fact, conclusions of law, and order in this matter.

FINDINGS OF FACT

1. On April 19, 2001, the Department was notified of an occupational accident at a worksite at the Northern Lights Hotel, 598 West Northern Lights Boulevard, Anchorage. The Department dispatched safety enforcement officer Dwayne Houck to conduct an inspection of the worksite.

2. JBS was performing a roofing job at the worksite. The job consisted of tearing off the old hot tar roof and replacing it with a new roof. The hotel is a six-story building with a flat roof.

3. Patrick Weyiouanna, an employee of JBS, was injured in the accident. He testified by telephone from Fairbanks. He was hired by JBS on April 10, 2001, and had about 25 years of experience as a carpenter and roofer. JBS had approximately six employees at the worksite, three roofers and three laborers, including a foreman.

4. Weyiouanna was injured during the operation of a crane hoist which was lifting a box of materials from the ground to the roof of the hotel. As the load was being raised, the hoist suddenly toppled over and knocked Weyiouanna over the side of the roof. He was wearing a safety harness but the lanyard didn't

have a proper connecting clip so he had tied a knot which saved him from falling down to the ground. Weyiouanna's body went over the edge of the roof and dangled next to the building until he could be rescued. His hair got caught up in the motor of the hoist and had to be cut off. As a result of the accident, Weyiouanna suffered massive head and scalp injuries and the left side of his face was crushed. His jaw was broken in three places and he also required a new eye socket.

5. According to Weyiouanna, the hoist was set up by JBS on the day before the accident, but was not been inspected by a knowledgeable person prior to operation. JBS did not provide any safety training to its employees during the period Weyiouanna was employed from April 10-19, 2001.

6. During his inspection, safety enforcement officer Houck documented OSHA safety code violations and took numerous photographs of the worksite. (Ex. 1.) By the time of the hearing, however, Houck had retired from the Department. John Stallone, acting chief of OSH enforcement, reviewed Houck's inspection report and testified concerning the citations and penalties issued to JBS.

7. Regarding Citation 1, Item 1a, Stallone testified that the lanyard on Weyiouanna's harness was not rigged correctly to prevent him from falling over the edge of the roof. Although the lanyard saved Weyiouanna from falling to the ground, it was too long to prevent him from going over the edge of the roof.

8. Regarding Citation 1, Item 1b, Stallone testified that the hoisting area on the roof was not blocked off properly. There should have been guardrails on either side of the hoist but there were none.

9. Regarding Citation 1, Item 1c, Stallone testified that JBS did not provide the proper device for connecting the lanyard to the harness. Because the proper clip was not provided, Weyiouanna was forced to tie a knot to connect the

lanyard to the harness.

10. Regarding Citation 1, Item 2a, Stallone testified that JBS had not provided any training to its employees on fall hazards. Houck had spoken to Robert Keinbaum, one of the owners of the company, who admitted that employees had not received any training regarding fall hazards at the worksite.

11. Regarding Citation 1, Item 2b, Stallone testified the Houck had requested written certification of fall hazard training, but Keinbaum told him that he had no such certification.

12. Regarding Citation 1, Item 3, Stallone testified that the hoist was not securely anchored to the roof. Stallone noted that there were hoist straps tied off to vents on the roof, which were inadequate to anchor the hoist.

13. Regarding Citation 1, Item 4, Stallone testified that JBS failed to have a competent person inspect the hoist before using it. According to the information gathered by the Department, the accident was caused by a missing bolt on the hoist; the weight of the box being lifted to the roof; and inadequate anchoring of the hoist on the roof. JBS owner Keinbaum had supervised the rigging of the hoist and had said that the missing bolt was not that important.

14. Regarding Citation 2, Item 1, Stallone testified that Keinbaum had admitted to Houck that JBS had no written hazard communication program.

15. Regarding Citation 2, Item 2, Stallone testified that JBS failed to have a knowledgeable person inspect or implement a proper guardrail/warning system before starting work on the roof.

16. According to Stallone, JBS owner Keinbaum was present at the worksite earlier in the day prior to the accident and was aware of the use of the hoist to raise materials to the roof. Stallone further testified that Keinbaum and/or his

foreman were aware of or should have been aware of each of the hazardous conditions cited by the Department.

17. As to the classification of the violations, Stallone testified that Citation 1, Items 1-4 were classified as “serious” violations due to the greater rather than lesser probability of an accident occurring and the high severity of any injury resulting from a fall-related accident. Citation 1, Items 1a, 1b and 1c, and 2a and 2b were grouped together because they involved similar or related hazards that could increase the potential for injury resulting from an accident.

18. As to the monetary penalties for the violations, Stallone testified that the initial unadjusted penalty for each item was \$5,000 according to the Department’s penalty calculation guidelines. JBS was given a reduction of 60% based on company size and 10% for no prior history of violations, resulting in a final penalty of \$1,500 for each item and a total penalty of \$6,000. No penalty reduction was awarded for good faith due to the high probability and severity of an accident. Citation 2, Items 1 and 2, were considered to be “other than serious” violations with no monetary penalty.

19. The Department’s citation and penalties were issued on August 14, 2001, and were sent by certified mail to JBS at its business address at 6500 East 10th Avenue, #1, Anchorage, Alaska 99504. Cheri L. Wise, JBS’ secretary, signed a receipt for the citation on August 14, 2001. JBS contested the Department’s citations in a letter from Cheri Wise dated October 2, 2001.

20. On February 21, 2003, the Board sent a notice of hearing by certified mail to JBS at its business address at 6500 East 10th Avenue, #1, Anchorage, Alaska 99504. The notice was returned as unclaimed and marked “moved, left no address, unable to forward, return to sender.”

21. On March 7, 2003, the notice of hearing was again sent by certified mail, return receipt requested, to JBS at the address shown on its letter of contest, 3705 Arctic Boulevard, Suite 931, Anchorage, Alaska 99503. The notice of hearing was again returned as unclaimed.

22. On March 18, 2003, the Board sent the hearing notice by regular mail to JBS at the Arctic Boulevard and East 10th addresses. Both hearing notices were returned as undeliverable.

23. On or about March 18, 2003, the Board's hearing officer attempted to contact JBS by telephone at the telephone number listed in its letter of contest. The telephone number was out of service.

24. According to John Stallone, JBS was not in business after the accident occurred on April 19, 2001.

25. At the scheduled hearing on April 10, 2003, JBS did not appear and did not file any written statement or explanation for its failure to appear. Pursuant to AS 18.60.093(f), the amount of the Board's reasonable expenses incurred for the hearing is \$509.58. (Ex. 2.)

CONCLUSIONS OF LAW

A. Default

JBS failed to appear at the scheduled hearing in Anchorage on April 10, 2003. The record reflects that the Board's hearing notice was duly sent to JBS' business addresses by certified and regular mail and was returned as undeliverable. In addition, an attempt was made to contact JBS at its business phone number, but the number was no longer in service. Under these circumstances, we find that every reasonable effort was made to give JBS notice of the hearing and an opportunity to participate. JBS has not shown any good cause to excuse its failure

to appear at the hearing. Under AS 18.60.093(f), we find it appropriate to order JBS to pay the Board's reasonable expenses for the hearing.

B. Department's Prima Facie Case

The Department has the burden of proof in contested cases. If an employer fails to appear at a hearing, the Board has required the Department to present sufficient evidence to establish a prima facie case with respect to the citations and penalties. To establish a prima facie case of violation, the Department must demonstrate that (1) the employer failed to comply with applicable standards; (2) one or more employees were exposed to the violative conditions; and (3) the employer knew or with the exercise of reasonable diligence could have known of the violative conditions. See Mark A. Rothstein, *Occupational Safety & Health Law*, § 102 at 152 (4th ed. 1998).

After reviewing the record, we conclude that the Department has presented sufficient evidence to establish that JBS was not in compliance with each of the cited code violations; that one or more of its employees were exposed to the violative conditions; and that JBS knew or could have known with reasonable diligence of the existence of each of the violative conditions. Further, we find no basis to question or to modify the Department's classification of the cited violations or the amount of the monetary penalties assessed.

We recognize that JBS may no longer be in business. However, we find that JBS' safety violations resulted in a serious accident in which an employee was severely hurt. Accordingly, we believe it is our duty to decide this case not only as a matter of law but as a public deterrent to any similar violations in the future.

ORDER

1. Each of the violations cited by the Department is AFFIRMED as cited.
2. The Department's total assessed penalties of \$6,000 are AFFIRMED.
3. Under AS 18.60.093(f), JBS shall also pay the Board's reasonable expenses incurred for the hearing in the amount of \$509.58.

DATED this 22nd day of August, 2003.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: Not Participating
Timothy O. Sharp, Chair

By: /s/
Carla Meek, Member

By: /s/
Cliff Davidson, Member