

**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, DIVISION OF LABOR)	
STANDARDS AND SAFETY,)	
OCCUPATIONAL SAFETY AND)	
HEALTH SECTION,)	
)	
Complainant,)	Docket No. 95-2010
)	Inspection No. 105859771
v.)	
)	
ITT FEDERAL SERVICES)	
CORPORATION,)	
)	
Contestant.)	
_____)	

DECISION AND ORDER

ITT Federal Services Corporation (ITT) contests a citation issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection at the U.S. Air Force Ballistic Missile Early Warning System (BMEWS) site at Clear Air Force Station, Alaska.

As a result of the inspection, the Department issued a citation to ITT alleging violations of Alaska occupational safety and health standards. The Department subsequently dismissed Items 2 and 3 of the citation, leaving only Items 1a and 1b in contest. Item 1a alleges a violation of General Safety Code (GSC) 01.1107(b)(1)(B) for allowing employees to enter an underground steam manhole by descending a fixed ladder with a distance of more than 12 inches from the top rung to the top of the manhole. Item 1b alleges a violation of GSC 01.1107(c)(4) for not providing at least seven inches of clearance behind each rung of the fixed ladder. Items 1a and 1b were grouped into a single citation

classified as "serious" with an assessed penalty of \$5000.

A hearing on the contested violations was held in Fairbanks on May 23, 1996. The Department was represented by Assistant Attorney General Toby N. Steinberger. ITT was represented by Vice President and General Counsel Walter I. Skinner. Each party presented witness testimony, documentary evidence and oral argument. At the close of the Department's case, ITT moved to dismiss Items 1a and 1b. After hearing oral argument, the Board granted ITT's motion to dismiss Item 1a on the basis that the cited code provision did not apply to the alleged hazard. The Board denied the motion to dismiss Item 1b. The Department then moved to amend Item 1a to allege a violation of the general duty clause in AS 18.60.075(a)(4) in lieu of a specific code violation. ITT opposed the motion to amend. The Board denied the motion to amend as untimely. The hearing then continued with respect to Item 1b.

Upon review and consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. ITT Federal Services Corporation is the primary operations and maintenance contractor for the U.S. Air Force at the BMEWS site at Clear Air Force Station, Alaska.
2. On December 27, 1994, Department Enforcement Officer Kayle Foster conducted an occupational safety and health inspection covering certain of ITT's work areas at the BMEWS site.
3. The inspection was prompted by a complaint lodged after an ITT employee was injured in an accident on September 14, 1994. The employee, a plumber, was descending a fixed ladder in an underground steam manhole to repair a steam leak when he apparently slipped on a wet rung and fell to the bottom of the manhole, sustaining injuries to his head, shoulder, back and legs. (Ex. 13.)
4. Officer Foster inspected the steam manhole where the accident occurred. The manhole is a confined space providing access to underground steam pipes which periodically require

servicing or repair. The manhole is accessed from ground level by descending a fixed ladder composed of individual metal rungs embedded in the concrete wall of the manhole. The top of the manhole is covered by a metal hatch with a smaller wooden cover underneath. (Exs. 1, 2, H.)

5. The vertical height inside the manhole is approximately 74 inches. The rungs on the fixed ladder are spaced 12 inches apart. Due to the presence of the hatch cover and the inner wooden cover, the distance from the top of the manhole down to the top rung of the ladder is approximately 18 inches. (Ex. X.)

6. The inside of the manhole is insulated with a two-inch thick styrofoam liner which was apparently glued onto the cement walls of the manhole. The clearance from the rear plane of the ladder to the styrofoam liner behind the ladder is approximately five inches. (Exs. G, H.)

7. In the event of a steam leak, the rungs of the fixed ladder become wet and slippery. There is not much to hold on to when descending the fixed ladder. Also, there is no lighting in the manholes and employees must use flashlights.

8. The steam manhole where the accident occurred is one of 11 underground steam manholes at the BMEWS site. The manholes were built by the Army Corps of Engineers in 1961. The styrofoam insulation was added to the manholes in 1989. (Exs. Y, Z.)

9. The BMEWS site is owned and controlled by the U.S. Air Force. ITT's contract with the Air Force requires prior approval from the Air Force before any modifications or alterations are made to real property facilities. (Ex. C.)

10. On September 26, 1994, about two weeks after the accident, ITT submitted a job order to the Air Force to install grab bars at the entrance to all steam manholes at the BMEWS site. The Air Force approved the job order. The necessary materials were ordered and arrived in November 1994. At the time of the inspection on December 27, 1994, however, the grab bars were not yet installed. Following the inspection the grab bars were installed on or about January 10, 1995. (Exs. 9, G, H.)

11. Other than the September 1994 accident, there is no evidence of any other accidents or injuries involving the steam manholes at the BMEWS site.

12. After the accident ITT prohibited its employees from going into the steam manholes except for emergencies, and then only with the approval of ITT's safety supervisor. Depending on conditions, employees entering a steam manhole to perform emergency repairs were sometimes required to wear special safety equipment such as a harness while descending into the manhole.

13. Officer Foster acknowledged there was no "missing" top rung on the fixed ladder as alleged in Item 1a of the citation. However, she interpreted the requirement for uniform distances between rungs to apply to the entire length of the ladder, including the distance from the top rung to the top of the manhole. She conceded that the cited code provision did not explicitly address this distance.

14. Regarding Item 1b, Foster did not believe that the styrofoam affixed to the cement walls of the manhole was an "unavoidable obstruction" making it impossible to comply with the cited code requirements. She stated that the styrofoam could be removed or cut to allow the required clearance behind the ladder.

15. Foster grouped Items 1a and 1b into a single "serious" violation, based on her belief that there was a high probability and high severity of an accident resulting from the hazard. She cited the following stress factors in her assessment: snow and ice conditions; bulky work clothing and gloves; shuttling tools and parts in and out of manholes. (Ex. 11.)

16. Based on the Department's finding of a high probability and severity of an accident, a monetary penalty of \$5,000 was assessed. No reductions were given for company size, good faith, or prior history of violations. (Exs. 11, 12.)

17. Upon receiving the citation, ITT sent a letter of notification to the Air Force, including the estimated cost of correcting the deficiencies alleged by the Department. ITT did not receive a written response from the Air Force. According to ITT's site manager, the Air Force verbally indicated that due to finding constraints it did not plan to take any additional remedial action with respect to the steam manholes. (Ex. B.)

CONCLUSIONS OF LAW

Item 1a

General Safety Code 01.1107(b)(1)(B) states:

The distance between rungs, cleats, and steps shall not exceed 12 inches and shall be uniform throughout the length of the ladder.

The Department contends that the "length of the ladder" includes not only the distance between rungs but also the distance from the top rung to the opening of the manhole. Since this distance was measured at 18 inches, it exceeds the 12 inches allowed by the Code and is not uniform with the distances between the rungs of the ladder.

Based on the evidence presented by the Department, we believe that a hazard did exist with respect to entry into the steam manhole. However, we granted ITT's motion to dismiss this alleged violation because we do not believe the cited code provision specifically addresses the distance between the top rung of the fixed ladder and the top of the manhole. GSC 01.1107(b)(1)(B) explicitly refers to distances "between" rungs, cleats or steps of a ladder. We do not believe this language covers the distance above the top rung or below the bottom rung. GSC 01.1107(b)(1)(B) is identical to the counterpart federal OSHA standard in 29 CFR 1910.27(b)(1)(ii). In a 1975 memorandum interpreting 29 CFR 1910.27(b)(1)(ii), federal OSHA stated that where there is a variable distance of 4 to 12 inches between the bottom step of a fixed ladder and the floor or landing below, as long as there is uniform spacing of 12 inches between the rungs of the ladder, the standard is satisfied and a variance is unnecessary. This interpretation appears to confirm that the standard applies only to distances between rungs, not to distances above the top rung or below the bottom rung. Since the fixed ladder in the steam manhole where the accident occurred complies with the plain language of the standard, Item 1a must be dismissed.

The Department offered evidence of national standards for fixed ladders to assist the Board in its interpretation of GSC 01.1107(b)(1)(B). The language of the cited provision appears to have been modeled after Section 4.1.2 of the 1956 American Standard Safety Code for Fixed

Ladders. (Ex. 5.) In 1974 the American National Standards Institute (ANSI) issued a new national standard for fixed ladders. The 1974 ANSI standard contains a specific requirement in Section 4.3.1 that "[t]he top of a step or rung of a ladder shall be level with the top of the access/egress level or landing platform served by the ladder." (Ex. 7.) However, the 1974 ANSI standard was never adopted by OSHA. Therefore we may not rely on the ANSI standard to interpret GSC 01.1107(b)(1)(B).

Item 1b

General Safety Code 01.1107(c)(4) states:

Clearance in back of ladder. The distance from the center line of rungs, cleats, or steps to the nearest permanent object in the back of the ladder shall be not less than 7 inches, except that when unavoidable obstructions are encountered, minimum clearances as shown in Figure 11-3 shall be provided.

The evidence establishes that the distance from the back of the fixed ladder was approximately five inches from the styrofoam insulation behind the ladder, two inches less than the required minimum clearance.

ITT makes the following arguments in defense of the alleged violation: (1) there is no code violation because the styrofoam insulation constitutes an "unavoidable obstruction" authorizing a lesser minimum clearance between the ladder and the wall; (2) even if a code violation exists, ITT does not have the authority or contractual responsibility to abate the hazard and took reasonable action to protect its employees and notify the Air Force of the hazard; (3) any violation of the ladder clearance standard is *de minimis* and does not warrant a "serious" classification; (4) ITT has been unfairly singled out for unequal treatment compared to other employers cited for ladder violations; and (5) the enforcement officer acted improperly because she did not inform ITT of the violation at the time of the inspection.

In response, the Department argues: (1) the styrofoam insulation is not an "unavoidable obstruction" since it can be easily removed or cut to allow sufficient clearance behind the ladder; (2) even though ITT may lack the authority to correct the hazard, it failed to take adequate alternative

measures to protect its employees from the hazard; (3) the seriousness of the hazard is amply demonstrated by the accident which seriously injured an ITT employee; (4) ITT's claim of unequal treatment is misleading and irrelevant; and (5) there was no improper conduct by the enforcement officer during the inspection.

We conclude the Department has established a *prima facie* violation of GSC 01.1107(c)(4). There is no dispute that ITT was aware of the hazard and that its employees were exposed to the hazard. The evidence establishes that the distance behind the fixed ladder to the styrofoam insulation was less than the seven inches required by the Code. We do not believe the styrofoam insulation qualifies as an "unavoidable obstruction."¹ The insulation was not a part of the original manhole construction and would be capable of being modified or removed to comply with the Code. Accordingly, we believe a violation of the cited code provision has been established. Further, we believe the violation was properly classified as "serious," as unfortunately demonstrated by the accident where an ITT employee sustained significant injuries.

We next consider ITT's defense based on its lack of authority to correct the hazard. To determine liability for OSHA violations at workplaces with more than one employer, we have previously adopted the multi-employer principles developed by the U.S. Occupational Safety and Health Review Commission (OSHRC) and the federal courts.² *See, e.g., Ketchikan Pulp Company*, Docket No. 94-1017, Decision and Order at 14 (AKOSH Rev. Bd. 7/17/95); *Earth Movers of Fairbanks, Inc.*, Docket No. 92-921, Decision and Order at 4-6 (AKOSH Rev. Bd. 11/18/92). OSHA violations at multi-employer worksites are evaluated in terms of two concepts, control and exposure. "Control" means control of the hazard, either by creating the hazard or having the authority and ability to abate it. "Exposure" refers to whether employees of the cited employer perform work in or have access to the

¹ The illustration in Figure 11-3 of the GSC appears to show a steel crossbeam as an example of an unavoidable obstruction behind a fixed ladder.

² 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).

zone of danger created by the hazard. See Mark A. Rothstein, *Occupational Safety and Health Law*, ? 165 at 200-01 (3rd ed. 1990) (hereinafter "Rothstein").

Under OSHA multi-employer principles, an employer whose employees are exposed to a hazard, but who did not create the hazard and who does not have the authority to abate the hazard, will not be liable for the violation if the employer has made a reasonable effort to protect employees by alternative means and has notified the party having the responsibility or authority to correct the violation. See *Electric Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267 (9th Cir. 1982); *D. Harris Masonry Contracting, Inc. v. Dole*, 876 F.2d 343 (3rd Cir. 1989); see also Rothstein, ? 168 at 209-10.

In Alaska, the Department applies the multi-employer principles to both construction and non-construction worksites.³ The Department's compliance manual recognizes that noncontrolling employers who did not create a hazard but whose employees are exposed to the hazard may have a defense as follows:

Prior to issuing citations to an exposing employer, it must first be determined whether the available facts indicate the employer has a legitimate defense to the citation, as set forth below:

- (1) The employer did not create the hazard;
- (2) The employer did not have the responsibility or the authority to have the hazard corrected;
- (3) The employer did not have the ability to correct or remove the hazard;
- (4) The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his/her employees are exposed.
- (5) The employer has instructed his/her employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it when the hazard was known or with the exercise of reasonable diligence could have been known.

³ Similarly, the Review Board has applied the multi-employer principles beyond the construction industry. See *Ketchikan Pulp Company*, *supra*, and *Earth Movers of Fairbanks, Inc.*, *supra*.

- a. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard
- b. When extreme circumstances justify it, the exposing employer shall have removed his/her employees from the job to avoid citation.

Department of Labor, OSHA Compliance Manual, Chapter V, Section F.2.c.(1992) (Ex. A.)

Applying the foregoing principles to the facts of this case, we conclude that ITT qualifies for the multi-employer defense. ITT did not create the fixed ladder hazard, nor did it have the authority or ability to correct the hazard without the approval of the Air Force. After the accident to its employee, ITT notified the Air Force of the ladder hazard and obtained the Air Force's approval of a job order to install grab bars at each of the steam manholes at the site. Further, ITT notified its employees of the hazard and prohibited them from entering the manholes except for emergencies. When emergency entry was required, entry was allowed only by permission of ITT's safety supervisor with the use of special safety equipment as warranted by conditions. Under these circumstances, we believe ITT took reasonable and appropriate measures to notify the Air Force of the hazard and protect its employees by alternative means. We conclude, therefore, that ITT should not be held liable for the fixed ladder violation.⁴

We recognize that the Alaska OSHA program does not have jurisdiction over the U.S. Air Force. Nevertheless, we are dismayed that the Air Force failed to promptly correct known safety hazards on its own premises after a contractor's employee was injured. As the party having ownership and control of the BMEWS site, the Air Force bears the primary responsibility to ensure that safety hazards are corrected and/or removed. We deplore this situation and urge the Air Force to take whatever steps are necessary to promptly correct any remaining fixed ladder hazards before additional accidents occur.

⁴ In view of this determination, we find it unnecessary to consider ITT's remaining arguments.

ORDER

Based on the foregoing findings of fact and conclusions of law, it hereby ordered that Citation 1, Items 1a and 1b, are DISMISSED.

DATED this 30th day of September, 1996.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

/s/

By: _____
James J. Ginnaty, Member

/s/

By: _____
Timothy O. Sharp, Member