

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD  
P.O. BOX 21149  
JUNEAU, ALASKA 99802

STATE OF ALASKA, )  
DEPARTMENT OF LABOR, )  
 )  
Complainant, )  
 )  
vs. )  
 )  
CHUCK'S BACKHOE, INC., )  
 )  
Contestant. )  
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Docket No. 87-716  
Inspection No. Ko-1791-875-87

DECISION AND ORDER

This matter came before the Board for a hearing on March 15, 1989, in Anchorage, Alaska. The State of Alaska, Department of Labor (hereinafter "the Department") was represented by Assistant Attorney General Mary Pinkel. Chuck's Backhoe, Inc. (hereinafter "the Contestant") was represented by its owner, Chuck Ferrell. Evidence was submitted in the form of witness testimony and documentary exhibits, and the record was deemed closed at the conclusion of the hearing.

At issue before the Board are two citations issued by the Department following a safety compliance inspection of Contestant's worksite on Davis Road in Eagle River on September 15, 1987. Citation #1 alleges that Contestant violated Alaska Construction Code 05.160(c)(1) by failing to adequately slope, shore or otherwise protect an excavated trench. The alleged violation was classified as "serious" and a penalty of \$400 was

assessed. Citation #2 alleges that Contestant violated Construction Code 05.160(b)(9)(A) by failing to store or place excavated materials at least 2 feet from the edge of the excavation. This alleged violation was also classified as "serious" and a \$400 penalty was assessed.

#### Summary of the Evidence

The Department presented the testimony of compliance officer Bill Kober. Kober testified that on September 15, 1987, he conducted an inspection of Contestant's worksite on Davis Road in Eagle River. He observed an excavated trench which he estimated was 11' deep and 7' wide in places. Around the edge of the trench he noticed an overhang of rocks and soil, and also some sloughing of soil into the ditch. Kober also testified that he saw a large mound or "spoil pile" of excavated material right on the edge of one side of the trench. He took several photographs of the scene and these were admitted into evidence.

Kober further stated that during his inspection he didn't see anyone in the trench, but that he questioned a man named John Lott who said he was an employee of Contestant and had been working in the ditch earlier. Kober said that Chuck Ferrell, Contestant's owner, also confirmed that Lott had been in the keybox area of the ditch near the backhoe.

Chuck Ferrell testified on behalf of his company. He stated that he had no employees at this worksite and that he

did everything himself except operate the equipment. He asserted that John Lott was not his employee but was merely "trying out" for a job for one day. He acknowledged, however, that Lott was paid for his day's work. Ferrell also stated that Lott had jumped into the ditch without permission and was reprimanded for it.

#### Findings of Fact and Conclusions of Law

Based on the photographs taken by the Department's inspector, we are persuaded that the trench in question was inadequately protected and that the spoil pile was less than 2 feet from the edge of the trench. Although the photographs suggest a depth of 5-6 feet rather than 11 feet as stated by the inspector, they show that the sides of the trench are nearly vertical and do not appear to be sloped or shored in any way, and that there is a dangerous overhang around the edge of the trench. The soil itself appears to be a fairly typical mix of rocks and dirt, with some of that material sloughing down into the ditch. It is also obvious that the spoil pile was placed right at the edge of the trench. Accordingly, we have no difficulty concluding that the two cited code provisions have not been met. Moreover, because of the potential for serious bodily injury in the event of a cave-in, we believe the citations were properly classified as "serious."

As part of the Department's prima facie case, it must also show that there was employee exposure to the

hazardous condition. Despite the fact that Kober did not see anyone in the ditch, Lott admitted that he had been working in the ditch earlier and Ferrell confirmed this. Ferrell also confirmed that Lott was paid for his work. Having listened to the testimony, we believe that Lott had been working in the trench and that he was Contestant's employee. In our minds this is clearly sufficient to establish employee exposure. In keeping with the broad safety purposes of the OSHA law, we have adopted a broad interpretation of the concept of "employee." Such an approach is consistent with federal authorities interpreting the parallel federal OSHA law. See Rothstein, Occupational Safety and Health Law, § 12, at pp. 12-14 (2nd ed. 1983).

Contestant has also asserted that he had no control over Lott jumping in the ditch and that he immediately ordered him out of it and let him go at the end of the day. To the extent that this argument raises the recognized defense of "unpreventable employee misconduct," we find that Contestant has failed to meet its burden of proof on this issue. See Rothstein, supra, § 117, at pp. 143-47. Contestant failed to show that 1) it had an established work rule to prevent the code violations; 2) it adequately communicated those rules to its employee(s); 3) it took adequate steps to discover the violations; and 4) it has effectively enforced its rules when violations have been discovered.



