

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

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
vs.)
)
NEWTON EXCAVATION, INC.,)
)
Contestant.)
)

Docket No. 88-751
Inspection No. Ru-2218-615-88

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 Lisa Fitzpatrick. Newton Excavation, Inc. (hereinafter "the Contestant") was represented by its president, Ned Newton. The record was deemed closed at the conclusion of the hearing.

At issue before the Board is one citation which was issued by the Department following a safety compliance inspection of Contestant's worksite at Sandlewood Road and Dimond Boulevard in Anchorage on July 20, 1988. Citation #1 alleges that Contestant violated Alaska Construction Code 05.160(b)(3) by allowing his employee to enter and work in a portion of an excavated trench that was not shored or properly sloped. The alleged violation was classified as a "repeat

serious" and a penalty of \$960 was assessed.

Summary of the Evidence

Compliance officer Mike Russell testified that on July 20, 1988, he inspected a trench being excavated by Contestant to replace a water line. Russell observed a large pit about 12' in diameter with partly sloped sides. Leading off the pit was a trench about 10' deep. One side of the trench was slightly sloped above the 5' level in one area; the facing wall of the trench was completely vertical and unsloped. He saw Ned Newton running the backhoe while one of his employees was working in the unsloped section of the trench. Russell took photographs of the trench which were admitted at the hearing as exhibits 1-4.

Russell further testified that the soil around the trench was regular, semi-compacted gravel which called for sloping at a 1:1 or 45-degree angle of repose. Because of the imminent hazard created, Russell stated that he issued a "red tag" order to restrain Contestant from performing further work in the trench until it was properly shored or sloped. He said that Newton had told him it was too costly to slope the trench and that he (Newton) didn't want to unnecessarily "tear up" the property owner's parking lot. Finally, Russell explained how the proposed penalty was calculated and noted that the violation was classified as a "repeat serious" since Contestant had been previously cited for the same code violation on April 29, 1986, and that citation had become final.

Safety compliance chief Dennis Smythe testified that he accompanied Russell on the inspection. In Smythe's opinion, the soil was "silty, rounded gravel" and he agreed that the code would require a 45-degree slope.

Ned Newton testified for the Contestant. He stated his opinion that the trench was not unsafe for either him or his employee. He asserted that the soil was "rock-hard" and that there was no "slough-off" of dirt or rocks even though he had been operating a 24,000-pound backhoe right on the edge of the trench. He also indicated that even though it rained the night following the inspection, on the following day the trench walls were still vertical and there was no evidence of sloughing of the soil. Finally, he stated that the reason he didn't slope one side of the trench was because he didn't want to dig up the adjacent private property.

Findings of Fact and Conclusions of Law

Upon consideration of all the testimony and exhibits in this matter, we find that the evidence clearly establishes that the trench was not properly sloped or shored. The photographs show that the soil was composed of a semi-compacted mix of dirt and rocks which was not "rock-hard" and which was subject to some sloughing. We also note that the sides of the unsloped trench appear to come well above the employee's head and shoulders. There is no question in our minds that this trench was not adequately sloped and that a serious hazard was created.

Moreover, we find no merit in Contestant's arguments regarding the costs of compliance or the fact that the adjacent property was privately owned. First, the law does not permit an employer to place his economic interests above the the safety of his employees. Second, the code provides alternative means of compliance without requiring interference with the adjacent property. Contestant had these means available but chose not to use them. Finally, we have not been given any good reasons why the assessed penalty should be reduced or eliminated. Accordingly, we conclude that the citation and penalty should both be affirmed as issued.

Order

1. Citation #1 is AFFIRMED as a "repeat serious" violation.
2. The penalty of \$960 for Citation #1 is AFFIRMED.

DATED this ____ day of _____, 1989, at
Juneau, Alaska.

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AND HEALTH REVIEW BOARD

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