

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
v.)
)
THE BROAD WAY,)
)
Contestant.)
_____)

Docket No. 93-978
Inspection No. Sa-9589-251-93

DECISION AND ORDER

This matter arises from an occupational safety and health inspection by the State of Alaska, Department of Labor ("Department") of a worksite under the control of The Broad Way ("Contestant") in Anchorage, Alaska, on June 9, 1993.

As a result of the inspection, the Department issued a citation alleging two violations of Alaska occupational safety and health codes. Contestant timely filed a notice of contest of the Department's citation. Prior to the hearing, the Department moved to amend one of the two alleged violations to change the code provision cited. The Department's motion, unopposed by Contestant, was granted at the hearing.

Citation 1, Item 1, as amended, alleges a violation of Construction Code 05.150(a)(1)(E) for operating a front-end loader

and a backhoe with cracked and broken front and side windshields. Citation 1, Item 2, alleges a violation of Construction Code 05.130(a)(5)(A)(iv) for failing to provide handrails on the wooden stairs leading into the rear of the job shack and tool storage trailer. Both alleged violations were classified as "other than serious" and no monetary penalty was assessed.

A hearing was held before the Board in Anchorage on November 17, 1993. The Department was represented by Assistant Attorney General Robert A. Royce. The Contestant did not appear at the hearing. The Department presented witness testimony, documentary evidence and a videotape 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 June 9, 1993, Department Compliance Officer Danny Sanchez conducted an occupational safety and health inspection of a construction site at the parking lot of Central Junior High School, 150 South Bragaw Street, Anchorage, Alaska.

2. Contestant was operating heavy equipment to perform excavation work at the construction site.

3. During his inspection, Sanchez noticed that the front and side cab windshields were cracked and/or broken on two

pieces of equipment used by Contestant: (1) a Terex front-end loader; and (2) a Poclain RC200 backhoe.

4. According to Sanchez, the windshield glass was so badly "spider-cracked" that it obstructed and impeded the view from the cab of each of the two pieces of equipment.

5. Sanchez also noticed a stairway without handrails leading into the rear of Contestant's job shack and tool storage trailer at the worksite. The stairway had six steps and was measured by Sanchez at 48 inches wide.

6. Sanchez determined that Contestant had one employee at the worksite who was exposed to both of the conditions cited, i.e., the employee was operating the two pieces of heavy equipment and also had access to the job shack/tool storage trailer.

7. Because of Contestant's small company size, no history of past violations, only one exposed employee, and its cooperation in promptly abating the hazards, the Department classified the alleged violations as "other than serious" with no monetary penalties.

8. The Department's citation was sent by certified mail to Contestant at its business address and was received by Contestant on July 20, 1993. Contestant transmitted its notice of contest to the Department by facsimile on August 2, 1993.

9. The Board's hearing notice was mailed to Contestant on October 1, 1993 at the same address where Contestant previously

had accepted receipt of the Department's citation. However, the hearing notice was returned as "unclaimed."

10. Prior to the hearing, the Board's staff attempted to contact Contestant's owner Tim Geiermann at the telephone number specified in his notice of contest. On October 22, October 26 and November 2, 1993, the Board's staff left messages on Mr. Geiermann's answering machine regarding the hearing in this matter.

11. Further efforts to reach Mr. Geiermann at the time of the hearing were unsuccessful.

CONCLUSIONS OF LAW

A. Contestant's Failure to Appear

Contestant failed to appear at the scheduled hearing in Anchorage on November 17, 1993. The record reflects that the Board's hearing notice was duly sent to Contestant's business address and that additional attempts were made to personally contact the owner of the business. Under these circumstances, the Department did everything that could reasonably be expected to notify Contestant of the hearing. We find no basis to excuse Contestant's failure to appear. Accordingly, we find Contestant to be in default.

The Department has the burden of proof in OSHA enforcement actions. Therefore, in the event of a default by a contesting employer, we must still review the Department's evidence

to determine whether a prima facie case has been presented with respect to each of the contested violations and penalties.

B. Department's Prima Facie Case

To establish a prima facie case of violation under the OSHA Act, the Department must demonstrate by a preponderance of the evidence that 1) the cited standard applies to the cited employer; 2) there was a failure to comply with the cited standard; 3) one or more employees were exposed to the condition cited; and 4) the cited employer knew or could have known of the cited condition with the exercise of reasonable diligence. See Rothstein, Occupational Safety and Health Law, § 102, at 138-39 (3rd ed. 1990).

In this case, we conclude that the Department has presented substantial evidence, including a videotape, showing that Contestant was not in compliance with the applicable code provisions cited and that one of its employees was exposed to the resulting hazards created. In addition, we conclude that both of the cited conditions were in plain view and therefore the employer had ample notice of both of the alleged hazards.

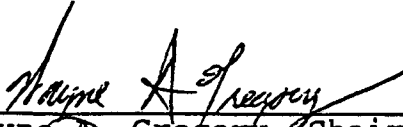
Finally, we have reviewed the Department's classification of the alleged violations as "other than serious" and conclude that this classification, with no monetary penalty assessed, is appropriate under the circumstances.

ORDER

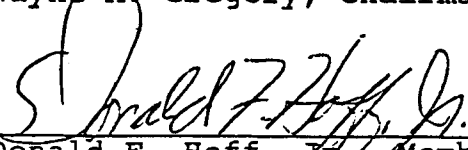
Citation 1, Items 1 and 2, are AFFIRMED.

DATED this 10th day of March, 1994.

ALASKA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD



Wayne A. Gregory, Chairman



Donald F. Hoff, Jr., Member