

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD  
P.O. BOX 21143  
JUNEAU, ALASKA 99802

STATE OF ALASKA, )  
DEPARTMENT OF LABOR, )  
 )  
Complainant, )  
 )  
vs. )  
 )  
HARMAN EXCAVATING, INC., )  
 )  
Contestant. )

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Docket No. 88-743  
Inspection No. Ru-2218-610-88

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. Harman Excavating, Inc. (hereinafter "the Contestant") was represented by its president, Randy Harman. Each party presented witness testimony and documentary evidence; 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 King Street in Anchorage on June 20, 1988. Citation #1 alleges that Contestant violated Alaska Construction Code 05.160(b)(3) by allowing two of its employees to work in a 16-foot trench that was not adequately sloped or shored. The alleged violation was classified as

"serious" and a penalty of \$640 was assessed.

Summary of the Evidence

Compliance officer Mike Russell testified that on June 20, 1988, he conducted an inspection of a trench which had been excavated by Contestant to install a sewer and storm drainage pipe. He observed two employees working in the trench, which he estimated was approximately 16' deep. He noted that the sides of the trench were nearly vertical but in some places were slightly sloped at about a 70-degree angle. He took several photographs of the trench which were admitted as exhibits A-E. Russell also testified that he examined the soil condition around the trench and found it to be "average soil" which under the code would require a proper slope of 1:1 or a 45-degree angle of repose. Finally, he explained that the violation was classified as "serious" because of the danger of serious bodily harm or death and also explained how the proposed penalty was calculated according to the Department's guidelines.

Randy Harman testified for Contestant. He stated that he didn't feel the ditch was unsafe, that the soil condition was sufficiently hard so that only a slight sloping was necessary, and that the ditch was not as deep as measured by the inspector. He submitted several photographs of the trench and the bucket of his backhoe which were admitted as exhibits 1-10.. He asserted that the ground was so hard that

it caused damage to his backhoe bucket which was virtually new and he presented a repair bill to substantiate the damage.

Three of Contestant's employees also testified at the hearing. Marshall Hetlet said that he was working in the ditch at the time of the inspection. Using a blueprint of the storm drain, he stated that the depth of the trench was 14' rather than 16'. He said that he did not feel unsafe in the ditch.

Stan Struemper testified that the soil around the trench was composed of a layer of peat underneath gravel, with clay below. He felt that the peat layer would prevent any cave-in of the trench.

Gary Drahosh was also at the worksite during the inspection. In his opinion, the soil was hard-packed and wouldn't crumble. He noted that the adjacent road had been oiled and would hold the earth together. He stated that it was unusual for a backhoe bucket to break like it did, further indicating how hard the ground was.

In addition to the above live witnesses, Contestant also submitted two written statements from employees who were not present, stating their opinions that the ditch was not unsafe.

#### Findings of Fact and Conclusions of Law

Upon consideration of all the testimony and exhibits in this matter, we find that a preponderance of the evidence establishes that the trench was insufficiently sloped or

shored. The photographs illustrate that the soil around the trench was composed of a semi-compacted mix of dirt and rocks which was subject to some sloughing and crumbling. We believe the photographs are a more reliable indicator of the ground conditions than Contestant's repair bill for the damage to the backhoe bucket. We also note that regardless of the exact depth of the trench, its sides are nearly vertical in places and come well above the head and shoulders of the employees working in it, posing a serious danger in the event of a cave-in or instability.

While we respect the professional experience and opinion of Harman and his employees, the law does not permit an employer or his employees to substitute their own judgment as to trench safety in place of the standards contained in the applicable safety codes. We believe the inspector's findings as to the ground conditions and the nature of the trench are reasonable and are supported by the evidence. We do not believe he acted in an arbitrary or capricious manner. Also, we have not been presented with any good reasons why the proposed penalty should be reduced or adjusted. Therefore, we conclude that the citation and the accompanying penalty should be affirmed as issued.

#### Order

1. Citation #1 is AFFIRMED as a "serious" violation.
2. The proposed penalty of \$640 for Citation #1

is AFFIRMED.

DATED this \_\_\_\_ day of \_\_\_\_\_, 1989, at  
Juneau, Alaska.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

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