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DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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STATE OF ALASKA,)
 DEPARTMENT OF LABOR,)
)
 Complainant,)
)
 v.)
)
 WASILLA FEED,)
)
 Contestant.)

Docket No. 93-1011
Inspection No. Ni-6959-388-93

DECISION AND ORDER

Wasilla Feed (Contestant) contests a "failure to abate" citation issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection at Contestant's workplace at 501 N. Airport Road, Wasilla, Alaska, on July 29, 1993.

The Department alleges that Contestant failed to abate an earlier violation of Electrical Code 03.002(g)(2)(A) by failing to adequately guard exposed live electrical parts against accidental contact. A monetary penalty of \$24,000 was proposed.

Pursuant to Contestant's notice of contest, a hearing was held before the Board in Wasilla on March 10, 1994. The Department was represented by Assistant Attorney General Toby N. Steinberger.

Contestant was represented by owner Randy Stanley and general manager Mike Allex.

At the hearing, Contestant stated that it did not contest the alleged violation or the Department's calculation of the penalty amount. Rather, Contestant requested a reduction of the proposed penalty on the grounds that it is a small business and has been experiencing financial difficulties. The parties presented witness testimony, documentary evidence and oral argument. Upon consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On July 29, 1993, Department compliance officer John Nielson conducted a follow-up occupational safety and health inspection at Contestant's place of business at 501 N. Airport Road, Wasilla, Alaska.

2. Contestant sells animal feed and supplies and has been in business since 1985. Contestant employs approximately five persons.

3. Nielson had previously inspected Contestant's place of business on November 18, 1992. As a result of that inspection, Contestant had been cited for a number of safety violations, including one violation for having an open panel box with exposed live electrical parts and more than 10 electrical junction boxes

with exposed connections but without proper face plates. Contestant had not contested the previous violation.

4. When Nielson returned to conduct a follow-up inspection on July 29, 1993, he determined that most of the previous violations had been corrected. However, he observed that there were still five junction boxes with exposed connections that did not have face plates and that the panel box in the back room still had exposed live electrical parts.

5. Nielson noted that Contestant had made some effort to abate this violation. Most of the previously uncovered junction boxes now had covers in place; ground fault circuit interrupters had been installed even though not required by code; and appropriate permanent wiring had replaced temporary flexible cord.

6. The Department's monetary penalty for the original violation was \$125 after taking into account various mitigation factors such as company size, good faith and history of prior violations. Under the Department's penalty calculation guidelines, the proposed penalty for the failure to abate violation amounted to \$24,000.

7. Contestant presented documentation showing that it had spent approximately \$3,000 to correct the violations cited after the Department's initial inspection. Contestant also presented 1993 income and expense statements showing gross sales of \$516,342.75 and business/inventory expenses totalling \$502,411.03, leaving a net profit of \$13,931.72.

CONCLUSIONS OF LAW

Since Contestant does not challenge the failure to abate violation or the Department's calculation of the proposed penalty, the only issue before the Board is whether the amount of the penalty is reasonable under the circumstances presented.

AS 18.60.093(c) provides that the OSHA Review Board may affirm, modify or vacate a penalty proposed by the Department. In reviewing a proposed penalty, the Board is not required to follow or apply the Department's penalty computation guidelines. See Rothstein, Occupational and Safety Health Law, § 332, at 357 (3rd ed. 1990). Rather, the Board makes an independent determination of the penalty based on the particular facts of each case. Consideration may be given to a variety of factors including the size of the business, the gravity of the violation, the good faith of the employer, and the history of previous violations. See AS 18.60.095(h). The Board may also consider other factors such as the financial condition of the employer. See Rothstein, § 337, at 363-64.

In this case we believe there are several mitigating factors that warrant a significant reduction in the Department's proposed penalty. First, Contestant took immediate steps to abate most of the violations cited after the previous inspection. It spent about \$3,000 on abatement, not an inconsiderable amount in light of its size and financial condition. Contestant also installed additional safety equipment (GFI's) that was not required by code.

Furthermore, we believe that the violations noted during the follow-up inspection were of minimal gravity since all but four junction boxes had been covered and the electrical panel box had a door covering any exposed live parts.

Finally, after reviewing Contestant's financial statements we are persuaded that the company was indeed experiencing financial difficulties and that payment of the Department's proposed penalty would impose undue financial hardship on the company and possibly drive it out of business. We do not believe this is the intent of the OSHA Act.

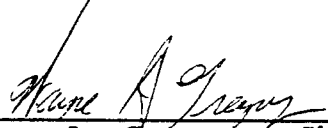
In light of the foregoing factors, we conclude that it is appropriate to reduce the Department's proposed penalty to \$240.

ORDER

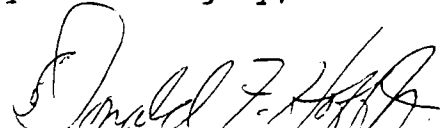
1. The "failure to abate" violation is AFFIRMED.
2. The proposed penalty is reduced is \$240.

DATED this 20th day of MAY, 1994.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD



Wayne A. Gregory, Chairman



Donald F. Hoff, Jr., Member

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APPEAL PROCEDURES

A person affected by an order of the OSH Review Board may obtain judicial review by filing a notice of appeal in the Superior Court as provided in the Alaska Rules of Appellate Procedure. The notice of appeal must be filed within 30 days from the date of filing of the order as certified below. After 30 days from the date of filing of the order, the order becomes final and is not subject to review by any court. AS 18.60.097.

CERTIFICATION

I hereby certify that on the 9th day of June, 1994, the foregoing Decision and Order in the matter of the Alaska Department of Labor vs. Wasilla Feed, Docket No. 93-1011, was filed in the office of the OSH Review Board at Juneau, Alaska and that on the same date a true and correct copy was mailed to each party at its address of record.

Heidi C. Hansen
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