

**STATE OF ALASKA  
DEPARTMENT OF LABOR**

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

<b>STATE OF ALASKA, DEPARTMENT</b>	)	
<b>OF LABOR, DIVISION OF LABOR</b>	)	
<b>STANDARDS AND SAFETY,</b>	)	
<b>OCCUPATIONAL SAFETY AND</b>	)	
<b>HEALTH SECTION,</b>	)	
	)	
Complainant,	)	Docket No. 98-2112
	)	Inspection No. 108517830
v.	)	
	)	
<b>ABREGO CONSTRUCTION,</b>	)	
	)	
Contestant.	)	
_____	)	

**DECISION AND ORDER**

Abrego Construction (Abrego) contests a citation issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection of Abrego's worksite at a residential construction project in Anchorage on March 27, 1998.

The Department's citation alleges five violations of occupational safety and health (OSHA) standards. Citation 1, Item 1a alleges a violation of 29 CFR 1926.501(b)(13) for failure to protect employees from a fall hazard while working on the roof of the building under construction. Citation 1, Item 1b alleges a violation of 29 CFR 1926.501(b)(4)(ii) for failure to provide fall protection from unguarded floor openings on the second floor deck area. Citation 1, Item 1c alleges a violation of 29 CFR 1926.501(b)(14) for failure to provide fall protection from a 9-foot-wide wall opening on the second floor of the building. Items 1a, 1b and 1c of Citation 1 were grouped together and classified as a single "serious" violation with a proposed penalty of \$1,275.

Citation 2, Item 1 alleges a violation of 29 CFR 1926.404(b)(1)(iii)(C) for failure to inspect power supply cords for insulation damage prior to beginning work. Citation 2, Item 2 alleges a violation of 29 CFR 1926.25(a) for failure to keep debris, including lumber with protruding nails, cleared from the area around the building. Items 1 and 2 of Citation 2 were each classified as an "other than serious" violation with no monetary penalty.

Upon Abrego's contest of the citation, a hearing was held before the Board in Anchorage on February 25, 1999. The Department was represented by Assistant Attorney General Robert A. Royce. Abrego Construction was represented by its owner, Rafael A. Abrego. The parties presented witness testimony, documentary evidence and oral argument. After considering the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law, and order in this matter.

#### **FINDINGS OF FACT**

1. On March 27, 1998, Department compliance officer Steve Standley conducted an occupational safety and health inspection of a residential construction site at 3907 Young Street in Anchorage, Alaska.

2. The project under construction was a two-story residential duplex. The general contractor on the project was Alaska Homes, Inc. At the time of the inspection the only subcontractor with employees working on the project was Abrego Construction. Abrego had four employees at the worksite.

3. Upon Standley's arrival at the worksite, he saw two workers laying plywood sheeting on the roof with no fall protection of any kind. Standley met with Rafael Abrego, owner of Abrego Construction, who confirmed that the workers on the roof were his employees. Standley also spoke to the two employees, who said that they had not been provided with any fall protection or training regarding fall hazards.

4. Standley measured the elevation of the roof as follows: the eave height on the

west side was 19 feet, 2 inches; the ridge height was over 25 feet; the roof width was 42 feet; and the length of the roof was 52 feet. Standley also took photographs showing the two employees on the roof without any fall protection. (Ex. 1A.)

5. During their meeting, Standley asked Abrego whether he had any safety harnesses or other equipment to protect his employees working on the roof. Abrego said that he did not, but that he intended to purchase the necessary equipment. Abrego also stated that he was not familiar with the OSHA fall protection standards and had not received any formal training on the standards.

6. Standley observed unguarded floor openings on the second floor deck area of the building. There was a plank approximately 12 inches wide, 2 inches thick and 20 feet long laid across the deck supports without any other horizontal decking or planking to cover the openings between the deck supports. (Ex. 1B.) The deck was the only means of access to the second floor of the building and all four employees at the worksite had to walk over the unguarded floor openings to gain access to the interior of the building. Standley measured the fall distance from the deck to the ground below at 11 feet.

7. Standley observed a large wall opening on the second floor near the outside deck. The opening was approximately 9 feet wide and at least 6 feet high. (Ex. 1C.) Like the deck area, the wall opening had a fall distance of approximately 11 feet to the ground below. The opening was being used to get lumber and other construction materials into the building. However, Standley explained that Abrego could have installed a simple 2x4 guardrail which would have provided adequate fall protection without obstructing the passage of construction materials into the building.

8. Standley observed several electrical power cords in use at the worksite which had frayed or damaged insulation. Also, one of the power cords was tied into a knot where it plugged into another cord and was missing the insulation at the plugged-in end of the cord. (Ex. 2A.) The power cords were being used to supply power tools on the second floor and the roof of the building. Standley noted that because the ground was damp and the employees were not wearing insulated

boots, the damaged cords posed a risk of minor electric shock.

9. Standley observed a considerable amount of construction debris, including lumber with protruding nails, on the east side of the building underneath and near the unguarded floor and wall openings on the second floor. (Exs. 1B and 2B.) The remaining areas of the worksite were relatively clean and clear of construction debris. According to Standley, an employee falling from the second floor openings could potentially land on top of the construction debris. In response, Abrego noted that the nails on some of the scrap lumber had been bent back.

10. During his closing conference, Standley explained each of the code violations he had observed. Mr. Abrego and his employees were cooperative and not belligerent during his inspection. Rafael Abrego has 23 years experience in construction, mainly in California. He has worked in Alaska since 1990 and has owned his own construction business since 1995. According to Mr. Abrego, he was not familiar with the OSHA standards cited during the inspection but is now fully complying with the standards.

11. The three violations pertaining to fall protection (Citation 1, Items 1a, 1b and 1c) were grouped into a single citation and were classified as "serious" based on Standley's opinion that in the event of a fall from the roof or the second floor, the resulting injury was likely to be serious. With respect to the power cord and construction debris violations (Citation 2, Items 1 and 2), Standley believed that these were essentially housekeeping violations which were less likely to result in serious bodily injury. Therefore, these items were classified as "other than serious."

12. Assistant chief of compliance Mike Russell testified concerning the Department's calculation of the monetary penalties. For the three items grouped into Citation 1, the initial penalty was \$5,000 based on the relatively high number of fall hazards and the severity of injury in the event of a fall. Under the Department's calculation guidelines, Abrego was given credit for its prompt abatement of the violations, its small company size, and its past history of no violations. After these credits were applied, Abrego's penalty for Citation 1 was reduced to \$1,275. There were no monetary penalties assessed for Citation 2.

## CONCLUSIONS OF LAW

### Fall Protection Violations

29 CFR 1926.501(b)(13) provides:

**Residential construction.** Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 29 CFR 1926.502.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 29 CFR 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

29 CFR 1926.501(b)(4)(ii) provides:

**Holes.** (ii) Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

29 CFR 1926.501(b)(14) provides:

**Wall openings.** Each employee working on, at, above, or near wall openings (including those with chutes attached) where the outside bottom edge of the wall opening is 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches (1.0 m) above the walking/working surface, shall be protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system.

To establish a violation of OSHA standards, the Department must demonstrate that: 1) the employer failed to comply with one or more applicable standards; 2) one or more employees were exposed to the violative conditions; and 3) the employer knew, or with the exercise of reasonable diligence, could have known of the violative conditions. See Mark A. Rothstein, *Occupational Safety and Health Law*, § 102, at 152 (4th ed. 1998).

After reviewing the evidence presented in this case, particularly the testimony and

photographs of compliance officer Standley, we conclude that the Department has clearly established that Abrego was not in compliance with the three cited fall protection standards; that one or more of Abrego's employees were exposed to the hazards created by the cited violations; and that Abrego knew or could have known of each of the cited conditions. Further, Abrego did not demonstrate that compliance with the cited standards was infeasible or would have created a greater hazard, nor did it establish any other recognized affirmative defense. As noted by the Department, fall hazards are among the most serious safety hazards in the construction industry and present a significant risk of serious injury to employees. While we commend Mr. Abrego's statement of intent to comply with the cited standards in the future, this does not excuse the cited violations but may serve as a mitigating factor in the assessment of a monetary penalty.

### **Housekeeping Violations**

29 CFR 1926.404(b)(1)(iii)(C) provides:

**Wiring design and protection. Branch circuits. Ground-fault protection. Assured equipment grounding conductor program.**

The employer shall establish and implement an assured equipment grounding conductor program on construction sites covering all cord sets, receptacles which are not a part of the building or structure, and equipment connected by cord and plug which are available for use or used by employees. This program shall comply with the following minimum requirements:

...

(C) Each cord set, attachment cap, plug and receptacle of cord sets, and any equipment connected by cord and plug, except cord sets and receptacles which are fixed and not exposed to damage, shall be visually inspected before each day's use for external defects, such as deformed or missing pins or insulation damage, and for indications of possible internal damage. Equipment found damaged or defective shall not be used until repaired.

29 CFR 1926.25(a) provides:

**Housekeeping.** (a) During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

We conclude that the evidence clearly establishes Abrego's violation of these two standards; that one or more of Abrego's employees were exposed to the cited conditions; and that Abrego knew or could have known of the hazards created. There is no evidence that Abrego conducted daily housekeeping inspections of the workplace to check for, among other things, damaged electrical cords or hazardous construction debris. We have no doubt that if Mr. Abrego had conducted a proper daily inspection of his worksite, he would have taken care of the damaged and frayed power cords as well as the hazardous construction debris near the building. As a construction contractor with many years of experience, Mr. Abrego should have been familiar with applicable safety standards and should have provided his employees with the necessary training and equipment to protect them from these potentially dangerous hazards. We can find no legitimate defense or justification for not enforcing the two violations alleged in Citation 2.

#### **Classification of Violations and Proposed Penalty**

Alaska Statute 18.60.095(b) provides that an OSHA violation is "serious" if the violation creates in the place of employment a substantial probability of death or serious physical harm. We believe that Abrego's failure to provide adequate fall protection from both the roof and the second floor of the building created a significant risk of serious physical injury in the event an employee were to fall. Therefore we conclude that the fall protection violations were properly classified as "serious." We further conclude that the violations in Citation 2 posed a lesser risk of serious bodily injury to Abrego's employees and therefore were properly classified as "other than serious."

With respect to the proposed penalty for Citation 1, we note that Abrego was awarded the maximum penalty reductions based on its company size, prior history, and good faith in promptly abating the cited violations. These factors substantially reduced the initial penalty of \$5,000 to the final proposed penalty of \$1,275. We find no reason to further modify the Department's proposed penalty.

#### **ORDER**

1. Citation 1, Items 1a, 1b and 1c are affirmed as a single "serious" violation with a penalty of \$1,275.
2. Citation 2, Items 1 and 2 are affirmed as "other than serious" violations with no monetary penalty.

DATED this 2nd day of June, 1999.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

/s/  
By: \_\_\_\_\_  
Timothy O. Sharp, Chair

/s/  
By: \_\_\_\_\_  
Carla Meek, Member

/s/  
By: \_\_\_\_\_  
Dennis Davidson, Member