

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

STATE OF ALASKA, )  
DEPARTMENT OF LABOR, )  
 )  
Complainant, )  
 )  
v. )  
 )  
WILDER CONSTRUCTION COMPANY, INC., )  
 )  
Contestant. )

Docket No. 88-750  
Inspection No. KU-9353-494-88

DECISION AND ORDER

This matter arises from a safety and health citation issued by the State of Alaska, Department of Labor ("Department") to Wilder Construction Company, Inc. ("Wilder") as a result of an inspection of Wilder's worksite at Milepost 1285-1308 of the Alaska Highway near Tok on July 22, 1988.

The Department's citation alleges that Wilder violated Alaska Construction Code 05.160(c)(3) by allowing employees to work in an excavated trench without adequately shoring, sloping or otherwise supporting the sides of the trench. The Department's citation is classified as a "repeat serious" violation and a penalty of \$2000 is proposed.

Following Wilder's notice of contest of the citation, a hearing was held in Anchorage on November 22, 1989. Board members Donald F. Hoff, Jr. and Lawrence D. Weiss were present and thus

constituted a quorum. The Department was represented by Assistant Attorney General Lisa Fitzpatrick. Wilder was represented by superintendent Dan Hertel. Evidence was submitted in the form of witness testimony and documentary exhibits, and the record was deemed to be closed at the conclusion of the hearing. Our findings of fact, conclusions of law and order follow.

#### FINDINGS OF FACT

1. On July 22, 1988, Department compliance officer Richard Kukowski conducted a safety and health inspection of Wilder's construction site at Milepost 1285-1308 of the Alaska Highway near Tok, Alaska.

2. During his inspection, Kukowski observed two Wilder employees working in an excavated trench. He visually estimate the trench to be approximately 7 feet deep, 9 feet across, and not more than 8 feet in length. He also examined the soil in the trench and found it to be hard, compacted dirt with gravel mixed in. (See Department Exhibits A and B).

3. The sides of the trench were not shored, sloped, or otherwise supported. In some places, the sides of the trench were essentially vertical.

4. According to Kukowski, the soil conditions in the trench would call for sloping at an angle of 1/2 to 1 (approximately 63 degrees) pursuant to Table P-1 on page 146 of the Construction Code.

5. Within the three-year period prior to the inspection, Wilder had been cited on two separate occasions for failing to slope or shore the sides of trenches. On August 8, 1986, Wilder was cited for an unshored trench at a worksite near McCrae and Spenard Roads in Anchorage; after an informal settlement conference, the proposed penalty of \$640 was reduced to \$500 and was paid by Wilder. (See Department Exhibit E). On August 13, 1987, Wilder was again cited for failing to shore a trench at a construction site at Arlene Street and Dimond Blvd. in Anchorage; after an informal settlement conference, Wilder paid the proposed penalty of \$1280. (See Department Exhibit D).

6. As a result of Wilder's payment of the penalty for each of the two previous violations, the Department considered both prior citations to be "final" and therefore the basis for the "repeat serious" citation issued in the present case. (See Department Exhibit C).

7. Compliance officer Kukowski further testified that the present violation was classified as "serious" because of the substantial probability of death or serious injury to employees should the sides of the trench collapse.

8. Under the Department's penalty calculation guidelines, the monetary penalty for a second repeated violation is four times the amount of the original violation, subject to possible reductions for such factors as company size, good faith, and history of previous violations. (See Department Exhibit F).

Accordingly, since the original violation had been resolved with the payment of a \$500 penalty, this second repeated violation resulted in a proposed penalty of \$2000. Additionally, Kukowski testified that there was no basis to apply any of the adjustment factors since Wilder was a large company and had a history of two recent trenching violations.

9. At the hearing, Department Exhibits A through F were admitted without objection. Wilder did not present any evidence of its own.

#### CONCLUSIONS OF LAW

Alaska Construction Code 05.160(c)(3) provides:

Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than four feet in depth and eight feet or more in length. In lieu of shoring, the sides of the trench above the four-foot level may be sloped to preclude collapse, but shall not be steeper than a one-foot rise to each one-half foot horizontal. When the outside diameter of a pipe is greater than six feet, a bench of four-foot minimum shall be provided at the toe of the sloped portion.

From our review of the Department's testimony and photographs, it is clear that the trench in question was not properly shored or sloped as required by the Construction Code.<sup>1</sup> We also conclude

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1. The Department's photographs also show an employee working in the trench without a hard hat. This appears to be a clear code violation, and we believe the Department should have cited it as a separate violation.

that Wilder employees were exposed in the hazard created, and that Wilder was fully aware of the excavation of the trench. The Department has thus satisfied its burden of proof in presenting a prima facie case of violation.

In its defense, Wilder argued that the trench was safe; that the soil was "cemented" and therefore required no sloping; that the trench was not a "trench" but an "excavation" within the meaning of the Code; that it was unfair to cite the violation because Wilder's supervisor was not on-site at the time of the inspection; that the company has a good safety record; and that the fine imposed was excessive.

We find no merit in any of these arguments. The Department's photographs, supplemented by the inspector's testimony, show that the soil in the trench was not solid rock or cemented sand or gravel which would allow for vertical walls without any sloping or shoring. We agree with the Department that the trench would be unsafe for employees in the event of the collapse of one of the side walls.

Moreover, under the definitions in Construction Code 05.160(d), we believe the excavation in question was indeed a "trench" subject to the sloping/shoring requirements since its width was less than 15 feet. Furthermore, the fact that Wilder's company's supervisor was not on-site during the inspection is irrelevant to the safety code violation; the company had presumably authorized the excavation of the trench by its employees and should

have been aware that they were working in a deep trench with vertical side walls. There was no evidence presented of misconduct by Wilder employees.

We also find no merit in Wilder's contention that the company has a good safety record with respect to trenching violations. The fact that Wilder was cited for two identical violations in the two years preceding this inspection is a persuasive indication that the company has a poor record with respect to trenching violations.

Finally, we have reviewed the Department's penalty calculations and we find the proposed penalty of \$2000 to be properly calculated under the Department's guidelines and not excessive in view of the company's two prior violations. As a large construction company, Wilder should be thoroughly familiar with State code requirements concerning the excavation of trenches. Should there be any further violation of these same trenching requirements, we believe the Department should give serious consideration to the issuance of a "willful" citation.

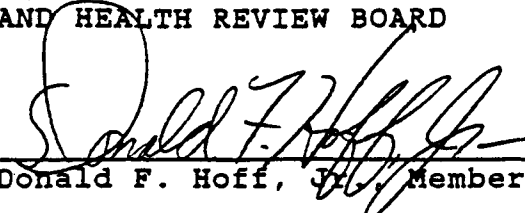
#### ORDER

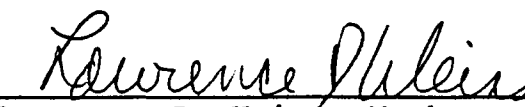
For the foregoing reasons, we hereby order as follows:

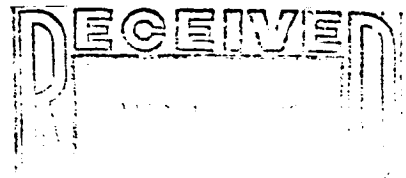
1. Citation #1 is AFFIRMED as a "repeat serious" violation.
2. The Department's proposed penalty of \$2000 is also AFFIRMED.

DATED this 8<sup>th</sup> day of March, 1990.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

  
Donald F. Hoff, Jr., Member

  
Lawrence D. Weiss, Member



**OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD  
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**NOTICE TO ALL PARTIES**

A person affected by an Order of the OSH Review Board may obtain review of the Order by filing a Notice of Appeal in Superior Court as provided by the Rules of Appellate Procedure of the State of Alaska. The Notice of Appeal must be filed within 30 days from the date of the issuance of the Order by the OSH Review Board. After 30 days from the date of the issuance of the Order, if no appeal has been filed, the Order becomes final and is not subject to review by any court. AS 18.60.097.

**CERTIFICATION**

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Department of Labor vs. Wilder Construction Company, Inc., Docket No. 88-750, filed in the office of the OSH Review Board at Juneau, Alaska, this 8th day of March, 1989.

A handwritten signature in cursive script that reads "Mary Jean Smith". The signature is written over a horizontal line.

Mary Jean Smith  
Administrative Assistant  
OSH Review Board

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