

**BEFORE THE ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD**

IN THE MATTER OF:	)	
	)	
STATE OF ALASKA, DEPARTMENT OF	)	
LABOR AND WORKFORCE DEVELOPMENT,	)	OAH Case No. 07-0079-OSH
DIVISION OF LABOR STANDARDS	)	
AND OCCUPATIONAL SAFETY	)	
AND HEALTH SECTION	)	DOCKET NUMBER 07-2223
	)	INSPECTION NO.308540509
Complainant,	)	
	)	
vs.	)	
	)	
ALCAN ELECTRIC ENGINEERING, INC.	)	
	)	
Contestant.	)	
_____	)	

**DECISION AND ORDER**

**I. Introduction**

This matter arises from a single citation issued by the Alaska Department of Labor and Workforce Development (“Department”) to Alcan Electric Engineering, Inc. (“Alcan”) on January 19, 2007 alleging a violation of occupational safety and health standards, namely 29 CFR 1926.1053(b)(13). That standard which provides that “(T)he top or top step of a stepladder shall not be used as a step.” The Department has classified the violation as “serious” and has assessed a monetary penalty in the amount of \$1300. On January 25, 2007, Alcan filed its notice contesting the citation.

A hearing before the Occupational Safety and Health Review Board (“Board”) was held May 18, 2007. The Department was represented by Larry McKinstry, Assistant Attorney General. Alcan was represented by its counsel, Timothy Verrett. Both parties presented witness testimony, documentary evidence and oral argument. The Department called as witnesses Steven Standley (AKOSH Chief Enforcement Officer) and Randy Waters (safety enforcement officer). Alcan called as witnesses Skipp Bringmann (Vice-president of Alcan), Rockwell Selvig (foreman), Jason Helf (Alcan general foreman), and Joe Carlson (general manager of operations for Alcan in southeast Alaska). The hearing was recorded. Department exhibits A through E

(five photos) were admitted into evidence; Alcan's exhibits A through I were admitted into evidence.

After considering the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law, and order.

## **II. Findings of Fact**

A. On January 19, 2007, at approximately 12:20 p.m., Department safety enforcement officer Randy Waters observed an individual standing on the uppermost step of a stepladder located on a marquee roof at the Juneau-Douglas High School, 1639 Glacier Avenue, Juneau, Alaska. Mr. Waters stopped his vehicle, took photos of the individual standing atop the ladder, entered school premises and proceeded to the location of the stepladder.

B. The individual who had been standing atop the ladder identified himself as Rocky Selvig, an employee of Alcan. Mr. Selvig explained that he had been atop the ladder to briefly inspect electrical wiring behind a large two section sign mounted on the exterior wall of the school. By holding onto the sign and standing on top of the stepladder, Mr. Selvig could look behind the sign as needed. Mr. Selvig was working alone at the time of the violation.

C. The stepladder used by Mr. Selvig was fiberglass and 12 feet tall. The ladder has a warning label which instructs the user not to use the top step of the ladder as a step.

D. The surface upon which the stepladder was placed is a flat roof, one story above the ground. The distance from the stepladder to the edge of the roof is approximately 15 feet. Access to the roof surface was gained by using an extension ladder.

E. Soon after Mr. Waters began speaking with Mr. Selvig, Jason Helf, the general foreman for Alcan (Juneau) and Mr. Selvig's supervisor, arrived. Mr. Selvig and Mr. Helf did not deny the violation.

F. Mr. Selvig is a journeyman electrician and holds a professional license issued by the state of Alaska. Mr. Selvig had been an electrician for approximately 25 years at the time of the violation. At the time of the hearing, Mr. Selvig had worked for Alcan approximately 15 months. Mr. Selvig frequently acts as foreman of Alcan work crews.

G. Mr. Selvig has received ladder safety training provided by Alcan, prior employers, and the International Brotherhood of Electrical Workers ("IBEW"). Alcan conducts

weekly safety meetings. On July 12, 2006, Mr. Selvig received stepladder safety training from Alcan using the *Toolbox Talks* materials.<sup>1</sup>

H. Mr. Selvig admits that it is against Alcan safety rules and policies to use the top step of a stepladder as a step.

I. Alcan has adopted a safety manual prepared by the National Electrical Contractors Association.<sup>2</sup> The manual contains a cover letter from Alcan management exhorting Alcan employees to follow all safety rules. Chapter 13 is devoted to ladders. Chapter 13 contains four subchapters. In very brief terms, the chapter addresses portable ladder inspection, portable ladder accidents, and portable ladder use. While not specifically instructed to avoid using the top step of a ladder as a step, chapter 13-1A (Portable Ladder Checklist) indirectly instructs a ladder user not to use the top step when the checklist asks the question “Are employees instructed not to use the top step of ordinary stepladders as a step?”

J. Mr. Selvig was aware of the rule against using the top step of a stepladder as a step at the time he committed the violation observed by Mr. Waters.

K. Mr. Selvig received a verbal reprimand on December 19, 2006, and written reprimand on December 20, 2006.<sup>3</sup> Alcan required on December 20, 2006 that (1) Mr. Selvig review *Toolbox Talks* lesson number 52 captioned “Ladder Safety”,<sup>4</sup> and (2) review and sign Alcan’s basic safety program and work procedures materials.<sup>5</sup>

### **III. Conclusions of Law**

The Department has the burden of proof in contested cases. In the case at hand, it is undisputed that the violation occurred when Mr. Selvig used the top step of a stepladder as a step, which is a clear violation of 29 CFR section 1926.1510(b)(13). Alcan does not deny that the violation occurred. Alcan argues that it is relieved or responsibility under the affirmative defense<sup>6</sup> known as “unavoidable employee misconduct.”

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<sup>1</sup> Lesson number 52.

<sup>2</sup> Exhibit I.

<sup>3</sup> Exhibit H, p. 2 (written reprimand).

<sup>4</sup> Exhibit H, pp. 3-4.

<sup>5</sup> Exhibit H, pp. 5-6.

<sup>6</sup> In the context of this case, the term “affirmative defense” means matters asserted by the contestant (Alcan), assuming the complaint to be true, which constitute a complete defense to the complaint.

The burden of proof for affirmative defenses is on the party asserting those defenses by a preponderance of the evidence.<sup>7</sup> The contestant (Alcan) bears the burden of proof of establishing an unavoidable employee conduct defense.<sup>8</sup> To prevail on the unpreventable employee misconduct affirmative defense, the contestant must satisfy four requirements. First, the employer must have a written rule that addresses the safety concern which constitutes the violation covered by the citation. The rule must be sufficiently specific to clearly inform employees what their responsibilities are in relation to the OSHA standard. Second, the rule must have been adequately communicated by the employer to the employee. Third, the employer must take reasonable steps to discover violations. Fourth, the employer must show evidence that it enforced the rule when violations occurred.<sup>9</sup>

Alcan has satisfied the first requirement (written safety rule). Alcan has a written rule contained in its Toolbox Talks program which states “Do not sit or stand on the top step or next-to-the-top step of any ladder.”<sup>10</sup> The evidence is clear that Alcan employees using portable stepladder have been told and have read that they shall not use the top step of a stepladder as a step.

Alcan has barely satisfied the second requirement (communicate the safety rule). While there is evidence in the record that the stepladder rule was communicated in several ways to Alcan employees, and there seems to be no misunderstanding among employees as to what to do, and what not do, when using portable stepladders, the record is not heavy with evidence showing a regular, effective, and timely delivery of safety information relating to ladder usage. When a supervisor (foreman) such as Mr. Selvig commits a safety violation, it is strong evidence that the employer’s safety program is lax.<sup>11</sup> The Board is left with the impression that Alcan is “going through the motions” with its safety program, but not delivering the safety program in a forceful, meaningful, and effective manner.

Alcan has not satisfied the third requirement (discover safety violations). An employer must take reasonable steps to discover violations. Admittedly, it may be difficult to discover

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<sup>7</sup> “Preponderance of the evidence” means that it is more likely than not that the asserted proposition is true. 8AAC 61.205(i).

<sup>8</sup> *E & R Erectors, Inc. v Secretary of Labor*, 107 F.3d 157, 163 (3<sup>rd</sup> Cir. 1997); *Riverdale Mills Corporation v. Occupational Safety and Health Review Commission*, 29 Fed. Appx. 11, 17 (1<sup>st</sup> Cir. 2002)

<sup>9</sup> *Jensen Construction Company*, 7 OSHRC 1477, 1979 OSHD section 23,664 (1979); *Capform Inc.*, 16 OSH Cases, 2040, 2043 (Rev. Comm’n 1994)

<sup>10</sup> Exhibit H, p.3.

<sup>11</sup> *Daniel Constr. Co.*, 10 OSH cases at 1552.

violations when only one Alcan employee is sent to the job, and that employee is a foreman, but the record does not indicate that Alcan is making surprise site inspections, or even any site inspections of its employees, except on an as needed basis. An employer is required exercise reasonable diligence in detecting workplace hazards.<sup>12</sup> “Reasonable diligence” has been defined as “such watchfulness, caution, and foresight as, under all circumstances of the particular service, a corporation controlled by careful prudent officers ought to exercise.”<sup>13</sup> Regardless of the fact that Mr. Selvig was a foreman, and regardless of whether Alcan employs apprentices, Alcan must take all reasonable steps to discover violations. Messrs. Helf and Carlson’s testimony indicated that Alcan did not have an ongoing, effective, inspection program designed to discover unsafe practices or site conditions.

Alcan has not satisfied the fourth requirement (effective enforcement). Alcan submitted three written reprimand letters issued to its employees to bolster its position that it effectively enforces safety rules. None of the three reprimand letters was issued from Alcan’s Juneau office. Alcan’s office manager testified that no written reprimands had been issued from the Juneau office during the preceding eight years. While it is conceivable that no safety violations were *discovered* during an eight year period, the Board believes that it is unlikely that no safety violations *occurred* during an eight year period. The Board regards the written reprimand to Mr. Selvig to be too lightweight. The written reprimand simply asks Mr. Selvig “to use a ladder that is tall enough for the work to be performed” and to again “read and sign our Basic Safety and Work Procedures form....”<sup>14</sup> Mr. Selvig is not penalized financially in any manner. The message to other employees becomes “that even if you are cited for a serious violation, you should not fear any significant or financial penalty.”

The Department urges the Board to adopt an interpretation and application of the unavoidable employee misconduct defense which would hold an employer responsible for any OSHA standard violation committed by a supervisory employee. For example, Mr. Selvig, a supervisor and foreman for Alcan, committed a safety violation. The Department would have the Board automatically impute the responsibility for Mr. Selvig’s violation to his employer, Alcan, because the violation has been committed by a supervisor. In support of its request, the Department correctly argues that the federal and state occupational safety and health acts are to

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<sup>12</sup> *Occupational Safety and Health Law*, Mark A. Rothstein (West, 2007 edition) at section §:27 at 207.

<sup>13</sup> *Ames Crane & Rental Service Inc.*, 3 OSHRC 1279, 1974-75 OSHD section 19,724 (1975).

<sup>14</sup> Exhibit H, p.2.

be interpreted and applied broadly in order to insure that employers take seriously their responsibility to protect employees from dangerous working condition.<sup>15</sup>

The Board agrees that an Alaska employer absolutely must take its responsibility to protect the health and safety of its employees. The Board agrees that when a safety violation is committed by a supervisor, the affirmative defense of unavoidable employee misconduct asserted by an employer must be strictly construed. Raising the bar for an Alaska employer to establish unavoidable employee misconduct when the violation is committed by a supervisor is an acceptable approach. However, the Board declines to *automatically* find the employer liable. This Board has observed over the years that the facts and circumstances giving rise to a safety violation vary, sometimes drastically, from case to case. The Board does not wish to prejudge, or give the appearance of prejudging, any case coming before it. Accordingly, the Board will strictly scrutinize the safety programs and practices of an employer whose supervisor committed a safety violation, but the employer has the legal right to assert the unavoidable employee misconduct affirmative defense. The Board believes that the proper focus of employee misconduct cases coming before it should be the effectiveness of the employer's safety program and not whether the employee misconduct is by a supervisor as opposed to an employee.<sup>16</sup>

#### **IV. Classification of Violation and Penalty Assessment**

The Department has classified the violation as serious. A serious violation exists if the violation creates in the place of employment a substantial probability of death or serious harm.<sup>17</sup> The key elements in determining whether a violation is serious are the probability of an accident occurring and the gravity of any resulting injury or illness.<sup>18</sup> The Board views the single violation in this matter as serious. If Mr. Selvig had fallen twelve feet onto a hard surfaced roof, there can be little doubt that a serious injury could result. The record suggests that Mr. Selvig might fall an additional distance to the ground, if he fell from the ladder while the ladder was close to the roof edge. Looking to the evidence on this point, we think that a fall from the marquee roof to the ground is possible, but not very likely considering that Mr. Selvig was approximately fifteen (or more) feet from the edge of the flat roof. The Board finds no basis to change the classification of the violation.

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<sup>15</sup> *Whirlpool Corporation v. Marshall*, 445 U.S. 1, 12-13 (1980).

<sup>16</sup> See *Consolidated Freightways Corp.*, 15 OSHC 1317, 1991 OSHD section 29,500 (1991)(misconduct by a supervisor is evidence that the safety program was lax).

<sup>17</sup> AS 18.60.095(b).

<sup>18</sup> Occupational Safety and Health Law, Mark A. Rothstein, section 313 at 365.

An employer who receives a citation for a serious violation of AS 18.60.010-18.60.105 that is applicable to the employer or of a standard or regulation adopted under AS 18.60.010-18.60.105 shall be assessed by the commissioner a civil penalty of up to \$7000 for each violation.<sup>19</sup> When the Department assesses a penalty, the Department must give due consideration to the employer's size, the gravity of the violation, the good faith of the employer, and the history of previous violations.<sup>20</sup> The Department relies on the Field Inspection Reference Manual ("FIRM") to calculate penalties.<sup>21</sup> The Board is not bound by the criteria used by the Department when the Board is evaluating the classification of a violation or the assessment of a penalty.<sup>22</sup>

The Board has considered the following in its review of the proposed \$1300 penalty:

- A. The employer's size. Alcan is a large company by Alaska standards, but the Juneau branch of Alcan is small.
- B. The gravity of the violation. The violation is properly classified as serious and was committed by a foreman for the company.
- C. The good faith of the employer. Alcan exhibited good faith by cooperating with the inspector and promptly admitting that a violation has occurred.
- D. The history of previous violations. The record is not clear as to the exact number of violations in a given period. The testimony of a Department witness indicates that Alcan, on a state-wide basis, has had six inspections in a five year period, but the exact number of violations and their classification is not in the record. Accordingly, the Board does not believe that Alcan has a history of serious violations.
- E. The number of workers exposed to the violation. Here, only one Alcan employee was in the "danger zone."

After considering the foregoing factors, the Board concludes that an adjustment of the penalty amount is justified. The Board exercises its discretion and reduces the total penalty amount for the single violation from \$1300 to \$100.

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<sup>19</sup> AS 18.60.095(b).

<sup>20</sup> AS 18.60.095(h).

<sup>21</sup> 8 AAC 61.140(c).

<sup>22</sup> 8 AAC 61.140(h).

**V. Order**

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that Citation 1, Item 1 is **AFFIRMED** as a serious violation, and the total penalty is reduced to \$100.

**VI. Right to Appeal**

A person affected by an order of the Occupational Safety and Health Review Board may obtain judicial review<sup>23</sup> of the order 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 in the Superior Court within 30 days from the date that the decision appealed from is mailed or otherwise distributed to the appellant.<sup>24</sup>

Dated this 23rd day of May, 2008.

Alaska Occupational Safety  
And Health Review Board

By: Signed  
Timothy O. Sharp, Chair

By: Signed  
Thomas A. Trosvig, Member

By: Signed  
James Montgomery, Jr., Member

[This document has been modified to conform to technical standards for publication.]

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<sup>23</sup> AS 18.60.097.

<sup>24</sup> Rule of Appellate Procedure 602(a)(2).