IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Hartman Construction & Equipment, Inc., Appellant, v. State of Alaska, Department of Labor and Workforce Development, Division of Labor Standards and Safety, Occupational Safety and Health Section, Appellee.	)	Appeal No. 3AN-17-05546 CI

ORDER ON APPEAL

I. INTRODUCTION

A trench collapsed on a company's construction site, mortally injuring employee Sam Morgan. Several other employees at Hartman Construction & Equipment, Inc. ("HCE"), the employer, attempted to dig Morgan out using shovels and a large excavator. Morgan died soon after being freed from the trench.

HCE was cited by the Alaska Department of Labor and Workforce Development ("AKOSH") for eight "willful-serious" OSHA violations related to the trench and the events surrounding the collapse, each carrying a proposed penalty of $70,000. HCE contested the violations themselves, as well as their classification as "willful-serious."

The Alaska Occupational Safety and Health Review Board ("the Board") held a hearing on the matter, presided over by an administrative law judge acting as hearing

officer. The hearing officer precluded an HCE expert witness from testifying and inadvertently allowed a piece of unadmitted evidence to be shared with the Board. The Board upheld the "willful-serious" classifications, but reduced the number of OSHA violations to five.

HCE appeals the Board's Decision and Order on four grounds. First, HCE argues that there were procedural defects in the hearing sufficient to warrant a trial de novo. Second, having conceded three of the five violations (though not their severity), HCE argues that the Board erred in upholding the other two. Third, HCE contends that the finding of "willful-serious" on all five violations was error. Finally, HCE argues that the Board erred in rejecting the significant reduction in fines for companies of HCE's size purportedly required by AKOSH's field operating manual (FOM).

For the reasons explained below, the court denies HCE's request for a trial de novo, remands one violation for further proceedings, and affirms the Board in all other respects.

II. FACTS AND PROCEEDINGS

David and Linda Hartman are the sole owners of HCE, which is incorporated in Alaska. As of early summer 2015, HCE employed David Hartman and his two sons, Derek and Chad Hartman. David Hartman acted as the supervisor or crew leader. HCE hired Samuel Morgan in late May or early June, not long before the incident. The subdivision in which the collapse took place is owned by David Hartman in his individual

capacity. At the time of the incident, HCE and the Hartmans had been developing the subdivision for ten years.[1]

David Hartman purchased the property for "a couple million" in 1999.[2] The land was designated as wetlands; therefore Mr. Hartman had to pay $300,000 for wetlands mitigation.[3] After he purchased the property he began to subdivide and attempted to sell lots. As of 2017 he had sold four out of fifteen lots.[4] The actual cost of developing the property was exceeding his projected estimate by a significant amount.[5]

In 2005, HCE received a citation from AKOSH for a trenching violation. The 2005 violation was not admitted into evidence because the document had just been found prior to the cross-examination of David Hartman and was late-produced. However, Mr. Hartman testified to the facts that HCE retained counsel, contested the 2005 citation, and entered into a settlement agreement.

In 2014 HCE was doing trench work in the same subdivision in which the incident took place when Kent Kohlhase, a supervisor in the Municipality of Anchorage Development Services Department, sent an e-mail to Hartman stating:

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[1] Transcript, 805-806, 217; R. 305.

[2] Transcript at 807.

[3] Transcript at 747.

[4] Transcript at 819.

[5] Transcript at 817–19 ("I believe it probably is higher yes. I have no clue. It just doesn't really matter. It's going to cost what it costs.").

> Looking at the middle picture in the right hand column, it appears that trench is not shored or otherwise configured to conform with OSHA trench standards. I strongly recommend that you review the OSHA standards and ensure that your excavations and operating procedures are in compliance.[6]

Hartman replied, "Will do. This was an unusual case as we were trying to maneuver in tight quarters."[7] The email, one of "thousands of pages of documents" produced by AKOSH prior to the hearing, had not been treated by AKOSH as an exhibit nor introduced in its case in chief. Nevertheless, on the last day of the hearing, the hearing officer informed the parties that he had shared the text portion of the email with someone on the Board prior to the hearing, and that all the members of the Board had now seen the email, but not the accompanying photograph(s) to which it referred.[8] The hearing officer decided to admit the email over HCE's strenuous objection. Hartman testified that he studied the picture when he received the email, that he had not thought that it needed shoring, and that HCE took no action in response to the email. Neither party questioned Hartman regarding the reply email.

In late May or early June 2015, a small section of the edge of an unused roadbed broke off or "sloughed." This section, parallel to but at a lower level than the roadbed being used by traffic in and out of the subdivision, was made up of the same sort of

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[6] R. 334.

[7] *Id.*

[8] *See* Docket No. 15-2286 ("Decision and Order") at 5, n. 18. The photograph was also unavailable for review during David Hartman's testimony.

material as the trench that HCE was digging. David Hartman placed orange traffic cones around the slough area to warn vehicles. However, Hartman and HCE took no additional precautions in their trench work as a result of the slough.

In June 2015, the Municipality required HCE to replace certain wastewater piping in the subdivision. HCE dug a trench on the north side and parallel to 91st Avenue roadbed moving east to west. The trench reached a length of approximately 100 feet at the time of the incident on June 16, 2015. The south wall of the trench was approximately six feet tall while the north wall was approximately four feet tall.[9] The piles of material excavated during the trenching project were placed immediately to the north of the trench wall, which increased the height of the north wall by several feet.[10] James "Ron" Anderson, AKOSH chief of enforcement testified that both walls of the trench were nearly vertical, rather than being sloped or benched as required under OSHA regulations.[11]

On the afternoon on June 16, 2015, Sam Morgan was in the trench. He had called in sick earlier, but showed up around lunch time. When Morgan called over to David Hartman from the trench, one wall of the trench suddenly collapsed, quickly burying

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[9] Both heights triggered certain OSHA requirements. 29 CFR 1926.652(a)(1)(ii); 29 CFR 1926.652(b)(1)(i).

[10] 29 CFR 1926.651(j)(2) Specific Excavation Requirements—Excavated materials ("spoil piles") must be placed 2 feet from edge of trench.

[11] Benching is "a process where step like benches are built into the trench at specified heights for trench stability." (https://www.osha.gov/dts/osta/otm/otm_v/otm_v_2.html).

Morgan up to his waste in rubble. Hartman testified that Morgan turned away from the collapsing wall, and was pinned against the intact wall, facing away from the collapsed edge.[12]

Linda Hartman called 911 while David Hartman maneuvered an excavator to the trench, realized it was too small to help, then maneuvered a larger excavator over to the edge. Chad and Derek Hartman used shovels to dig Morgan out and spotted David Hartman's use of the large excavator, the bucket of which came near Morgan during the rescue attempt. Emergency personnel arrived on the scene but did not go into the trench, citing safety concerns. HCE employees eventually freed Morgan, but he had suffered a massive injury to his groin area and died shortly after being removed from the trench. It was disputed whether the force of the collapse caused the injury or whether David Hartman's rescue attempts with the excavator caused the injury.

Ron Anderson conducted interviews with the Hartmans and investigated the incident. Several months later, AKOSH cited HCE for eight violations.[13] HCE contested

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[12] Hartman also repeated this observation to his medical expert, Dr. Norman Means.

[13] R. 777–78:

1. AS 18.60.075(a)(4) General Duty Clause
2. 29 CFR 1926.651(c)(2) Specific Excavation Requirements—Means of Egress
3. 29 CFR 1926.651(j)(1) Specific Excavation Requirements—Adequate Protection from loose rock or soil falling.
4. 29 CFR 1926.651(j)(2) Specific Excavation Requirements—Excavated materials ("spoil piles") 2 feet from edge of trench.
5. 29 CFR 1926.651(K)(1) Specific Excavation Requirements—Daily inspections by "competent" person.
6. 29 CFR 1926.652(a)(1)(ii) Requirements for Protective Systems—For trenches five feet and deeper.

all eight and a hearing was set for August 2016, before members of the Alaska Occupational Safety and Health Review Board ("the Board").

HCE changed counsel before the hearing and was granted a two-month continuance, moving the hearing to October. Fifteen days before the hearing began, HCE asked to include Steve Standley, former AKOSH chief of enforcement, as an expert witness. AKOSH moved to preclude Standley from testifying, citing the lateness of the request and pointing out several deficiencies in Standley's "expert report." The matter was fully briefed and the hearing officer ruled in favor of AKOSH a week before the hearing commenced, precluding Standley from offering expert testimony.

At the hearing, AKOSH presented testimony from its chief of enforcement, Ron Anderson; safety enforcement officer Seth Hansen; municipal surveillance inspector Pamela Ronning; the state medical examiner, Dr. Cristin Rolf; and David and Derek Hartman. HCE called David and Derek Hartman, as well as a retained medical expert, Dr. Norman Means. In its closing brief, HCE conceded three of the eight violations, but not their designation as "willful-serious."[14] HCE also asked for the small business reduction in the penalty suggested in the AKOSH Field Operations Manual (FOM).

(continued)
7. 29 CFR 1926.652(b)(1)(i) Requirements for Protective Systems—Trench walls sloped no steeper than 34 degrees measured from the horizontal.
8. 29 CFR 1926.652(c)(2)(i) Requirements for Protective Systems—Support designs in accordance with all specifications issued or made by the manufacturer.

[14] Item 2, Item 4, and combined Items 6 & 7. R. 762.

After a three-day hearing, the Board issued its Decision and Order upholding five of the eight violations: Item 1, for violating the general duty clause; Item 2, for lack of ladders or other means of egress; Item 4, for having spoil piles too close to the trench; Item 5, for failure to have daily inspections performed by a "competent person"; and the (merged) Items 6 & 7, for failure to properly slope or bench the trench, or to use trench boxes to prevent cave-ins.[15] It found the testimony of AKOSH's medical witness, Dr. Rolf, more reliable than that of Dr. Means because Dr. Means' testimony was predicated on David Hartman's information that Morgan was facing away from the excavator.[16] The Board also discredited the Hartmans' testimony in large part, pointing out testimony it found inconsistent with the evidence, especially David Hartman's incorrect testimony on direct examination that he had not received a prior OSHA citation.[17] Finding that the 2005 citation, the Kohlhase email, and the slough put HCE on notice that there were specific OSHA trenching standards such that HCE's failure to investigate those standards constituted "a reckless disregard for and plain indifference to employee safety and the requirements of the applicable OSHA regulations," the Board upheld the willful-serious designation as to all five violations.[18]

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[15] Decision and Order, 18–24.

[16] *Id.* at 15.

[17] *Id.* at 12–13.

[18] *Id.* at 18, 25–26.

As for a small-business reduction in penalty, the Board reduced HCE's fines for four of the five violations by 5%, and one of them by 50%. The Board noted that it was not bound by the FOM's guidelines; rather, only a small reduction was justified for four of the violations because "the gravity of each of these violations was extreme and led to the death of Samuel Morgan."[19] The ladder violation, Item 2, was given a 50% reduction because the Board "had far less of a causal connection with Mr. Morgan's fatal injuries than the other violations."[20]

On appeal, HCE asks for trial de novo based on Standley's preclusion, the admission of the Kohlhase email into evidence, and the Board's treatment of Morgan's death as being in any way caused by Hartman's use of the excavator in the rescue. In the alternative, HCE contests Items 1 and 5 substantively, the willfulness designation for each violation, and the Board's rejection of the FOM penalty-reduction guidelines.

III. STANDARDS OF REVIEW

A. Appeals From The OSHA Board

In considering administrative appeals, the court applies four principal standards of review.[21] The "substantial evidence" test is used for questions of fact.[22] The "reasonable

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[19] *Id.* at 26.

[20] *Id.*

[21] *State v. Pub. Safety Employees Ass'n*, 93 P.3d 409, 413 (Alaska 2004); *accord.* AS § 18.60.097(e) ("The court shall review an order of the OSHA Review Board or of the commissioner on a substantial-evidence basis.").

basis" test is used for questions of law involving agency expertise.[23] The "substitution of judgment" test is used for questions of law where no expertise is involved.[24] The "reasonable and not arbitrary" test is used for review of administrative regulations.[25]

B. Trial De Novo Under Appellate Rule 609(b)

Additionally, the reviewing court may decide that a trial de novo is appropriate. Rule 609(b)(1) of Appellate Procedure states that:

> In an appeal from an administrative agency, the superior court may in its discretion grant a trial de novo in whole or in part. If a trial de novo is granted, the action will be considered as having been commenced in that court at the time that the record on appeal is received by the superior court.[26]

However, de novo review "is rarely warranted and is generally limited to review of due process violations at the agency level."[27] A violation of due process should be alleged with particularity and a showing of prejudice.[28] Appropriate circumstances for granting trial de novo include situations where "certain issues are not within the expertise of the

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[22] *Id.*; *accord.* AS § 18.60.097(e) ("The court shall review an order of the OSHA Review Board or of the commissioner on a substantial-evidence basis.").

[23] *Pub. Safety Employees Ass'n*, 93 P.3d at 413.

[24] *Id.*

[25] *Id.*

[26] Alaska R. App. P. Rule 609.

[27] *City of Valdez v. State*, 372 P.3d 240, 252 (Alaska 2016) (citing *Pacifica Marine, Inc. v. Solomon Gold., Inc.*, 356 P.3d 780, 795 (Alaska 2015)).

[28] *Nash v. Matanuska-Susitna Borough*, 239 P.3d 692, 699 (Alaska 2010).

reviewing body; where the agency record is inadequate; where the agency's procedures are inadequate or do not otherwise afford due process; or where the agency was biased or excluded important evidence in its decision-making process."[29]

IV. DISCUSSION

A. Trial De Novo Is Not Warranted

The court begins with HCE's arguments in support of granting a trial de novo. First, HCE contends that the preclusion of Steve Standley, HCE's expert witness, was prejudicial error, excluding important evidence in the Board's decision-making process.[30] Second, HCE argues that when the hearing officer inadvertently gave the email from Kent Kohlhase to the Board then admitted the email into the record without the photograph attachment, this was prejudicial error.[31] When the Board subsequently used the email to discredit David Hartman's testimony and to establish willfulness in its Decision and Order, knowing that it was improperly admitted and incomplete, HCE argues that this demonstrates bias.[32] Third, HCE claims that when the Board used its own judgment over that of the medical experts in determining the mechanism of

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[29] *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 774, 778 (Alaska 2007).

[30] App.'s Br. at 3.

[31] *Id.* at 14–19.

[32] *Id.*

Morgan's death, they were substituting their judgment on issues outside their expertise.[33] Further, HCE argues that their insistence on blaming Morgan's death on the excavator, despite strong evidence to the contrary, also demonstrates bias.[34] Finally, HCE argues that all of this also implies that the record is incomplete, though this is stated as a conclusion that follows from the other supposed defects.[35]

HCE's arguments, rearranged, are that the Board made and relied on medical findings outside of its expertise, excluded important evidence, and demonstrated bias. None of these arguments persuades the court that trial de novo is warranted, though certain points apply to HCE's other contentions regarding the misapplication of the general duty clause.[36] Affording the Board due deference in its findings of fact, including credibility determinations and evidentiary rulings, and on the scant showing of prejudice, the court sees no need for a trial de novo based on these arguments.

i. The Board does not lack the relevant expertise

In addressing HCE's expertise argument, *South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Board of Adjustment* is illustrative.[37] In *Concerned*

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[33] *Id.* at 19–25.

[34] *Id.*

[35] *Id.* at 25.

[36] *See* Section IV.C., below.

[37] 172 P.3d 774 (Alaska 2007).

Coalition, a group of concerned residents petitioned the superior court for a trial de novo on the grounds that the Anchorage Platting Board was an administrative body that lacked the expertise to decide the technical issues presented to it.[38] In affirming the superior court's denial of trial de novo, the Supreme Court explained that the Coalition had misunderstood what the "expertise" argument entails:

> The premise for the Coalition's de novo argument here is that the Platting Board lacks expertise to decide whether the development will have an adverse impact on the area's groundwater supply. We agree with the superior court that this argument is without merit. The Coalition has misperceived the Platting Board's duty; it is not to determine the actual impact of the development on the area's groundwater. The Platting Board's duty is, more broadly, to determine whether the plat application conforms to the standards set forth in the municipal code. More specifically, the Board's task on remand was to determine whether the developers had met the burden of providing additional information and ensuring that groundwater quality concerns were being addressed. For these endeavors, the Board members do not need degrees in hydrology or any other surrogate expertise. Rather, the Board must be collectively qualified to weigh the testimony and information presented to it and to completely and accurately review information provided. In this case, several reports were submitted and critiqued, and numerous experts in the field of hydrology offered written and verbal comments; the Board is entitled to rely on these submissions and then to apply its own judgment in determining whether the code's requirements have been met. We acknowledge that the data and conclusions ultimately relied on by the Board are controverted: experts disagree. But this does not mean that the Board is incompetent to ultimately determine whether—based on the information provided—the plat application merits approval.[39]

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[38] *Id.*

[39] 172 P.3d at 779 (quotations, citations, and alterations omitted).

HCE similarly misperceives the Board's duty in this matter. The Board was not required to determine the actual mechanism of Morgan's injuries; it need only "be collectively qualified to weigh the testimony and information presented to it and to completely and accurately review information provided."[40] Similarly, though Dr. Means and Dr. Rolf disagreed on the exact mechanism of injury,[41] the Board's expertise here involved relying on these reports and applying its own judgment in determining whether OSHA's requirements have been met, not determining the exact mechanism of Morgan's injury.[42]

Simply put, the Board was well within its area of expertise in weighing the evidence presented and making credibility determinations. After discounting Dr. Means' testimony because it was premised on information relayed by HCE—that Morgan had been facing away from the excavator bucket at the time of his injury—the Board expressed an opinion as to the mechanism of Morgan's fatal injury that aligns more with Dr. Rolf's expert opinion than with Dr. Means' opinion.[43] There is nothing improper about this opinion.

The court acknowledges that the Board's finding was problematic on the point of how Morgan was injured: the Board found both that "AKOSH did not prove by a

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[40] *Id.*

[41] *See* Decision and Order at 11.

[42] *Cf.* 172 P.3d at 779.

[43] Decision and Order at 15.

preponderance of the evidence that the injuries were caused by one of the excavators"[44] but also that "the appearance of the wound supports the theory that the excavator played a contributory role in the injury."[45] In making the second finding, the Board also found that aspects of the detailed photographs of Morgan's injury "do not appear to be consistent with Dr. Means' opinion regarding the mechanism of injury—the edges of the gaping wound seem too uniform to have occurred in the manner described by Dr. Means."[46] With this language, the Board may be doing more than weighing evidence and applying it to OSHA requirements.

However, the Board's ultimate conclusions did not turn on whether Morgan's injuries were caused, directly or otherwise, by the excavator.[47] While it is unclear why the Board made any findings on the mechanism of Morgan's injury—especially two seemingly contradictory ones—the Board's finding was immaterial to the conclusion that HCE had violated the general duty clause. For this reason, the court finds that the Board did not act outside of its expertise in any meaningful way regarding the medical issues. Trial de novo will not be granted on this point.

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See* Decision and Order at 19 ("[W]hether or not Mr. Morgan's fatal injuries were directly caused by one of the excavators, the use of the excavators was extremely dangerous and put Mr. Morgan at risk of serious injury or death.").

ii. The Board's conduct does not demonstrate bias

HCE argues that the Board's reliance on the improperly admitted Kohlhase email, as well as its interpretation of David Hartman's testimony concerning the email, demonstrate bias. It also argues that the Board's focus on the excavator as the cause of Morgan's death, despite evidence to the contrary, demonstrates bias. Neither contention has merit.

In *AT&T Alascom v. Orchitt*, a case involving an appeal from the Workers' Compensation Board, the Supreme Court explained that "[a]dministrative agency personnel are presumed to be honest and impartial until a party shows actual bias or prejudgment."[48] To show such bias, the *Orchitt* court continued, "a party must show that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence."[49] Applying this standard, the *Orchitt* court held that because the appellant had made no showing that the hearing officer had prejudged any facts or was motivated by actual bias in ruling on procedural issues, his status as an AFL-CIO vice president did not imply bias violative of the appellant's due process right to an impartial tribunal.[50]

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[48] *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007).

[49] *Id.* (citing *Tachick Freight Lines v. Dep't of Labor*, 773 P.2d 451, 453 (Alaska 1989)).

[50] *Id.*

HCE's claims regarding bias do not even attempt to show that the Board prejudged any facts or that it was motivated by actual bias; rather, HCE shoehorns its complaints about procedural irregularities into the "bias" category of due process violations that can warrant a trial de novo. For this reason, the court finds HCE's bias arguments unavailing; neither demonstrates that the Board was biased.

Even construing HCE's "bias" arguments as more general due process issues, the court declines to grant trial de novo on any of the bases submitted by HCE. Neither focusing on the excavator as a cause of death nor admitting the Kohlhase email prejudiced the outcome of the hearing, because neither was necessary for the Board to arrive at its conclusions.

1. The excavator and mechanism of injury

As discussed above, the Board's findings on the excavator as a potential mechanism of injury do not seem to have underpinned any of its conclusions.[51] Because the conclusions would stand independent of the problematic findings, HCE's argument regarding the Board's treatment of the excavator and mechanism of injury is without force; absent any showing of prejudice it does not demonstrate a denial of due process sufficient to grant de novo review.[52]

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[51] *See* Section IV.A.i., above.

[52] *See Nash*, 239 P.3d at 699 ("A violation of due process should be alleged with particularity and a showing of prejudice.").

2. The Kohlhase email

The email from Kent Kohlhase, dated October 16, 2014, is the source of some of contention for HCE. In it, Kohlhase informed David Hartman of certain concerns regarding a picture taken of a trench that HCE had dug:

> Looking at the middle picture in the right hand column, it appears that trench is not shored or otherwise configured to conform with OSHA trench standards. I strongly recommend that you review the OSHA standards and ensure that your excavations and operating procedures are in compliance.[53]

The Board cited the email in discrediting David Hartman's testimony[54] and in finding willfulness.[55]

Regardless of whether admitting the email constitutes error by the hearing officer, the court finds that any error did not result in actual prejudice. As AKOSH points out, the Board had other reasons to discredit David Hartman's testimony.[56] When he testified that he had never been cited by AKOSH before, he was forced to amend his story when he was shown the citation from 2005. His testimony also contained other contradicting statements when compared with his initial AKOSH interview after the incident. This is enough for the Board to have discredited his testimony.

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[53] R. 334.

[54] *Id.* at n.17.

[55] *Id.* at 13.

[56] *See id.* at 12-13.

The Board also had at least two other significant pieces of evidence—the 2005 trenching violation and the photograph of the slough—upon which it explicitly based its finding of willfulness.[57] Though the Board does make frequent reference to the email, the 2005 violation and the slough suffice for the willfulness finding on most of the violations.[58] Thus, the Board's use of and reliance on the email, even if in error, did not prejudice HCE. Absent prejudice, HCE's due process complaints in this regard are unavailing.[59]

iii. The hearing officer did not exclude important evidence

Finally, HCE claims that the hearing officer excluded important evidence by precluding its expert, Steve Standley, from testifying at the hearing. AKOSH argues that there were several permissible reasons for not allowing Standley to testify as an expert witness: his testimony was offered relatively late and without good cause for being late; it did not comport with Civil Rule 26; it invaded the province of the Board by opining on matters of law; and, at any rate, it was not the sort of evidence a reasonable person would rely on in the conduct of serious affairs—that is, that the evidence was unnecessary or

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[57] *See also id.* at 13, n.58 ("Mr. Hartman's vague admission during his interview with [AKOSH Enforcement Officer] Anderson that he 'came up a bit short' is further support for [the] finding" that HCE was on notice regarding OSHA trench safety standards.).

[58] *See* Section B.i., below.

[59] *See Nash*, 239 P.3d at 699.

unhelpful. HCE counters that Standley's proposed testimony was critical to its case, and that by precluding Standley, the Board caused great prejudice to HCE.

Reviewing the record, including the hearing officer's order[60] precluding Standley and the Board's own Decision and Order, the court is persuaded by the argument that Standley's report was unhelpful. "In general, expert testimony that states an opinion on the current status of the law on a particular subject is almost always excluded because it is not helpful to the jury."[61] Here, much of the bare-bones "Disclosure of Expert Testimony"[62] authored by Standley reads like the summary of a legal brief: it states arguments and conclusions regarding the proper application of the law, rather than the facts.[63] And while HCE is correct that an expert witness is allowed to have an opinion that embraces legal conclusions,[64] "such opinions may run afoul of other restrictions in particular instances, e.g., opinions as to how the case should be decided and what amount

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[60] R. 199–201.

[61] *Hagen Ins., Inc. v. Roller*, 139 P.3d 1216, 1222 (Alaska 2006).

[62] R. 166–67.

[63] *E.g.* R. 166 at ¶ 4.b ("While I find that some of the allegations may have merit, there are others that appear to be redundant, or lack merit, or are otherwise not applicable"); *id.* at ¶ 4.b.ii. ("Misleading, or erroneous, or confusing information referenced to establish 'willful' status for alleged violations"); *id.* at ¶ 4.c. ("Further, none of the violations cited merit a finding of "willful intent" . . . . A preponderance of evidence, necessary to support an allegation of "intentional disregard of, or plain indifference to employee safety" was not supported. . . .").

[64] *See* Alaska R. Evid. Rule 704; *see also Wilson v. State*, 669 P.2d 1292, 1297 (Alaska 1983) ("According to the commentary to this [Rule 704], the only limits on admissibility of an expert's opinion on an ultimate issue are that the opinion be helpful to the trier of fact (Evidence Rules 701 and 702), based on facts or data reasonably relied on by other experts (Evidence Rule 703), and not unduly prejudicial or misleading to the jury (Evidence Rule 403).").

of money damages would be appropriate."[65] Standley's proposed testimony is akin to the latter category of opinions: impermissible because unhelpful.

HCE argues that Standley's proposed testimony is analogous to the sort at issue in *Hagen Insurance v. Roller*, in which a lawyer familiar with workers' compensation awards testified as to the amount a person might have been entitled to had his insurance been properly secured.[66] But in *Hagen Insurance*, the legal issue testified on—whether an injured worker's injury would be considered a "permanent partial impairment" and how much that would entitle him to in benefits—was raised in such a manner that it became "an operative fact to be proven within the case."[67] The benefits Roller would have received under the workers' compensation law raised a question of fact for the jury because they were relevant to the measure of compensatory damages.[68]

But Standley's proposed testimony went to the operative *law* of the case: whether the general duty clause should apply, whether and how willfulness might be proven, and the fines that should be levied as a result.[69] These are issues that the Board is tasked with

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[65] 1 McCormick On Evid. § 12 (7th ed.); *see also id.* ("The fact that an opinion or inference is unobjectionable merely because it embraces an ultimate issue does not mean, however, that all opinions embracing the ultimate issue are admissible. Both Fed. R. Evid. 701 and 702 embody the criterion of helpfulness for lay and expert witnesses. Thus, an opinion that plaintiff should win is rejected as unhelpful.").

[66] *Hagen Ins., Inc. v. Roller*, 139 P.3d 1216, 1223 (Alaska 2006).

[67] *Id.* at 1223 (citing *Crookham v. Riley*, 584 N.W.2d 258, 267 (Iowa 1998)).

[68] *Id.*

[69] *See* R. 166 at ¶ 4.b, c.

deciding, and though Standley is not *per se* barred from opining on them, the hearing officer's determination that his proposed testimony would not have been helpful to the Board is well-founded.[70] Cognizant that "[q]uestions as to the admissibility of expert testimony should be left to the wise discretion of the trial judge,"[71] the court sees no violation of due process sufficient to merit de novo review on this matter.[72]

B. Four Violations Were Properly Upheld

HCE challenges the Board's findings that Items 2, 4, and the combined Items 6 & 7 were "willful-serious" violations, and challenges the Item 5 violation in its entirety. Because the court finds that the Board had substantial evidence supporting its conclusion that HCE acted with intentional disregard of or plain indifference to the requirements of the Alaska OSHA Act, the court affirms the Board's findings with respect to these four violations.

i. Willfulness for specific OSHA violations

Like the federal OSHA Act, the Alaska OSHA Act does not define a willful violation.[73] But as the parties agree, Alaska follows federal precedent on this point and

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[70] *See* R.201.

[71] *Oxenberg v. State*, 362 P.2d 893, 900 (Alaska 1961).

[72] The court also notes allowing Standley would likely have required a continuance for AKOSH to prepare a rebuttal witness, and that the hearing officer had warned HCE's that, absent a critical emergency, the hearing would not be continued a second time. R. 201, n.3.

[73] The terms "willful-serious" and "willful" are interchangeable in this context.

the U.S. Occupational Safety and Health Review Commission (OSHRC), as well as the majority of federal circuits has adopted the following definition: a willful violation is "one involving voluntary action, done either with an intentional disregard of, or plain indifference to, the requirements of the statute."[74] Under this definition, the violation does not require a bad motive or malicious intent.[75]

Under this standard, the Board's Decision and Order found that HCE's 2005 trenching citation, the Kohlhase email, and the nearby slough that preceded the fatal incident all put HCE on notice generally that there were OSHA trenching standards, that HCE's trench was potentially out of compliance with those standards, and that the soil in the area was unstable enough that precautions should have been taken.[76] By continuing to perform trenching work without so much as learning the OSHA trenching requirements it knew existed, the Board concluded, HCE was substituting its judgment for the requirements of the Act, thus demonstrating plain indifference to or intentional disregard of those requirements.[77] This led the Board to uphold the "willful-serious" level of violation on each of the OSHA violations it affirmed.

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[74] *Nat'l Steel & Shipbuilding Co. v. Occupational Safety & Health Review Comm'n*, 607 F.2d 311, 314 (9th Cir. 1979); *see also Ketchikan Pulp Company*, Docket No. 94-1017, Decision and Order at 28-29 (Alaska OSH Rev. Bd. 1995).

[75] *Nat'l Steel & Shipbuilding Co.*, 607 F. 2d at 314.

[76] Decision and Order at 17.

[77] *Id.* at 18.

HCE cites *Dayton Tire v. Secretary of Labor*[78] as persuasive authority for this court to reject the Board's determination of willfulness. In *Dayton Tire*, the D.C. Circuit court reversed the willfulness portion of a violation, reasoning that when Dayton Tire's safety officers persisted in a good-faith (but mistaken) belief that they were satisfying a known OSHA requirement, this precluded a willfulness finding.[79] In the *Dayton Tire* court's words:

> to sustain a willful violation, the Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. A good faith, reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness.[80]

The court then held that the Dayton Tire's safety manager "made some effort to ensure Dayton's [] compliance, and under these circumstances, some effort is enough to save Dayton from a willfulness determination."[81] Applying that reasoning here, HCE argues, the Board should not have found that HCE's violations were willful because it too, made "some effort" to ensure compliance, rather than deliberately disregarding standards or ignoring known hazards to save a few bucks.[82]

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[78] 671 F.3d 1249, 1257 (D.C. Cir. 2012).

[79] *Id.* at 1257.

[80] *Id.* at 1255 (quotations and alterations omitted).

[81] *Id.* at 1257.

[82] Decision and Order at 17.

The court disagrees with HCE. The reasoning behind the Board's willfulness determination shows that the analogy to *Dayton Tire* is inapposite. Here, HCE did not simply lend its own interpretation to a specific standard in an attempt at compliance like the safety managers in *Dayton Tire*. Rather, as the Board found, HCE knew that there were OSHA trenching standards, knew that there was a safety risk, and did not even "learn the specific terms of the OSHA standards applicable to trench work and make a reasonable effort to comply with those standards."[83] HCE knew there were OSHA trenching standards because it had already been cited for violating OSHA trenching standards a decade previous.[84] HCE was aware that the soil in the same trench, albeit a distance away, had sloughed without warning not long ago; there were safety risks involved in trench work.

Any argument that HCE's trench violations were not willful fails for these basic reasons. It knew there were standards and it chose not to abide by them. Such behavior plainly evinces "intentional disregard of, or plain indifference to, the requirements of the statute."

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[83] *Id.*

[84] *Id.* Hartman's testimony also confirmed that he knew there were standards, but that he didn't know what they entailed. Transcript at 744.

ii. Items 2, 4, and 6 & 7

The willfulness finding applies straightforwardly to Item 2, the means of egress penalty; Item 4, the spoil piles penalty; and combined Items 6 & 7, the sloping, benching, or trench box violation. There were no ladders in the trench. The spoil piles were located too close to the trench. The trench walls were vertical, and no trench box was in the trench on the day that HCE employees were in it. Each is a specific OSHA trenching standard that HCE should have known, chose to ignore, and violated.

iii. Willfulness for Item 5

Item 5, the competent person violation, was not conceded and is contested on appeal both as to the substantive violation and the willfulness finding. Section 1926.651(k) of the federal Act requires that daily inspections of the trench be performed by a competent person.[85] "Competent person" is defined in the preceding section: "Competent person means one who is capable of identifying existing and predictable

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[85] 29 C.F.R. § 1926.651(k) reads in its entirety:

(k) Inspections.

> (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.
>
> (2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."[86]

The substantive finding is easily affirmed: many of the things that a competent person would be looking for in an inspection were unknown to David Hartman.[87] A competent person is tasked with looking "for evidence of a situation that could result in possible cave-ins."[88] Employees are protected from possible cave-ins, we are told, "by an adequate protective system designed in accordance with paragraph (b) or (c)" of the following section, 1926.652.[89] Paragraphs (b) and (c) describe the sloping or benching requirements and the use of trench boxes, respectively.[90] But these are the standards that HCE violated by having no sloping, de minimus benching, and a trench box on the premises but nowhere near the trench. A competent person who inspects trenches to prevent cave-ins cannot be the same person who is ignorant of what causes cave-ins; David Hartman's ignorance of OSHA trenching violations precludes him from being a competent person.

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[86] 29 C.F.R. § 1926.650.

[87] *See* testimony of David Hartman, Transcript at 802–04 (acknowledging that he knew there were OSHA trenching standards, but that he did not know "[e]xactly what they were", before misstating the requirement for spoil piles, acknowledging that he got the sloping standard wrong, then acknowledging that the trench walls did not even come close to his mistaken sloping standard of forty-five degrees.")

[88] 29 C.F.R. § 1926.651(k)(1).

[89] 29 C.F.R. § 1926.652(a)(1).

[90] *Id.* § (b), (c).

As for willfulness, HCE's *Dayton Tire* argument may seem to apply here at first glance: David Hartman believed that he fulfilled the standard for a "competent person" within the meaning of the Act and his good-faith mistake may not qualify as a willful violation. But there is a large difference between a safety manager who diligently attempts to perform her duties under a misinterpretation of certain terms, and the owner of a construction company who never bothers to learn how to safely excavate a trench, much less inspect it. David Hartman knew that there were standards but did not know what they were.[91] Instead of hiring someone who did know the standards, he either neglected to ensure inspections were done or ensured that inspections were neglected. In short, this is not the sort of good-faith difference of interpretation that mitigated the violation in *Dayton Tire.*

Thus, four of the five violations are upheld—Item 2, Item 4, Item 5, and Items 6 & 7—as is the finding of willfulness for each one.

C. The General Duty Clause Violation Requires Further Findings

The story is a little different for Item 1, the violation of the general duty clause,[92] for several reasons. While the process afforded HCE at the hearing was not violative of

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[91] Transcript at 744.

[92] AS § 18.60.075(a): "An employer shall do everything necessary to protect the life, health, and safety of employees, including . . . (4) furnishing to each employee employment and a place of employment that are free from recognized hazards that, in the opinion of the commissioner, are causing or are likely to cause death or serious physical harm to the employees."

due process such that a trial de novo is warranted, the court agrees with HCE that the Board's findings and conclusions regarding the general duty clause are insufficient in other respects. First, in upholding a violation of the general duty clause, the Board did not adequately discuss the elements of the violation. Second, the Board omitted any discussion of feasibility and specific abatement procedures. Third, to find a willful violation of the general duty clause, the Board needed to make specific findings above and beyond those supporting the "willful-serious" designation of the other violations.

Because the Board either applied the law unreasonably or its findings as stated do not support its conclusions, the court remands Item 1, the general duty clause violation, for further findings consistent with the following analysis.

i. Violations of the general duty clause

AS 18.60.075(a)(4) is Alaska's implementation of what is known as the "general duty clause" of the federal Act.[93] The general duty clause was enacted to cover serious hazards to which no specific standard applies; it is improper to issue a citation under it when a specific standard is appropriate.[94] Establishing a violation requires proof that the employer failed to render its workplace free of a hazard, which was "recognized" by the employer or its industry, and which was causing or likely to cause death or serious

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[93] *Compare id. with* Occupational Safety and Health Act of 1970, § 5(a)(1): "Each employer--(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." (codified at 29 U.S.C. § 654(a)).

[94] Mark A. Rothstein, *Occupational Safety and Health Law*, § 6:1 (2019 ed.).

physical harm.[95] A "recognized hazard" can be either established as common knowledge in the employer's industry or by the employer's actual knowledge of the hazardous condition.[96]

Further, because the general duty clause is so broad, several courts and the federal OSHRC have imposed an additional requirement: the feasibility and likely utility of specific abatement measures must be demonstrated.[97] This is because:

> [o]nly by requiring the Secretary, at the hearing, to formulate and defend his own theory of what a cited defendant should have done can the Commission and the courts assure evenhanded enforcement of the general duty clause. Because employers have a general duty to do virtually everything possible to prevent and repress hazardous conduct by employees, violations exist almost everywhere, and the Secretary has an awesomely broad discretion in selecting defendants and in proposing penalties. To assure that citations issue only upon careful deliberation, the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.[98]

In other words, one of the reasons reviewing tribunals require the "feasibility" element is so that the general duty clause is alleged with specificity.

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[95] *Id.*

[96] *Id.* at § 6:5.

[97] *Id.* at § 6:1; *see, e.g.*, *Whitewater Engineering Corp.*, Docket No. 99-2131, 30-31 (Alaska OSH Rev. Bd. 1999) (explaining measures that should have been taken, finding those measures feasible).

[98] *Nat'l Realty & Const. Co., Inc. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1268 (D.C. Cir. 1973); *see also id.* at n. 41 ("Such precautions will not, of course, make the broad commands of the general duty clause any more precise and clear to prospective violators of the clause. But any statute or rule of law imposing general obligations raises certain problems of fair notice.").

The Board's general duty clause discussion was problematic in several ways. The Board found that the excavator did not cause Morgan's injuries[99] but that "it played a contributory role,"[100] and believed it was "possible" that the excavator had increased the pressure of the collapsed material on Morgan's body, causing or exacerbating the injury.[101] Following these seemingly contradictory findings, the Board explained that the cause of the injury did not matter for the general duty clause violation because there were two other ways the clause was violated. The use of an excavator in the rescue was "dangerous" and "could have caused or contributed" (in the hypothetical sense) to Morgan's injuries; additionally, HCE's safety culture was "woefully inadequate" and this somehow constituted a violation of the general duty clause.[102]

Both assertions are premised on a flawed understanding of the general duty clause. First, what is the "recognized hazard" that is common knowledge in the industry or that HCE had knowledge of?[103] The Board does not say, but under either of its theories, there are problems. If the Board is referring to the use of the excavator in the rescue, a "dangerous practice" regardless of whether it caused any injury,[104] then it has not

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[99] Decision and Order at 15.

[100] *Id.*

[101] *Id.* at n. 59.

[102] *Id.* at 19-20.

[103] *See* Rothstein, § 6:5.

[104] *See* Decision and Order at 20.

explained how that constitutes a recognized hazard. Is using an excavator bucket near an employee dangerous, or was walking it to the edge of a just-collapsed trench? Are these recognized industry standards or something that David Hartman knew? Especially in light of the finding that the excavator did not cause Morgan's injuries, the Board's conclusions should be more specific.[105] As the treatise that the Board cited in their Decision and Order puts it:

> The most distinctive and significant element of [general duty clause] violations is that they are limited to "recognized hazards." The "recognition" requirement serves to ensure that cited employers at least have constructive knowledge of the existence of specific hazardous conditions. In this way, Congress sought to eliminate the unfairness of assessing first-instance civil penalties based on such a sweeping and broadly worded provision.[106]

Premising the violation on HCE's "woefully inadequate" safety culture fares no better. In addition to suffering the same defect vis-à-vis the unidentified "recognized hazard", the findings made by the Board on HCE's safety culture were that HCE exercised "what they believed to be common sense" and that employees "cared for each other"—but that it fell short in "ignoring the *specific,*

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[105] *See, e.g., Brennan v. Occupational Safety & Health Review Comm'n*, 494 F.2d 460, 464 (8th Cir. 1974) (even where appellate court could possibly infer the requisite findings for actual knowledge of a "recognized hazard" to uphold general duty clause violation, proper course was to remand for specific findings); *see also St. Joe Minerals Corp. v. Occupational Safety & Health Review Comm'n*, 647 F.2d 840, 847 (8th Cir. 1981) ("Since the general duty clause is so broad, the evidence to support a charge of violation should be specific and detailed.") (citing *Brennan v. OSHRC (Hanovia Lamp)*, 502 F.2d 946, at 952-53 (3d Cir. 1974)).

[106] Rothstein, § 6:5.

clear OSHA requirements for trenches and excavations. . . ."[107] But, as the Board rightfully agrees later in its Decision and Order, specific, clear OSHA requirements are not what the general duty clause is for.[108]

The Board concludes that the general duty clause applies nonetheless, because "the Board finds there is no specific OSHA standard covering . . . a woefully inadequate safety culture such as HCE's."[109] But the Board's findings regarding HCE's poor safety culture were limited to ignorance of the four specific OSHA requirements for trenching and excavating examined above; it did not explain how HCE's safety culture was otherwise inadequate.[110] The flagrancy of HCE's ignorance with respect to the specific OSHA requirements is accounted for in the Board's willfulness determination(s) for those specific violations. The specific hazards HCE was already cited for in Items 2, 4, 5, and 6 & 7, without more findings, cannot constitute a separate violation.[111] If the Board believes that HCE's "woefully inadequate safety culture" includes conduct beyond that already punished in the specific violations, it must make findings to that effect.

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[107] Decision and Order at 12 (emphasis added).

[108] *See id.* at 19 ("The Board agrees that as a general matter, the general duty clause should only be used where there are *no specific OSHA standards* applicable to the workplace violation.") (emphasis added).

[109] *Id.*

[110] *See* Decision and Order at 14 ("HCE's safety culture of relying on experience and common sense, while ignoring the specific, clear OSHA requirements for trenches and excavations, was woefully inadequate.")

[111] *See Nat'l Realty & Const. Co., Inc.*, 489 F.2d at 1261 ("Specific, promulgated standards preempt the general duty clause, but only with respect to hazards expressly covered by the specific standards.").

Further, both of the Board's alternate theories lack any proposed abatement and discussion of feasibility. While not always strictly required by courts,[112] this element ensures that the citing agency or reviewing body can point to what the violator should have done differently, and in so doing specify what they did that was wrong.[113] Given the way the Board framed the general duty clause violation, it is unsurprising that the discussion is missing; how does one feasibly abate the 'practice' of using an excavator in a rescue? The ill fit of this framework to the violation as cited is further evidence to this court that AKOSH and the Board may have applied the general duty clause incorrectly. On remand, the Board must either analyze AKOSH's citation via the lens of feasible abatement or explain why the citation stands without such analysis.

ii. Willfulness as it relates to the general duty clause

Even if this court were comfortable with the Board's conclusion that the general duty clause somehow applies here, the Board erred in concluding that willfulness in the specific violations applies with equal force to the general duty clause violation. This court agrees with the many courts that have analyzed the question of how an employer

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[112] *See, e.g., St. Joe Minerals Corp.*, 647 F.2d at 844 (upholding violation of general duty clause where Secretary failed to suggest feasible means to remedy hazard because the record disclosed such means).

[113] *See* Rothstein § 6:9; *see also Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981)("The key issue is whether the Secretary proved that Royal failed to render the workplace free of the recognized hazard. To satisfy that element, the Secretary must specify the specific steps an employer should have taken to avoid the citation and demonstrate their feasibility.").

"intentionally disregarded or was indifferent to requirements of the Act"[114] in the context of a broad, catch-all provision like the general duty clause: it requires "a more concrete evidentiary showing" than in the context of specific violations.[115]

Such was the showing in *Whitewater Engineering Corp.*,[116] a case cited by both parties and the Board in its Decision and Order.[117] This court believes that the Board would find instructive the discussion of willfulness in *Whitewater*, which included specifically what the company should have done, what it did instead, and how that demonstrated "a reckless disregard for employee safety and the requirements of the OSHA Act."[118] On remand, if the Board finds that there is still a substantive general duty clause violation, it should separately make findings and conclusions as to the willfulness of that violation.

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[114] *St. Joe Minerals Corp.*, 647 F.2d at 847.

[115] *Id.*; *see also id.* at 848–49 ("a reasoned application of the Act's penalty scheme requires that to prove a willful violation there must be evidence, apart from that establishing knowledge of the hazard, from which we may reasonably conclude that the employer intentionally disregarded or was indifferent to the safety of the workplace. . . . Although it is clear in hindsight that some risk remained, the petitioner's conduct falls short of plain indifference to the general duty clause."); *Ensign-Bickford Co. v. Occupational Safety & Health Review Comm'n*, 717 F.2d 1419, 1424 (D.C. Cir. 1983) (Scalia, J., dissenting) ("[W]here a specific action has been mandated by law, the duty of observance is more prominent and categorical-so the level of inattention necessary to establish "indifference" is less. When, however, only a general obligation of safe practices is involved, it must be appreciably clearer, in order to establish willfulness, that the requirements for safety were either known and consciously disregarded, or else not a subject of the employer's concern.").

[116] Docket No. 99-2131 (Alaska OSH Rev. Bd. 1999).

[117] Decision and Order at 17.

[118] Docket No. 99-2131 at 40-42. Note also the findings, including the feasibility of the suggested alternative, that supported the willfulness finding. *Id.* at 29-31.

D. The Board's Penalty Reduction Determination Is Reasonable

HCE's final contention, that AKOSH's FOM requires a penalty reduction for HCE's small size is mostly without merit. First, the FOM begins by explicitly disclaiming HCE's argument:

> This manual is intended to provide instruction regarding some of the internal operations of Alaska Occupational Safety and Health (AKOSH), and is solely for the benefit of AKOSH. *No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Alaska Department of Labor and Workforce Development or the State of Alaska.* Statements which reflect current Occupational Safety and Health Review Board, federal OSHA Review Commission, or court precedents do not necessarily indicate acquiescence with those precedents.[119]

The court finds the Board's interpretation of the FOM's disclaimer very reasonable; absent any legal argument to the contrary, the court will not disturb this decision.

However, though the Board may not be bound by the FOM's penalty reduction guidelines, the court notes that the Board's decision seems again to rely on a causal relationship between the excavator and Morgan's death.[120] In examining the general duty clause violation on remand, any clarifying findings made by the Board on the use of the excavator in the rescue of Morgan as related to the mechanism of Morgan's death may affect this determination. If the Board's findings on remand do not lead to a causal

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[119] FOM, Executive Summary at 3, "Disclaimer" (http://labor.state.ak.us/lss/forms/akosh-fom.pdf) (emphasis added); *see also* Decision and Order at 19, n.75 (citing the FOM Disclaimer).

[120] Decision and Order at 26 ("the gravity of *each* of these violations was extreme and *led to the death* of Samuel Morgan.").

relationship, it should either reassess the reduction for the general duty clause violation or state clearly why other factors militate in favor of only a 5% reduction.

V. CONCLUSION

Trial de novo is denied. The Board's Decision and Order is affirmed with regard to Items 2, 4, 5, and the combined Item 6 & 7. The case is remanded for further consideration of Item 1, the violation of the general duty clause, for proceedings consistent with this opinion.

ORDERED this 1st day of April, 2019, at Anchorage, Alaska.

Hon. Herman Walker, Jr.
Superior Court Judge

I certify that on 4.1.19
a copy of the above was emailed to each
of the following at their addresses of record:

K. Fitzgerald
K. Vogel
M. Bahr

KThomas, Law Clerk