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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE



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| 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 Case No. 3AN-17-5546 CI |

#11

**MOTION FOR RECONSIDERATION**

COMES NOW appellant, Hartman Construction & Equipment, Inc. ("HCE"), by and through counsel, Ingaldson Fitzgerald, P.C., and hereby moves for reconsideration of at least one part of the Order on Appeal issued April 1, 2019 by Superior Court Judge Herman Walker, Jr. This Motion for Reconsideration is brought pursuant to Alaska App. R. 503(h).

In its order, the Superior Court, sitting as an appellate court from an administrative decision, remanded for further consideration Item 1, the violation of the general duty clause, for proceedings consistent with the opinion. HCE moves for reconsideration of the remand for further consideration of Item 1. A remand is neither necessary or appropriate.

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It was incumbent upon the State to prove and the Board to find that the general duty clause was violated. The Board did, but erroneously, both as a matter of fact and law, as this court has already determined. The State did not prove the violation and the Board erred in so finding. No remand is necessary.

The basis for the Board's legal and factual finding is clear as is its errors. A remand for further proceedings simply allows the State and the Board another "bite at the apple" to prove and/or find a violation of the general duty clause, which they failed to properly find in the first instance.

About this issue, this court stated as follows in its order:

> The Board's general duty clause discussion was problematic in several ways. The Board found that the excavator did not cause Morgan's injuries but that it played a contributory role, 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. 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.

Curiously, at the hearing, the State's presentation of evidence and argument on this point was exclusively that the use of the excavator in the course of the rescue of Sam Morgan was a violation of the general duty clause. In response, HCE argued that the general duty clause was enacted to cover serious hazards for which no specific

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standard applies and that given the use of the excavator here under emergency circumstance was not a violation of the general duty clause.

> This, then, leaves the use of the excavators in an effort to rescue Mr. Morgan as the only basis for the application of the General Duty Clause here. However, applying the General Duty Clause to this unique and special circumstance is at odds with both the language and apparent spirit of the statute which governs "general" duties applicable to the work site. See AS 18.60.075.
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> * * * * *
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> The Board also contends that the General Duty Clause is applicable here because of the alleged "woefully inadequate safety culture such as HCE's." Id. Not only is the Board wrong about HCE's safety culture, but the Board's reference to HCE's safety culture specifically relates to its trench work, which is covered by specific standards, including the seven other violations with which HCE was charged. Thus, by the Board's own admission, this "latter point" cannot constitute a violation of the General Duty Clause.

Brief of Appellant, p. 30; P. 30 n. 10.

> As a matter of fact, the use of the excavator to pull material away from and from behind Mr. Morgan did not place him at risk of serious physical injury or death. In fact, quite the opposite is true. Nor does it constitute an unreasonable risk given the extant circumstances. Finally, Mr. Standley would have testified that based upon his considerable training and experience and his role as both an AKOSH compliance officer and Chief of Enforcement, application of the General Duty provision here was wrong as a matter of both fact and law. R. 166-167.

Reply Brief of Appellant, p. 9.

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To find that the general duty clause had been violated, the Board suggested grounds that had not been urged or argued by the State. This court has determined already that these alternative grounds do not constitute a violation of the general duty clause.

> 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. 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.

Thus, no remand is necessary. The State failed to prove the violation. And, the Board's finding that there was a violation was erroneous as a matter of both law and fact. Accordingly, the finding of the Board should be reversed. No remand is either necessary or appropriate.

Dated at Anchorage, Alaska April 12, 2019.

INGALDSON FITZGERALD, P.C.
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By: _____
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I certify that on 4-15-19 a copy of the following was mailed/ faxed/ hand-delivered to each of the following at their addresses of record: K. Fitzgerald M. Baker K. Vogel
Administrative Assistant

The motion to reconsider is denied

4-15-2019

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 12th day of April, 20 19, a copy of the foregoing was sent to the following via:

[X] U.S. Mail, First Class, Postage Prepaid
[ ] Hand-Delivery
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