

STATE OF ALASKA, DEPARTMENT OF )  
 LABOR AND WORKFORCE DEVELOPMENT, )  
 DIVISION OF LABOR STANDARDS AND )  
 SAFETY, OCCUPATIONAL SAFETY AND )  
 HEALTH SECTION, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 WHITEWATER ENGINEERING )  
 CORPORATION, INC., )  
 )  
 Contestant. )  
 \_\_\_\_\_ )

Docket No. 99-2131  
 Inspection No. 301266516

**DECISION AND ORDER**

**INTRODUCTION**

This matter arises from a fatal industrial accident on April 15, 1999, involving an employee of Whitewater Engineering Corporation, Inc. (Whitewater) at the Power Creek Hydroelectric Project near Cordova, Alaska. After investigating the accident, the State of Alaska, Department of Labor and Workforce Development (Department) issued a citation to Whitewater alleging violations of occupational safety and health standards and assessing total monetary penalties in the amount of \$294,000. Whitewater contested the Department’s citation and penalties. Subsequently the Department amended its citation to modify the alleged violations and reduce the total monetary penalties to \$126,000. The Department was represented by Assistant Attorney General Toby Steinberger. Whitewater was represented by Thomas Gingras of Eide, Miller & Pate, P.C.

## **Items in Contest**

As amended, the Department's citation alleges the following violations:

Item 1 alleges a violation of AS 18.60.075(a)(4), known as the "general duty clause," for exposing employees to a known avalanche hazard; failing to initiate and maintain an avalanche control program to mitigate avalanche hazards; and failing to have a competent person trained in avalanche hazard recognition conduct regular inspections of the worksite. This item was classified as a "willful" violation with a proposed penalty of \$42,000.

Item 2 alleges a violation of 29 CFR 1926.21(b)(2) for failure to instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment to control or eliminate any hazards. This item was classified as a "willful" violation with a proposed penalty of \$42,000.

Item 3 alleges a violation of 29 CFR 1926.651(a) for failure to remove all surface encumbrances at an excavation site that created a hazard to employees. Item 4 alleges a violation of 29 CFR 1926.651(k)(1) for failure to conduct an inspection of the areas adjacent to an excavation site to safeguard employees from an avalanche hazard. Item 5 alleges a violation of 29 CFR 1926.651(k)(2) for failure to remove employees from an excavation site until the necessary precautions were taken to ensure their safety from avalanche hazards. Items 3, 4 and 5 were grouped into a single "willful" violation with a proposed penalty of \$42,000.

## **Procedural History**

This case has a lengthy and complicated procedural history. Only the most pertinent events will be mentioned in this summary.

Following the fatal accident, the State of Alaska conducted a criminal investigation of the matter. On June 13, 2000, based on the stipulation of the parties, the Board granted a stay of this proceeding until the final resolution of the criminal investigation and any resulting criminal charges.

On November 15, 2001, the Department notified the Board that the criminal proceedings had been concluded and requested a resumption of this administrative proceeding. After a prehearing conference on December 3, 2001, the Board issued a prehearing order and scheduled a hearing for September 23-27, 2002.

In January 2002, Whitewater filed a motion for partial summary judgment regarding the applicability of the excavation standards cited in Items 3, 4 and 5, and a motion for law of the case regarding the applicable standard of "willfulness." The Department opposed both motions and cross-moved for partial summary judgment as to the excavation standards. Oral argument was held before the Board on May 15, 2002. On June 10, 2002, the Board issued orders setting forth the applicable standard of willfulness and denying the cross-motions for partial summary judgment on the grounds that there were genuine issues of fact for hearing.

On August 15, 2002, about five weeks before the hearing, Whitewater's counsel filed a motion to withdraw as counsel. On August 30, 2002, Whitewater

requested a postponement of the hearing based on the withdrawal of counsel. The Department opposed both motions. On September 13, 2002, the Board granted the motion for withdrawal of Whitewater's counsel but denied Whitewater's motion for postponement of the hearing. Whitewater's counsel did not withdraw but continued to represent Whitewater for the remainder of this proceeding.

The hearing began on September 23, 2002, before Board members Tim Sharp and Cliff Davidson. Board member Carla Meek was unable to attend the first three days of hearing due to a family emergency. However, she participated in the remainder of the hearing beginning on September 26 and was provided with the audiotapes and exhibits from the portion of the hearing she had missed. Five days of hearing were held from September 23-27, 2002. Because the hearing was not completed, the hearing was continued to November 4-8, 2002.

On October 11, 2002, prior to resumption of the hearing, Whitewater filed a motion to disqualify Board member Tim Sharp. The Department opposed the motion. Upon consideration of the motion by the other two Board members, the Board notified the parties on October 31, 2002, that the motion to disqualify was denied. On November 1, 2002, Whitewater filed a petition for review in the Superior Court concerning the Board's denial of Whitewater's motion to disqualify Board member Sharp and requested the court to stay this proceeding until the disqualification issue was resolved. The Department opposed Whitewater's petition for review and motion for stay.

Prior to any ruling by the court, the Board hearing resumed as scheduled on November 4, 2002. On November 5, 2002, the Superior Court issued a stay of administrative proceedings until further notice. The Board hearing was suspended upon receipt of the court's stay order.

On November 12, 2002, the Superior Court issued its ruling on the merits of Whitewater's petition for review and affirmed the Board's order denying Whitewater's motion to disqualify Board member Sharp. Thereafter the Board scheduled a resumption of the hearing on February 3-5, 2003. After Whitewater's counsel requested rescheduling of the hearing due to his unavailability, the hearing was rescheduled to March 11-13, 2003.

The hearing resumed and was completed on March 11-13, 2003. During the hearing, both parties presented witness testimony, documentary evidence, legal authorities, and oral argument. Upon consideration of the evidence, legal authorities and arguments of the parties, the Board makes the following findings of fact, conclusions of law, and order in this matter.

#### **FINDINGS OF FACT**

1. Whitewater Engineering Corporation, Inc., was the prime contractor for the Power Creek Hydroelectric Project near Cordova, Alaska. The purpose of the project was to provide hydroelectric power to Cordova Electric Cooperative, Inc. (CEC). Whitewater was issued a license for the project by the Federal Energy Regulatory Commission (FERC). (Ex. 12.)

2. The project involved the construction of the following major items: a 20-foot-high concrete and earth fill diversion dam and intake structure on Power Creek; a 5,900-foot-long tunnel and pipeline power conduit system; a powerhouse containing two generating units; a tailrace returning water to Power Creek; a 7.2-mile-long transmission line; and approximately 2.5 miles of access road. According to the FERC license, construction work was to take place from 1999 through 2001. The total construction contract amount, not including change orders, was \$13,315,721. (Ex. 12.)

3. Whitewater began doing business in 1980 and was incorporated in 1991. Thom Fischer is Whitewater's president and principal owner. Prior to the Power Creek project, Whitewater was involved in a variety of construction projects, including small hydroelectric projects in Alaska. Fischer first learned of the proposed Power Creek project in 1991. After several years of project reviews and studies, Whitewater applied for and was issued a FERC license for the project in December 1997. (Testimony of Thom Fischer; Ex. 12.)

4. Whitewater's initial construction plan consisted of four phases: (1) construction of the access roads; (2) construction of a temporary bridge across Power Creek; (3) blasting the tunnel from the bridge area to the upstream pipeline and diversion dam; and (4) building a permanent bridge over Power Creek. The access roads were constructed by a roadway subcontractor from Cordova. The tunnel blasting was performed by another subcontractor, Mainstreet America Mining.

Whitewater was responsible for the construction of the temporary and permanent bridges over Power Creek. (Testimony of Thom Fischer; Ex. 12.)

5. The FERC license for the project required, among other things, monitoring of construction progress and environmental compliance. George Keeney of CEC was the primary on-site inspector for quality control and construction monitoring. Bruce Campbell, a land specialist with the U.S. Forest Service in Cordova, was responsible for land use authorizations. Jeff Davis, a habitat biologist for the Alaska Department of Fish & Game (ADF&G), was the primary environmental compliance monitor on the project. (Testimony of George Keeney, Bruce Campbell and Jeff Davis; Ex. 12.)

6. The project site was located along Power Creek at the base of a narrow canyon with steeply sloping sides. The area next to where the bridge was to be built contains a known avalanche chute and has vertical slopes of up to 53 degrees. On the west side of the bridge was a relatively open and flat area which was used as the main construction staging area. On the east side of the bridge was the tunnel portal where Main Street Mining conducted blasting and earth removal operations. (Exs. 1, 2, 4, 5, 64, 72.)

7. Work began on the construction of the access road in the fall of 1998. On October 15, 1998, Department safety enforcement officer Steve Standley conducted a safety inspection of the project site. At that time the only Whitewater employees at the site were John and Mary Fischer, who were performing surveying

work for the access road. Standley did not observe any safety violations during his October 1998 visit. Standley spoke to Thom Fischer who was at Whitewater's main office in Bellingham, Washington. Their discussion focused primarily on the construction of the tunnel and Standley provided Fischer with information about how to obtain the applicable Alaska safety standards. Standley also mentioned the availability of OSHA's consultation service and provided contact information. Fischer told Standley the bulk of the construction work would not begin until spring 1999. Standley indicated that there would likely be future OSHA enforcement inspections of the project and told Fischer that a site-specific hazard analysis should be done, especially regarding the tunnel portal area. There is no evidence that avalanche hazards were discussed at that time. (Testimony of Steve Standley, Thom Fischer.)

8. In November 1998 Fischer went to the project site to look at the area where the powerhouse was to be built. He saw fallen trees at an odd angle, and this was his first inkling that the area might be in an avalanche zone. Fischer asked his on-site superintendent, Dick Potter, to contact avalanche experts. In particular, Fischer wanted to know how strong the powerhouse had to be to withstand the effects of an avalanche. (Testimony of Thom Fischer, Dick Potter.)

9. In his capacity as Whitewater's on-site superintendent, Dick Potter completed daily reports of construction progress. (Ex. 11.) Potter's daily reports were normally faxed to Whitewater's home office in Bellingham, where they were reviewed by Fischer. Fischer was not at the project site on a day-to-day basis, but



instead delegated the overall supervision of the worksite to Dick Potter. Fischer visited the project site from time to time and was in regular communication with Potter and the Whitewater office in Cordova. (Testimony of Thom Fischer.)

10. George Keeney also completed daily reports in his capacity as on-site construction monitor for the project. Keeney's reports detailed the names of contractor and subcontractor employees working on the project each day, described construction activities, and noted the weather conditions. (Ex. 37.)

11. In his daily report for December 13, 1998, Dick Potter noted: "Thought you'd like to know Thom, that the area just to the south of the tunnel portal is full of snow and it has started balling up and rolling downhill, so it could very well be an avalanche area." (Ex. 11 at 60.)

12. In January 1999, Whitewater obtained permits from the Corps of Engineers and ADF&G to work in Power Creek and begin construction of a temporary log bridge across the creek. At about this time, Dick Potter also contacted an avalanche expert in Valdez, who was unavailable, and an avalanche expert in Anchorage, David Hamre, who was not available to visit the project site until early March. (Testimony of Dick Potter, David Hamre; Ex. 11 at 79.)

13. On January 27, 1999, Dick Potter went to Anchorage and met with Tim Bundy of the Department's OSHA consultation and training section. They discussed the Power Creek project and Bundy gave Potter information about the OSHA standards applicable to the project. During this conversation, Bundy raised the issue

of avalanche hazards and indicated that the issue would need to be addressed. Bundy also described the consultation services available from the Department. After the meeting, Potter went to the bookstore and bought the volumes of the Code of Federal Regulations applicable to the project. (Testimony of Dick Potter, Tim Bundy; Ex. 11 at 92.)

14. Dick Potter testified that in mid- to late March, he telephoned Bundy and requested a consultation inspection of the project. According to Potter, Bundy said the Department did not have sufficient staff or funds to perform an on-site consultation inspection. Bundy, however, denied that Potter had ever requested a consultation inspection and maintained that the Department did have sufficient staff to conduct an on-site consultation. Potter acknowledged that there was no written documentation of his request for a consultation inspection and that there was no reference to such a request in his daily reports. Telephone records of calls made from Whitewater's Cordova office do not indicate any telephone calls to the OSHA office after January 1999. (Testimony of Dick Potter, Tim Bundy; Exs. 11, 104.)

15. The project site received a considerable amount of snow and rain during the winter of 1998 and the spring of 1999. (Ex. 70.) George Keeney's daily report for February 1, 1999, states that more than 10 feet of snow had fallen in the preceding three weeks. (Ex. 37 at 100.) Potter's daily report for the same date states in pertinent part: "Snowing!! 25 degrees . . . we're clearing snow – A LOT OF IT." (Ex. 11 at 97.)

16. In their daily reports for February 26, 1999, both Potter and Keeney noted that a snow slide had come down and blocked the access road. (Ex. 11 at 111; Ex. 37 at 113.)

17. David Hamre is the snow safety director for the Alaska Railroad. He also maintains a private business as an avalanche hazard consultant. Hamre has been involved in Alaska avalanche-related work since 1970, including the oil pipeline and numerous public construction projects. Hamre's work for the Alaska Railroad includes avalanche forecasting, risk mitigation and avalanche training. (Testimony of David Hamre.)

18. Hamre testified that avalanche forecasting is "not an exact science" because there are so many variables involved, including weather conditions, the nature of the terrain, and the density of the snow pack. Nevertheless, Hamre stated that avalanche forecasting is a well-established tool for the reduction of risk. According to Hamre, avalanche risk is evaluated in terms of three primary variables: consequences, exposure and probability. Each avalanche site is different. Normally an avalanche hazard evaluator examines the site, decides how best to mitigate the avalanche risk, and develops a written avalanche control plan. (Testimony of David Hamre.)

19. At Whitewater's request, Hamre visited the Power Creek site on March 5, 1999, together with Dick Potter and Thom Fischer. Hamre made a visual inspection of the project area and noticed previous avalanche run-outs and potentially

unstable cornices high above the project site. He also took photographs of the project site and the surrounding area. (Testimony of David Hamre; Ex. 64.)

20. After his observation of the site, Hamre met with Potter and Fischer at Whitewater's office in Cordova. Hamre told them there was a significant avalanche hazard at the site, particularly at the bridge, powerhouse and tunnel portal areas. Because Hamre had a full-time job with the Railroad and was unavailable to serve as a regular avalanche forecaster for Whitewater, he recommended two other avalanche experts. (Testimony of David Hamre.)

21. During his visit to the Power Creek project, Hamre spoke to three or four Whitewater employees at the project site for about 20 minutes regarding avalanche hazards. According to Hamre, his discussion of avalanche hazards with employees was merely to make them aware of the hazard and was not a substitute for actual avalanche hazard training. (Testimony of David Hamre.)

22. In a report to Whitewater dated March 8, 1999, Hamre provided a more detailed explanation of the avalanche risk at the site and the recommended alternatives for mitigating the risk. Hamre's report describes in detail (1) the consequences of an avalanche at the project site; (2) the exposure of employees at the site to the avalanche hazards; and (3) the probability of avalanches at the site. Hamre summarized his conclusions and recommendations as follows:

In summary, your project site has a high risk level from avalanches if work activities continue in the present configuration. A combination of limiting exposure levels and forecasting for avalanches can be used to reduce this risk level to what would be considered an acceptable

level. Application of explosives following storms could be used to further reduce risk levels. A typical approach for reducing risk levels is to write a safety plan which determines the appropriate course of action, and train personnel regarding the risks. Making personnel aware of job site risks is a standard part of the worker right-to-know laws on hazards in the workplace. The safety plan would comply with this federal requirement. A forecaster would then be used to determine the transient nature of the avalanche stability conditions, and would work with management to implement appropriate personnel protection procedures.

Hamre's report also discussed avalanche engineering concerns at the site, noting that "the avalanche frequency at the bridge site is almost certainly higher than at the power plant." Hamre stated that "it is unlikely that these facilities [the bridge and powerhouse] would make it to the end of their economic life without being destroyed" and recommended that Whitewater hire an avalanche engineer. (Ex. 65.)

23. Notwithstanding Hamre's report and recommendations, Whitewater did not develop a written avalanche safety plan, did not provide avalanche safety training to employees, and did not hire an avalanche forecaster. Thom Fischer testified that based on his discussions with Hamre and with another avalanche expert in Canada (Peter Schaerer), he was skeptical about the use of an avalanche forecaster. Fischer expressed his belief that avalanche forecasting was "not infallible" and that most avalanche experts were "ski bums who don't know about the engineering forces of an avalanche." Fischer asserted that avalanches cannot accurately be predicted and that "the only defense is not to be there" when an avalanche occurs. Fischer maintained that Dick Potter was "as good as any avalanche expert" at predicting

avalanches and therefore it was unnecessary to hire a professional avalanche forecaster. Dick Potter testified, however, that prior to the fatal accident on April 15, 1999, he had no training on avalanche safety or forecasting. Potter acknowledged that avalanche danger was the biggest safety issue on the project and that he believed the likelihood of an avalanche was “very probable.” However, Potter did not feel professionally qualified to assess avalanche dangers. (Testimony of Thom Fischer, Dick Potter.)

24. One of the avalanche experts recommended by Hamre to Whitewater was Denny Hogan in Colorado. Hogan was interested in and available for avalanche forecasting on the Power Creek project. He called Whitewater on at least five occasions in March 1999 and left messages with the Cordova office. However, Whitewater did not return his calls or contact him about forecasting work on the project. (Testimony of Denny Hogan; Ex. 80.)

25. Due to the weather conditions at the project site, there was constant discussion among Whitewater employees and management about avalanche hazards. Thom Fischer acknowledged that at times he argued with Potter and other Whitewater employees about the avalanche danger and there were differences of opinion as to whether work should stop on certain days. Fischer testified that based on his discussions with David Hamre, he established a policy that if it rained more than one inch or snowed more than twelve inches, the job would be shut down. Fischer testified that Whitewater also had a policy whereby any employee who did

not want to work due to avalanche concerns could go home without any penalty. It is unclear whether any Whitewater employees actually took advantage of this policy. Most of Whitewater's employees were concerned about avalanches, but did not want to stop working. (Testimony of Thom Fischer.)

26. Based on the historic stream flows in Power Creek, Thom Fischer concluded that the best time to construct the permanent bridge was during the months of March and April when water flows were low. Upon review of Cordova weather statistics, Fischer noted that since 1988 there had been little or no snowfall in the month of April and therefore he felt that Whitewater was "home free" with respect to the avalanche risk for purposes of building the permanent bridge in April. (Testimony of Thom Fischer; Ex. AAA.)

27. Beginning in mid-March 1999, there was considerable snow and rain at the project site almost every day. (Ex. 70.) In his daily report for March 12, 1999, Dick Potter noted that David Hamre called and was concerned about avalanches, as there had been two in Anchorage and one at the Alyeska ski resort in Girdwood. After speaking to Hamre, Potter decided to pull back all the equipment from the tunnel portal area near the bridge. He also spoke to "avalanche control people" in Cordova about possibly renting a helicopter to blast and/or remove the snow cornices above the project site. (Ex. 11 at 123.)

28. On March 13, 1999, Potter removed all personnel and equipment from the portal area due to an avalanche warning. George Keeney's daily report noted

that two small avalanches came down in the chute area by the portal. (Ex. 37 at 124.)

29. On March 14, 1999, 1999, it continued to snow heavily and there was no work done at the site. (Ex. 37 at 125.)

30. On March 15 and 16, 1999, it continued to snow heavily at the site. George Keeney noted that it had snowed more than four feet in the past week. (Ex. 37 at 127.) Dick Potter noted that CEC called to let Whitewater know there was a 75% chance of an avalanche that day. When Potter asked CEC where it got its information, he was told "from a guy that's been around here for years." However, Whitewater did not shut down its operations that day. (Ex. 11 at 126.)

31. On March 22, 1999, there was rain, snow and 40 degree temperatures at the site. Potter's daily report notes that Thom Fischer called and was concerned about avalanches. After speaking to Main Street Mining supervisor Blair Shilleto, Potter sent everyone home except equipment operator Gary Stone who was moved to the gravel pit area. (Ex. 11 at 132.)

32. On March 27, 1999, Whitewater brought additional employees to the project site, including John Loomis who was hired as Whitewater's project manager. (Ex. 37 at 136.) Potter's daily report notes that Loomis excavated the creek channel and built a diversion in preparation for the construction of the permanent bridge. (Ex. 11 at 138.)

33. On March 30, 1999, a construction review meeting was held in Cordova,



including representatives from Cordova Electric Cooperative, Whitewater, and ADF&G. According to the minutes of the meeting, the issue of avalanche danger was discussed; Whitewater stated that the risk increased with one inch of rain or twelve inches of snow. It was agreed that Whitewater would monitor avalanche risk and take action as appropriate. The minutes further noted that Whitewater would be ready to excavate for the permanent bridge piers by April 2, 1999. Whitewater and ADF&G were to coordinate to make sure that proper permits were issued. (Ex. 45.)

34. During the first week of April 1999, Whitewater employees welded the piers for the permanent bridge. During this time, Whitewater was also working with ADF&G to obtain the necessary permit to install the piers in Power Creek. The permit was issued on April 8, 1999, with an expiration date of April 30, 1999. The permit described the specific steps proposed by Whitewater to place two piers below ordinary high water and isolate the work area using streambed material, sandbags, and visqueen. The permit required Whitewater to protect the Power Creek habitat from pollution, sedimentation, and erosion in connection with construction activity. The permit was signed by John Loomis on behalf of Whitewater and Jeff Davis on behalf of ADF&G. (Ex. 63.)

35. On or about April 6, 1999, Dick Potter designated his wife Fran Potter to act as an avalanche spotter at the project site. She was given binoculars and an air horn, and was instructed to watch the mountains for potential avalanche slides. Fran Potter was not paid for this work, nor did she have any training in avalanche safety or

forecasting. (Testimony of Dick Potter.)

36. On or about April 10, 1999, Dick Potter and his wife left the project site. According to John Loomis' daily report, Potter left on vacation. (Ex. 11 at 149.) Potter, however, testified that he quit his job due to differences in management philosophy with John Loomis. Potter testified that job safety was not an issue in his decision to quit. (Testimony of Dick Potter.)

37. On April 8, 1999, Whitewater was issued a special use permit by the Forest Service to conduct helicopter blasting for avalanche control purposes. In its proposal for the permit, Whitewater noted that it had not yet obtained a helicopter but named three helicopter companies under consideration. (Ex. 55.) Whitewater had previously notified ADF&G in January 1999 of its intent to perform blasting to bring down snow that might cause avalanches at the project site. (Ex. 60.)

38. Despite the efforts of Thom Fischer and Deela Dahlstrom in Whitewater's Cordova office, Whitewater was unable to secure a helicopter for avalanche control blasting at the project site. According to Fischer, Whitewater owned two helicopters but they were tied up on a job in Wrangell and were too far away with bad weather conditions to bring them to Cordova. (Testimony of Thom Fischer, Deela Dahlstrom; Ex. Z.)

39. During the second week of April 1999, Jeff Davis was at the project site to monitor for environmental compliance. He kept field notes of his observations and also took photographs at the site. (Exs. 57, 58, 59.) According to Davis' notes for

April 12, 13 and 14, 1999, Whitewater had not been successful in dewatering the isolation area where the bridge piers were to be placed and a fair amount of sediment was leaving the area and entering the creek. Whitewater equipment operator Gary Stone had been using a Hitachi excavator to excavate the isolation area, which was muddy with sediment from the digging work. On April 14, Davis spoke to John Loomis about his concerns. Loomis told him that Whitewater was attempting to get a larger pump from the City of Cordova to more effectively dewater the isolation area. (Testimony of Jeff Davis, Ex. 59.)

40. Between April 12 and 15, 1999, Deela Dahlstrom in Whitewater's Cordova office filled out an "avalanche daily report" each day. Dahlstrom obtained weather information from Points North, a local flying service; and the U.S. Forest Service. However, this information was cursory regarding weather conditions and avalanche hazards. (Ex. 14.)

41. On April 15, 1999, the weather at the project site was overcast with blowing snow, more than an inch of rain, and temperatures around 38-40 degrees. Visibility above the site was restricted by fog and it was not possible to see the tops of the surrounding mountains. There were approximately 16 Whitewater employees working that day, including surveyors, welders, equipment operators, and laborers. Several of the employees expressed concern about avalanche hazards, as two small slides had come down on the previous day. (Testimony of John Fortuny, Gordon Jensen, Micah Stone, Charles Shupp, Ben Ybarra; Ex. 16 at 8.)

42. Two Whitewater employees, welding foreman Bill Lemley and welder Ben Ybarra, testified that they thought another Whitewater employee, Charles Shupp, had been designated as an avalanche spotter on April 15. Shupp, however, testified that he was never assigned to do avalanche spotting and didn't know of anyone besides Fran Potter who had acted as an avalanche spotter. (Testimony of Bill Lemley, Ben Ybarra, Charles Shupp.)

43. Jeff Davis arrived at the project site about 9:30 a.m. on April 15. Two Whitewater laborers were building a sediment retention (silt) box. Davis had a discussion with operators Gary Stone and Jim Proctor and welder Bill Lemley about the best location for the silt box and the water pump. They looked at several possible locations in the area of the temporary bridge. Part of the discussion occurred on the temporary bridge; when they looked up at the nearby avalanche chute, they decided it would be safer to move off the bridge to talk. Davis asked Proctor when they were going to start using the pump, and Proctor said he thought they would wait until they got the Corps of Engineers' permit and then do it all in one day. Davis said he thought it would be a good idea to test the pump ahead of time so they wouldn't be held up if there were problems. Shortly thereafter, Davis left the site around 11:30 a.m. and went to Whitewater's Cordova office to discuss the situation with John Loomis. (Testimony of Jeff Davis; Ex. 59, Ex. 1 at Ex. 2.)

44. According to Bill Lemley, who was involved in the discussion with Jeff Davis on April 15, Lemley and Gary Stone didn't want to work in the creek that day

due to the weather conditions and they argued with Davis for about 30-45 minutes regarding placement of the silt box and the pump in the creek. According to Lemley, Davis said the pump needed to be tested in the creek that day and he threatened to seek further review of the matter, which would have shut down the job and delayed construction. Davis, however, denied that he gave specific work orders to Whitewater employees or that he threatened to shut down the job. Dick Potter, who was Whitewater's superintendent at the site until early April, testified that Jeff Davis had never directed him or other Whitewater employees about how to do their work, but that Davis had cautioned employees about protecting the creek habitat. Whitewater project manager John Loomis also denied that Davis had directed Whitewater's work activities or that he had tried to "steer the job." (Testimony of Bill Lemley, Ben Ybarra, Jeff Davis, Dick Potter; Ex. 16 at 9.)

45. At lunch time on April 15, most of the employees went to the trailer in the staging area to eat lunch. Gary Stone, however, stayed behind to work on the excavator in the creek to clear an area for placement of the pump. At approximately 12:15 p.m., a large avalanche came down and buried the temporary bridge and the adjacent area where Stone was working. The avalanche pushed the temporary bridge and the excavator about 50 feet upstream. Gary Stone was killed in the avalanche. (Testimony of John Fortuny, Ben Ybarra, Charles Shupp, Bill Lemley; Ex. 59.)

46. Various public safety and emergency rescue agencies were notified of

the avalanche and a search and rescue operation was begun. However, after additional avalanches came down in the same area, the search efforts were suspended for safety reasons. After weather conditions stabilized, the search resumed. Gary Stone's body was subsequently found wedged between the excavator and a section of the temporary log bridge. His body was recovered and flown to Anchorage. (Exs. 5, 15, 37 at 155, 48, 59, 74.)

47. Following notification of the fatality, Department safety enforcement officer John Nielson was assigned to conduct an accident investigation. Nielson flew to Cordova and took photographs of the accident scene on April 17, 1999. (Ex. 5.) Because Nielson was nearing retirement, the investigation was reassigned to safety enforcement officer Steve Standley. Standley traveled to Cordova on April 23 and began his investigation. He met with Thom Fischer on April 26 and took photographs of the accident scene. (Ex. 6.) He also interviewed a number of witnesses regarding the accident and the events leading up to it. (Testimony of Steve Standley.)

48. As part of his investigation, Standley asked Thom Fischer for a copy of Whitewater's safety plan for the Power Creek project. Fischer replied that Whitewater was still working on the safety plan at its Bellingham office and would forward a copy as soon as it was completed. Standley received a copy of the safety plan at the end of May 1999. Among other things, the plan covered bear safety; fuel and hazardous substance spills; and blasting and the use of explosives. However, the plan did not contain a site-specific avalanche control program. (Testimony of

Steve Standley; Ex. 13.)

49. Standley asked Whitewater employees whether they had received any training on the avalanche dangers at the Power Creek site. Employees reported that when they were hired, they were told that the site was “very dangerous” due to the avalanche risk. Standley also learned of the meeting between David Hamre and 3-4 employees on March 5, 1999. However, Standley did not find any evidence that Whitewater provided any site-specific avalanche training program to its employees. (Testimony of Steve Standley.)

50. Standley also determined that Whitewater had not employed a professional avalanche forecaster as recommended by David Hamre; had not conducted daily inspections of the worksite using a trained avalanche safety person; had not conducted helicopter blasting or used other mitigation techniques to reduce the probability of avalanches; and had not removed exposed employees from the worksite on days of high avalanche risk. (Testimony of Steve Standley.)

51. Based on Standley’s investigation, the Department issued a citation to Whitewater for violations of Alaska occupational safety and health standards. The tunnel subcontractor, Mainstreet America Mining, was also cited for not adequately protecting its employees. (Testimony of Steve Standley; Ex. 36.)

52. Standley classified the violations issued to Whitewater as “willful” because in his opinion, Whitewater’s conduct demonstrated a reckless disregard and plain indifference to employee safety from avalanche hazards. (Testimony of Steve

Standley.)

53. The maximum penalty for a willful violation under Alaska law is \$70,000. Applying the Department's penalty calculation guidelines, Standley found that Whitewater was entitled to a penalty reduction of 30% for company size and 10% for no history of prior violations, resulting in an assessed penalty of \$42,000 for each willful violation. Due to the willful nature of the violations, no penalty reduction was awarded for good faith. (Testimony of Steve Standley.)

54. The Department presented the testimony of Doug Fesler as an expert on avalanche safety. Fesler has been an avalanche consultant since the mid-1970s and is the founder and co-director of the Alaska Mountain Safety Center, an organization specializing in avalanche hazard management and mitigation for commercial and residential development, mining, transportation, utilities and recreational pursuits. Fesler has extensive experience in avalanche safety education, research, training and consultation, and has participated in numerous avalanche rescues and body recoveries, including more than 45 fatalities. Fesler was paid by the State of Alaska for his consultation work in this case and in the criminal proceedings against Whitewater. (Testimony of Doug Fesler; Ex. 68.)

55. Fesler described the essential elements of an appropriate avalanche control program, including an avalanche hazard analysis; the development of a snow safety plan; the provision of appropriate training and equipment to personnel for avalanche hazards and rescue operations; and avalanche forecasting to minimize



exposure to avalanche hazards. Fesler provided instructional materials for avalanche forecasting; a sample avalanche safety plan; a site-specific snow safety plan for the Power Creek site; and an avalanche hazard classification and risk reduction analysis for the project. (Testimony of Doug Fesler; Exs. 69, 75, 75, 77, 82.)

56. Fesler was first contacted immediately after the Gary Stone accident on April 15, 1999. He flew to Cordova and traveled to the accident site that same day. He assisted with rescue efforts and the recovery of Gary Stone's body. In addition, he spoke to Thom Fischer and other individuals involved in the Power Creek project. He also took photographs of the worksite after the accident. (Testimony of Doug Fesler; Ex. 74.)

57. In Fesler's opinion, the Power Creek site was not a safe worksite and was "the worst and most dangerous site" he had ever seen in his experience as an avalanche expert. According to Fesler, Whitewater had no avalanche control program and did not take adequate safety measures to protect its employees. Fesler believed that Whitewater had been "grossly negligent" in connection with the accident. Fesler acknowledged that avalanche forecasting is not an exact science and that not all avalanches can be avoided even with a professional forecaster, but maintained that the vast majority of avalanches can be avoided with an appropriate snow safety plan, equipment and training, and daily avalanche forecasting. Fesler believed that the Gary Stone accident was "completely preventable" if Whitewater had developed an adequate snow safety plan, hired a forecaster, and implemented

appropriate safety measures. Fesler was also critical of various government agencies, including the Department of Labor, and sent a complaint letter to the Department in March 2001 regarding his safety concerns at the Power Creek site. (Testimony of Doug Fesler; Ex. L at 559.)

58. The Department presented the testimony of Dr. Jack Mickle as an expert on the OSHA excavation standards in 29 CFR Part 1926, Subpart P. Dr. Mickle is professor emeritus at Iowa State University and was involved in the development of the OSHA excavation standards adopted in 1989. (Testimony of Jack Mickle; Exs. 83, 87, 88.)

59. Dr. Mickle was retained by the Department as an expert to review the applicability of OSHA excavation standards to the avalanche hazards at the Power Creek worksite. He reviewed Steve Standley's investigation of the Gary Stone accident. In Dr. Mickle's opinion, Whitewater performed excavation work at the Power Creek site subject to the excavation standards. Dr. Mickle also testified that the avalanche hazards at the site were "surface encumbrances" and "other hazardous conditions" within the scope of 29 CFR 1926.651(a), 1926.651(k)(1) and 1926.651(k)(2). (Testimony of Jack Mickle; Ex. 84.)

## **CONCLUSIONS OF LAW**

### **Item 1 (General Duty Clause)**

AS 18.60.075(a)(4) of the Alaska Occupational Safety and Health Act provides:

An employer shall do everything necessary to protect the life, health, and safety of employees including, but not limited to, 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.

This provision is known as the “general duty clause” and is based on virtually identical language in the federal Occupational Safety and Health Act, 29 USC §654(a)(1). The purpose of the general duty clause is to cover serious hazards to which no specific standard applies. See Mark A. Rothstein, *Occupational Safety and Health Law*, §141 at 197 (4<sup>th</sup> ed. 1998).

The Department cites the general duty clause to address several alleged hazardous conditions at the Power Creek project site. To support the general duty clause citation, the Department gives the following examples of unsafe practices: (1) Whitewater exposed employees at the Power Creek site to a known avalanche hazard, resulting in the death of an employee; (2) Whitewater failed to develop an avalanche control program for the worksite and failed to implement the recommendations of its avalanche safety consultant received five weeks prior to the fatal accident; and (3) Whitewater failed to have a competent person, trained in avalanche hazard recognition, conduct regular inspections of the worksite.

Under the general duty clause, an employer must provide a workplace that is free of “recognized” hazards. There are two established methods to demonstrate that a hazard is recognized. First, the hazard may be recognized within the employer’s industry, as demonstrated by safety experts who are familiar with the industry or

activity in question. Second, a hazard may be recognized if the employer is aware of the hazard or hazardous condition. See Rothstein, *Occupational Safety and Health Law* §145.

In this case, we find ample evidence to conclude that there was both industry recognition and employer recognition of the avalanche hazards at the Power Creek worksite. Avalanche experts David Hamre and Doug Fesler, both of whom visited the worksite, testified at length about the nature and risk of the avalanche hazards at the site. In addition, there is no question that Whitewater was acutely aware of the avalanche hazards at the site, based on Thom Fischer's and Dick Potter's visual observations of the project area and their knowledge of the avalanche hazards obtained from Hamre and other sources.

There is also no dispute that the avalanche hazards at the Power Creek site were capable of causing or likely to cause death or serious physical harm to employees. The unfortunate death of Gary Stone provides tragic confirmation of this element of a general duty clause violation.

The key question is whether Whitewater did "everything necessary" to protect its employees from the avalanche hazards at the Power Creek worksite. While it is apparent that Whitewater took some limited steps to address the avalanche dangers, such as hiring David Hamre to conduct an avalanche hazard evaluation and obtaining a special use permit to conduct helicopter blasting, it is clear to us that Whitewater's actions were entirely inadequate and insufficient to mitigate the substantial avalanche

risk. In particular, Whitewater ignored the recommendations of its own avalanche consultant David Hamre. After evaluating the worksite, Hamre had recommended – in no uncertain terms – that Whitewater develop a written avalanche safety plan; provide appropriate training for employees regarding avalanche hazards and safeguards; and use a trained avalanche forecaster to inspect worksite conditions on a regular basis. Whitewater did none of these things. The written safety plan prepared by Whitewater and given to enforcement officer Standley after the accident fails to contain any site-specific avalanche control program. Whitewater failed to provide any avalanche training to employees beyond telling them the worksite was a dangerous place and they were free to go home without penalty anytime they felt unsafe. David Hamre’s 20-minute meeting with a few Whitewater employees on March 5, 1999, hardly qualifies as adequate avalanche training considering the known avalanche risks.

Whitewater also failed to hire a trained professional to conduct daily avalanche forecasting. The designation of Fran Potter – who had no avalanche training whatsoever – to act as an unpaid avalanche spotter for a total of five days was plainly inadequate to provide the avalanche forecasting recommended by Hamre and may have even been counterproductive by giving employees a false sense of security. Whitewater also ignored the availability of Denny Hogan from Colorado to act as a forecaster, as had been recommended by Hamre. Thom Fischer asserted that his superintendent, Dick Potter, was sufficiently qualified to evaluate avalanche

hazards at the worksite. By his own admission, however, Potter felt unqualified to assess the avalanche dangers even though he felt it was “very probable” that an avalanche would occur at some point.

Moreover, Whitewater obtained a special permit to conduct helicopter blasting for avalanches but failed to actually conduct any blasting to mitigate the avalanche hazard. Given the size of the project and the magnitude of the avalanche hazard, we are not persuaded that Whitewater made enough of an effort to obtain a helicopter for blasting, either by renting a helicopter or bringing up one of its own helicopters from Southeastern Alaska (which it did after the accident).

Furthermore, Whitewater failed to remove its employees from exposure to avalanches on high-hazard days with heavy rainfall or snowfall. Thom Fischer asserted that he had implemented an informal policy of shutting down the job whenever it rained more than one inch or snowed more than one foot. However, there were several days in March and April 1999 when these limits were exceeded and employees were still exposed to the avalanche hazards at the site. See Exs. 11, 37, 70, 78. Although there were some days on which Whitewater did not work or sent employees home early, there were also other days on which the avalanche danger was high yet Whitewater chose to go ahead and work its employees.

We believe that David Hamre’s recommendations to Whitewater – an avalanche control plan; training of employees; use of a trained avalanche forecaster; helicopter blasting; and removal of exposed employees on high-hazard days – were

all feasible safety measures which would have significantly mitigated the avalanche hazards. Because Whitewater did not implement these reasonable safety measures, we conclude that Whitewater did not do everything necessary to protect its employees from recognized avalanche hazards and therefore violated Alaska's general duty clause in AS 18.60.075(a)(4).

**Item 2 (Employee Training)**

29 CFR 1926.21(b)(2) provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The Department alleges that Whitewater failed to adequately train employees concerning the avalanche hazards at the Power Creek worksite. Whitewater maintains that its employees were well aware the worksite was dangerous and had the option not to work on any day they were concerned about avalanche danger.

The evidence clearly establishes that Whitewater employees were not given adequate training concerning the avalanche hazards at the worksite. Superintendent Dick Potter admitted that no avalanche safety training was provided to employees even though the risk of avalanches was recognized as the most serious safety issue on the Power Creek project. Whitewater had some safety information at its Cordova office covering such matters as bear safety, hazardous substance spills, and the use of explosives, but these materials did not address avalanche safety. See Ex. 13. Although employees were aware of the avalanche danger and regularly discussed

their concerns about avalanches, there was no actual training or education about avalanche safety provided by Whitewater. To the extent that safety meetings were held, there were no notes or documentation to show that employees were instructed in how to recognize and avoid avalanche hazards at the site. The Whitewater employees who testified at the hearing uniformly stated that they had not received any avalanche training. Moreover, the fact that employees may have had the option of not working if they were concerned about avalanches is plainly inadequate to satisfy the OSHA requirement to provide appropriate safety training and instruction. Under these circumstances, we conclude that Whitewater failed to adequately instruct its employees in the recognition and avoidance of avalanche dangers.

**Items 3, 4 and 5 (Excavation Standards)**

29 CFR 1926.651(a) provides:

Surface encumbrances. All surface encumbrances that are located so as to create a hazard to employees shall be removed or supported, as necessary, to safeguard employees.

29 CFR 1926.651(k)(1) provides:

Inspections. 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.

29 CFR 1926.651(k)(2) provides:



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.

The above standards are contained in OSHA's excavation standards in 29 CFR Part 1926, Subpart P. Whitewater contends that the excavation standards do not apply to avalanche hazards because the standards do not mention avalanche hazards and it would be unreasonable to expect an employer to know that the excavation standards would apply to avalanche hazards.

It is clear to us that Whitewater was performing excavation work in Power Creek prior to the accident on April 15, 1999. 29 CFR 1926.650(b) defines "excavation" as "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." Under this broad definition, there is no question that Whitewater was excavating in the creek. According to Whitewater's daily reports prepared by Dick Potter, John Loomis excavated in the creek and built a diversion on March 27, 1999. In addition, Gary Stone used the excavator to excavate in the creek on several days prior to the accident. This included clearing an isolation area and digging holes for the placement of the piers for the permanent bridge. Most significantly, Gary Stone was working with the excavator in the creek to clear an area for the dewatering pump when the avalanche occurred on April 15, 1999.

The main point of contention is whether the three cited standards can be reasonably read to apply to avalanche hazards. The expert opinion of Dr. Jack

Mickle, who was involved in the development of OSHA's excavation standards, was that the excavation standards were meant to address any surface encumbrances or other hazardous conditions that could create a hazard for employees doing excavation work, including avalanche hazards. The legislative history materials submitted by the Department support Dr. Mickle's opinion regarding the broad scope and application of the excavation standards. See Exs. 86, 87. Given OSHA's regulatory intent and the broad language of the cited standards, there is no question in our minds that the standards were intended to address any potential hazard affecting employees at excavation sites, including avalanche hazards.

Regarding Item 3, we note that 29 CFR 1926.651(a) requires "all" surface encumbrances that might create a hazard to employees must be removed or mitigated to safeguard employees. Since the Power Creek site was located at the bottom of a narrow canyon with steeply sloping sides and was known to be an avalanche zone, we conclude that this standard required Whitewater to either remove or adequately mitigate the avalanche risk to employees.

Regarding Item 4, we conclude that under 29 CFR 1926.651(k)(1) the avalanche hazards at the Power Creek site were "other hazardous conditions" that should have been inspected on a daily basis by a competent person, i.e., a trained avalanche forecaster. We also note that this standard requires inspections "after every rainstorm or other hazard increasing occurrence," underscoring that the standard is meant to apply to hazards caused or created by weather conditions,

which would reasonably include avalanches.

Regarding Item 5, we similarly conclude that the avalanche hazards at the Power Creek site were “other hazardous conditions” under 29 CFR 1926.651(k)(2) that required Whitewater to remove employees from the hazardous area until the necessary precautions were taken to ensure their safety.

Based on the evidence, we conclude that the excavation standards cited in Items 3, 4 and 5 applied to the avalanche hazards at the Power Creek site; that Whitewater failed to comply with these standards; that one or more employees were exposed to the avalanche hazards at the site; and that Whitewater had knowledge of the avalanche hazards at the site. Thus the Department has established a prima facie case with respect to these alleged violations.<sup>1</sup>

### **Employer Defenses**

Whitewater makes several arguments in defense to the Department’s alleged violations. First, Whitewater maintains that it requested an on-site “voluntary compliance” inspection from OSHA’s consultation office prior to the April 15, 1999 accident but was turned down by the Department due to insufficient staffing and

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<sup>1</sup> Even though we conclude that the cited excavation standards apply to the avalanche hazards at the Power Creek site, we are concerned that the State of Alaska does not have specific avalanche safety standards to protect employees in all affected workplaces, not just excavation sites. The wealth of information submitted about avalanche hazards in Alaska from such local experts as Doug Fesler and David Hamre persuades us that we should not have to rely on the excavation standards or the general duty clause to protect employees from avalanche hazards. We urge the Department to consider the adoption of specific Alaska avalanche safety standards to protect all employees who may be exposed to avalanche hazards in the course of their employment.

resources. However, the weight of the evidence does not support this contention. Although Dick Potter met with the Department's consultation office in January 1999 and was provided with safety information, there is no persuasive evidence that Whitewater actually requested an on-site consultation. Dick Potter's daily reports mention his visit to Anchorage in January, but there is no mention of any request for a consultation inspection at the project site. The Department's consultation chief, Tim Bundy, testified that he had sufficient staffing and resources to perform an on-site consultation but no such request was ever received from Whitewater. Moreover, even if an on-site consultation had been requested or performed prior to the Gary Stone accident, this would not establish a legal defense to any serious or willful OSHA violations at the worksite. See Rothstein, *Occupational Safety and Health Law*, § 224 (on-site consultation by OSHA does not preclude a subsequent enforcement inspection in the event of an employee complaint or serious accident).

Second, Whitewater cites its policy of allowing employees at the Power Creek site to go home without penalty on any day they felt unsafe due to avalanche conditions. While it is unclear whether any employees actually took advantage of this policy, we find that such a policy does not relieve Whitewater of its legal responsibility to protect the safety and health of employees on the job. Under OSHA law, the employer has the primary responsibility for making sure that its workplace is safe; this responsibility cannot simply be passed on to the individual employees (although employees are responsible for following applicable safety rules and regulations.) See

AS 18. 60. 075. Whitewater's policy is not a valid substitute for its obligation to develop a site-specific avalanche safety program; train employees in the recognition and avoidance of avalanche hazards; take specific measures (such as avalanche forecasting and/or blasting) to reduce or mitigate the risk of avalanches; and remove employees from the workplace if their safety cannot be assured.

Third, Whitewater contends that the Gary Stone accident was the direct result of orders given by ADF&G compliance monitor Jeff Davis regarding the placement of a silt box and pump at the worksite on the day of the accident. Whitewater suggests that Jeff Davis bears primary responsibility for the accident because he threatened to shut down the job if his orders regarding the silt box and pump were not followed. We find no merit in this argument. While Davis had authority over environmental compliance issues on the Power Creek project, we find no factual basis that Davis actually ordered Whitewater or any of its employees to perform specific work tasks or that he threatened to shut down the job if his directions were not followed. The evidence shows that Davis discussed the placement of the silt box and the pump with Whitewater employees on April 15, but was not directing work activities. *See Exs. 59, I at 47.* Both John Loomis and Dick Potter, Whitewater's most senior on-site representatives, denied that Davis was directing the job or giving orders. *See Ex. 16 at 9; Testimony of Dick Potter.* Additionally, Thom Fischer gave specific instructions that his crew was not to take orders from either George Keeney or Jeff Davis. Moreover, the scope of the work described in the ADF&G permit was drafted and

submitted by Whitewater. See Ex. 63 at paragraphs 1-17. While ADF&G, through Jeff Davis, had the authority to inspect Whitewater's work and enforce permit conditions, this did not mean that ADF&G and Jeff Davis were in charge of Whitewater's work activities or became responsible for the Gary Stone accident.

Fourth, Whitewater argues that avalanche expert Doug Fesler was biased against it and therefore his opinions should be given little or no weight. We must reject this argument. Fesler's knowledge and experience in the area of avalanche safety make clear to us that he is one of the foremost avalanche experts in Alaska if not the United States. Even though Fesler believed that Whitewater was "grossly negligent" and was primarily responsible for the death of Gary Stone, this does not mean that we cannot rely on his expert opinion and analysis. Fesler spent considerable time and effort reviewing the Power Creek worksite, the relevant weather information, and the events leading up to the accident. His analysis should not be discounted merely because he had strong feelings about the conclusions he drew from the evidence. Although Thom Fischer testified that he had consulted an avalanche engineering expert in Canada, Whitewater did not present any expert evidence to contradict Fesler's (or David Hamre's) conclusions. We do not find that Fesler had any bias or predisposition that improperly influenced his opinion. In our view, it was the evidence and the facts that led to Fesler's strong feelings about Whitewater, not any impermissible bias or prejudice. We note that Fesler also had strong feelings about the perceived inaction and responsibility of various

government agencies, including the Department of Labor, but in our view this too does not lessen the impact or value of his conclusions.

### **Willfulness**

The Department classified each of Whitewater's alleged violations as willful. The Department contends that Whitewater acted in reckless disregard of employee safety and failed to follow the advice of its own avalanche consultant. Whitewater responds that its efforts to protect employees against avalanche hazards may have been imperfect or negligent, but denies that any noncompliance with OSHA standards was willful.

The Alaska OSHA Act, like the federal Act, does not define a willful violation. According to the U.S. Occupational Safety and Health Review Commission, the majority of federal courts and our own previous decisions, a violation is willful if it is committed with intentional, knowing or conscious disregard for the requirements of the Act or with plain indifference to employee safety. *Asbestos Textile Co., Inc.*, 12 OSHC 1062, 1063 (OSHRC 1984); *National Steel and Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 313-16 (9<sup>th</sup> Cir. 1979); *Ketchikan Pulp Company*, Docket No. 94-1017, Decision and Order at 28-29 (Alaska OSH Rev. Bd. 1995); *see generally* Rothstein, *Occupational Safety and Health Law*, §315. No showing of the employer's bad motive or malicious intent is required. *National Steel*, 607 F.2d at 314. In addition, the federal courts have recognized that willful violations may be alleged for violations of either specific standards or the general duty clause. *See, e.g., Ensign-Bickford*

*Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983); *see also* Rothstein, *Occupational Safety and Health Law*, §315 at 371.

Based on our review of the entire record in this matter, we conclude that Whitewater's noncompliance with the cited OSHA laws and standards was willful. In our opinion, Whitewater demonstrated a reckless disregard for employee safety and the requirements of the OSHA Act. Whitewater consciously disregarded the advice of its own avalanche consultant David Hamre and substituted its own admittedly inexperienced judgment regarding the avalanche hazards at the Power Creek site. Whitewater president Thom Fischer and superintendent Dick Potter were keenly aware of the avalanche hazards at the site and admitted they did not have any specialized training or knowledge about avalanche safety prior to the accident. David Hamre provided an avalanche hazard evaluation and made several key recommendations, including the development of a written avalanche safety plan; the training of employees in recognition and avoidance of avalanche hazards; the hiring of a trained avalanche forecaster to make daily safety determinations; and the use of techniques such as blasting to mitigate the avalanche risk. Despite having this specific guidance from its own expert, Whitewater completely failed to implement or follow through on Hamre's recommendations.

It is apparent to us that Thom Fischer acted willfully in failing to implement Hamre's advice and recommendations. Fischer, who had no avalanche training himself, candidly stated that he regarded most avalanche experts as "ski bums" and



did not believe that hiring a professional avalanche forecaster would make the worksite any safer. Fischer appears to have been more interested in avalanche expertise for the purpose of constructing the powerhouse to withstand avalanches than for protecting the safety of employees. Fischer made clear that it was important to him to complete the construction of the permanent bridge in the spring of 1999 before the water level was too high and that he regarded the environmental compliance monitoring by Jeff Davis as an impediment to the construction work. In deciding to go forward with the bridge construction work in April 1999, Fischer relied primarily on the average snowfall statistics for Cordova but ignored the high rainfall average for the month of April contained in the same statistics. *See Ex. AAA.* Fischer was in regular communication with the job site and received daily weather and construction reports, yet he allowed his employees to keep working on days with bad weather and high avalanche risk. Fischer also announced plans to conduct helicopter blasting as early as January 1999, but failed to follow through with blasting or other mitigation techniques even though he knew from Hamre that “if the snow cornices were knocked down, this would mitigate 95% of the avalanche risk.”

In our judgment, it was indefensible for Thom Fischer and Whitewater to consciously ignore the avalanche safety advice received from David Hamre. Whitewater’s efforts to mitigate the avalanche risk and protect employees were cursory at best and far short of what Hamre recommended. Under these circumstances, we conclude that Whitewater’s conduct demonstrated reckless

disregard of employee safety. Therefore we conclude that each of the alleged violations was properly classified as willful.

### **Penalty**

The OSHA Act provides that a penalty of up to \$70,000 may be assessed for each willful violation. Under the Department's penalty calculation guidelines which are based on federal OSHA guidelines, Whitewater was awarded the maximum credit of 30% for company size and 10% for no history of prior violations. No credit for good faith was awarded due to the willful nature of the violations.

We find a substantial overlap exists between the general duty clause violation in Item 1 and the specific excavation violations in Items 3-5. Example 1 in the general duty clause violation is similar to Item 5. Example 2 in the general duty clause violation is similar to Item 3. Example 3 in the general duty clause violation is similar to Item 4. Because of this overlap, we conclude that the general duty clause violation should be affirmed only in the event that the excavation standards cited in Items 3-5 are found not to apply. For the same reason, we find that only a single willful penalty of \$42,000 is warranted for the general duty clause violation in Item 1 and the excavation violations in Items 3-5. Finally, we conclude that the employee training violation in Item 2 is separate and distinct from the remaining items and should carry a separate willful penalty of \$42,000.

**ORDER**

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered as follows:

1. Item 2 (Employee Training) is AFFIRMED as a willful violation with a penalty of \$42,000.

2. Items 3-5 (Excavation Standards) are AFFIRMED as a single willful violation with a penalty of \$42,000.

3. Alternatively, in the event that the excavation standards in Items 3-5 are found not to apply, Item 1 (General Duty Clause) is AFFIRMED as a willful violation with a penalty of \$42,000.

4. The total penalty amount is reduced from \$126,000 to \$84,000.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2003.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

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

By: \_\_\_\_\_  
Cliff Davidson, Member

Board Member Meek, concurring in part and dissenting in part:

I agree with my colleagues that the general duty clause violation in Item 1 and the employee training violation in Item 2 should be affirmed as willful violations.

However, I believe the general duty clause violation is sufficiently broad to address all of Whitewater's actions in this matter and therefore I would uphold only a single penalty of \$42,000. In addition, I do not agree that the excavation standards cited in Items 3-5 apply to avalanche hazards because there is insufficient notice in the standards that avalanche hazards are covered. Accordingly, I would affirm Items 1 and 2 with a single penalty of \$42,000, but would dismiss Items 3-5.

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