

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

DIRECTOR, DEPARTMENT OF )  
LABOR AND INDUSTRIAL RELATIONS )  
Complainant, )  
vs. )  
THE HERRICK CORPORATION, )  
Respondent. )

CASE NO. OSAB 95-042  
(OSHCO No. C8955)  
(Rep. No. 120601943)

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a written Notice of Contest by THE HERRICK CORPORATION ("Respondent") to contest Citations and Notifications of Penalty, issued by the Director of the Department of Labor and Industrial Relations ("Director"), via the division of Hawaii Occupational Safety and Health ("Complainant").

The issues on appeal are:

(1) Whether Respondent violated Standard §12-133-1(a). If so, whether compliance with the Standard is impossible or would result in greater hazards to employees than noncompliance.

a. If there was a violation, is the characterization of the violation as "serious" appropriate. If not, what is the appropriate characterization.

b. If there was a violation, was the imposition and amount of the proposed \$4,500.00 penalty appropriate.

(2) Whether Respondent violated Standard 29 C.F.R. §1926.1053(a)(6)(ii).

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a. If so, is the characterization of the violation as "general" appropriate.

For the reasons stated below, we vacate the Citations and Notifications of Penalty.

#### FINDINGS OF FACT

1. Respondent was a subcontractor involved in steel erection. Respondent worked on the project to construct the First Hawaiian Center in downtown Honolulu. Fletcher Pacific served as the general contractor on the First Hawaiian Center project.

2. During the course of construction, Respondent and Fletcher Pacific had a difference in opinion as to the applicability of fall protection rules for the steel connectors employed by Respondent.

3. Employees whose job is to bolt steel beams into place are called steel connectors. Respondent's steel connectors wore safety belts or body harnesses, but were unsure whether they were required to be "tied-off" or connected to a lanyard or life line when performing their connecting duties at a height of more than ten feet above the nearest floor level.

4. On April 25, 1995, Respondent and Fletcher Pacific met with a representative of HIOSH to discuss the application of fall protection rules for the steel connectors on the project. Respondent was of the understanding that HIOSH would allow its steel connectors to work more than ten feet above the nearest floor level without being tied off.

5. By letter dated May 8, 1995, Fletcher Pacific notified Respondent that the former has learned that Respondent was not complying with the fall protection rules for steel connectors working more than ten feet above ground. It was Fletcher Pacific's understanding from the meeting with HIOSH that with the exception of the raising gang, all other steel erection workers working more than ten feet above the nearest floor level must be tied off. Fletcher Pacific urged Respondent to resolve the problem either by complying with HIOSH's requirements or requesting a clarification of the rules with HIOSH.

6. On May 15, 1995, Respondent wrote to HIOSH's administrator, requesting a clarification of, or, in the alternative, a variance from §12-133-1(a) of the Hawaii Occupational Safety and Health Standards. That Standard requires safety belts and life lines to be worn for all steel erection work ten feet or more above the nearest floor level. Respondent wanted to know if the safety belts and life lines that are worn by the employees must also be hooked up or tied off at all times. It was Respondent's position that requiring belts and life lines to be tied off at all times would create greater hazards for its steel erecting crew.

7. By letter dated May 19, 1995, HIOSH's administrator responded to Respondent's letter. She stated that HIOSH will need to review the matter further before it could respond to its request for a formal interpretation or determination. HIOSH's administrator cautioned Respondent that while variances can be



granted by HIOSH, the variance is only effective against future conduct and that while HIOSH will do its best to issue a "prompt notice" or determination, there is no "immunity" from compliance inspections that take place before a determination is made.

8. On May 24, 1995, prior to any response to Respondent's request for clarification and/or variance, HIOSH sent a compliance officer to inspect Respondent's job site for violations of the standards.

9. While at the job site, HIOSH's compliance officer observed Respondent's steel connectors working more than ten feet from the nearest floor without tied-off safety belts and lifelines.

10. At the time of the inspection, Respondent's employees were either standing on girders or spreaders more than ten feet above the ground, maneuvering and bolting into place steel beams that were being hoisted by an overhead tower crane. As the beams were hoisted into place, Respondent's workers released the load and secured the beams with bolts.

11. As a result of the inspection, Respondent was cited for a violation of §12-133-1(a).

12. At trial, Respondent presented the testimony of Rod Dear, a construction manager and former steel connector with twenty-seven years of steel erection experience. According to Mr. Dear, requiring a connector to tie off would create a greater hazard because the connector would not be able to move out of the way if the beams that are being hoisted by the crane suddenly

comes at or moves toward the connector. Mr. Dear testified that a load of beams could weigh many tons. Beams that are hoisted by a crane are difficult to maneuver and could suddenly swing out of control at a connector. If the connector was tied-off, he or she may not be able to move out of the way and could be struck and knocked over by an out-of-control load of steel beams. Mr. Dear further testified that a tied-off life line could also present a tripping hazard for the connector and/or expose that worker to a fall hazard if the hoisted beams hit or snagged the life line while it was being lifted into place. It was Mr. Dear's opinion that steel connectors needed to be mobile to guide the beams into place and to move out of harm's way when necessary. Mr. Dear opined that requiring connectors to tie-off at a height of more than ten feet would place them in greater danger.

13. Mr. Dear further testified and showed by a preponderance of evidence that alternative means to protect the employees were unavailable and that the alternative solutions suggested by Complainant were unsafe.

14. We find based on the evidence presented that the hazards of compliance with the subject fall protection standard are greater than the hazards of noncompliance, that alternative means of protecting the employees are unavailable in this case, and that a variance was sought.

15. Also as a result of the May 1995 inspection, Complainant cited Respondent for a violation of 29 C.F.R.

§1926.1053(a)(6)(ii) for failing to coat the rungs of two metal ladders with skid-resistant material.

16. The subject ladders were used by Respondent's employees.

17. We credit the testimony of Rod Dear and other evidence to find that the subject ladders for which the citation was issued were secured with rope, weighed 250 lbs each, and could not be readily moved or carried.

#### CONCLUSIONS OF LAW

1. Standard §12-133-1(a) requires "safety belts and life lines [to be] worn for all work 10 feet or more above the nearest floor level."

We conclude that Respondent violated Standard §12-133-1(a). We interpret this Standard to require steel connectors working more than ten feet above the nearest ground level to wear safety belts or life lines and be tied off.

Respondent argues that even if it had violated Standard §122-133-1(a), its noncompliance should be excused under the "greater hazard" defense.

In some instances, the Occupational Safety and Health Review Commission has accepted the greater hazard defense to vacate a citation. Industrial Steel Erectors, Inc., 1 OSHC (BNA) 1497 (1974). In Industrial Steel, the employees were removing steel trusses between columns of a building being demolished. It was the employees' regular practice not to tie off while removing the last four bolts and safety pins, because the truss was likely



to spring free. The employer presented evidence that it was much more hazardous to tie-off than to remain unfettered, because a tied-off lanyard would restrict the employees' freedom of movement and hamper their ability to dodge an out-of-control truss. Recognizing that the purpose of the occupational safety and health statutes was to augment and not reduce the safety of working conditions, the Commission concluded that employers "should not be required to comply with a standard so sedulously as to follow a course of conduct that is shown by the weight of the evidence to be less safe than an existing work practice." Id. at 1498.

Similarly, in American Bridge, Division of U.S. Steel Corp., 2 OSHC (BNA) 1222 (1974), steel erection employees were observed traversing and climbing roof trusses more than 60 feet above the ground without tying off by means of safety belts, lifelines, or lanyards, in violation of 29 C.F.R. §1926.28(a). Although the employees wore safety belts, they were not tied off to any stationary objects. The employer, American Bridge, successfully showed by a preponderance of the evidence that its steel erectors would be endangered rather than protected by tied-off lifelines while working on steel beams 60 feet above ground. The Commission agreed with the employer that safety was enhanced by maximum freedom of movement and that tying-off would restrict the employees' ability to avoid moving objects such as cranes and beams.

The greater hazard defense is established if the employer can prove (1) that the hazards of compliance are greater than the hazards of noncompliance; (2) that alternative means of protecting employees are unavailable; and (3) that a variance application was made or a showing that such an application would be inappropriate. Russ Kaller, Inc., t/a Surfa-Shield, 4 OSHC (BNA) 1758, 1759 (1976); General Electric Co. v. Secretary of Labor, 576 F.2d 558 (3rd Cir. 1978). The rationale for requiring a variance application or a showing that such an application would be inappropriate is to discourage employers from taking chances with the lives and limbs of their employees, in the event that some employers, who believe that their working conditions are safer than those prescribed in the standards, are incorrect. General Electric 576 F.2d at 561.

Based on the foregoing findings, we conclude that Respondent has established all three elements of the greater hazard defense. Respondent has demonstrated that it is more hazardous for steel connectors to be tied-off than not, that there are no alternative means of protecting the employees, and that a variance application was made. Accordingly, the citation for a violation of Standard §12-133-1(a) shall be vacated.

Having concluded that Respondent has successfully defended its violation of Standard §12-133-1(a), we do not reach the issues of characterization of the violation or the appropriateness of the penalty assessed.



2. Standard 29 C.F.R. §1926.1053(a)(6)(ii) requires the rungs and steps of portable metal ladders to be corrugated, knurled, dimpled, coated with skid-resistant material, or otherwise treated to minimize slipping. A portable ladder is defined as a ladder that can be readily moved or carried. 29 C.F.R. §1926.1050(b).

We found that the subject ladders used by Respondent's employees were not portable ladders. Therefore, 29 C.F.R. §1926.1053(a)(6)(ii) does not apply.

Accordingly, we conclude that the citation for violation of 29 C.F.R. §1926.1053(a)(6)(ii) shall be vacated.

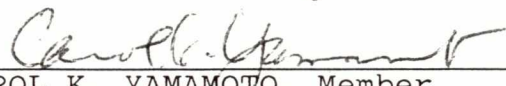
ORDER

The citations for violations of Standard §12-133-1(a) and 29 C.F.R. §1926.1053(a)(6)(ii) are, hereby, vacated, in accordance with the foregoing.

Dated: Honolulu, Hawaii, \_\_\_\_\_.

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FRANK YAP, JR., Chairman

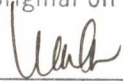
  
CAROL K. YAMAMOTO, Member

  
VICENTE F. AQUINO, Member

Herbert B.K. Lau, Esq.,  
for Complainant

Jeffrey S. Harris, Esq.,  
for Respondent

I do hereby certify that the foregoing  
is a full, true and correct copy of  
the original on file in this office.

  
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NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.