

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of) CASE NO. OSAB 96-038
DIRECTOR, DEPARTMENT OF LABOR) (OSHCO No. M0685)
AND INDUSTRIAL RELATIONS,) (Report No. 120594791)
Complainant,)
vs.)
KIEWIT PACIFIC COMPANY,)
Respondent.)

DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest, filed on June 19, 1996 by KIEWIT PACIFIC COMPANY ("Respondent") to contest a Citation and Notification of Penalty issued to it by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, via the Division of Occupational Safety and Health ("Complainant").

The issues before the Board are:

(1) Whether Respondent violated Occupational Safety and Health Standard 29 CFR §1926.701(b); and

(2) If so, is the characterization of the violation as "other" appropriate? If not, what is the appropriate characterization.

For the reasons stated below, we affirm the citation for violation of Standard 29 CFR §1926.701(b), and affirm Complainant's reclassification of the violation from "serious" to "other".

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FINDINGS OF FACT

1. Respondent was the general contractor for the H-3 lower Halawa viaduct construction project.

2. On May 6, 1996, Complainant's compliance officer, Hervie Messier, inspected Respondent's job site. Diantha Goo, a federal Occupational Safety and Health compliance officer whose office monitors the State's occupational safety and health program, accompanied Mr. Messier on the inspection. Ms. Goo's function was to observe Mr. Messier's performance as a compliance officer and not to inspect Respondent or to issue any citations.

3. While at Respondent's job site, Mr. Messier observed many guarded and unguarded reinforcing steel or rebars on the viaduct deck area. Some of the guarded rebars were covered with "mushroom caps", while others were covered with 4' x 4' lumber.

The unguarded rebars, according to Mr. Messier, did not have finished edges, and were rusty and jagged in sections. Mr. Messier testified that some of the unguarded rebars he observed were vertical, while others were bent. Some of the bent rebars were not bent far enough to eliminate the impalement hazard. In Mr. Messier's opinion, the unguarded rebars posed an impalement hazard.

4. Mr. Messier observed Respondent's employees in close proximity to the unguarded rebars who could have fallen onto or into the rebars.

5. Mr. Messier took photographs of some of the unguarded rebars and the employees who were in close proximity to those unguarded rebars.

6. Ms. Goo, who had a video camera with her at the inspection, videotaped some of the same unguarded rebars observed by Mr. Messier and the employees who were exposed to those rebars.

7. According to Mr. Messier, if an employee should trip and fall onto one of those unguarded rebars, the rebar could puncture or pierce the employee's skin. In Mr. Messier's estimation, the rebars he observed were long enough to pierce a person's skin.

8. At the end of the inspection, Respondent and Mr. Messier held a closing conference. Respondent's representative tape recorded the closing conference.

9. Respondent prepared a transcript of the tape recording. According to Respondent, Mr. Messier had stated at the closing conference that there was no impalement hazard at Respondent's job site. Based on Mr. Messier's statements, Respondent was under the impression that it would not be cited for the unguarded rebars.

10. Respondent understood and was aware at the closing conference that a final determination of whether a citation would issue is made by Mr. Messier's supervisor after he or she reviewed Mr. Messier's report, worksheets, and recommendations.

11. After the inspection, Mr. Messier submitted his worksheet and recommendations for citations to his supervisor. Mr. Messier recommended several citations, one of which was for Respondent's failure to guard exposed or protruding rebars, in violation of Standard 29 CFR §1926.701(b). Mr. Messier recommended that this violation be characterized as a "serious" violation.

12. On June 6, 1996, as a result of the May 6, 1996 inspection by Mr. Messier, Complainant issued five citations against Respondent for violations of the State's Occupational Safety and Health Standards.

13. An informal conference was held on June 17, 1996, between Respondent and Mr. Messier's supervisor, Mel Han. At the conclusion of the conference, four of the five citations issued against Respondent were withdrawn. The remaining citation was for Respondent's violation of Standard 29 CFR §1926.701(b). Complainant had initially classified Respondent's alleged violation of this Standard as a "serious" violation. At the conclusion of the informal conference, Complainant, via Mr. Han, refused to withdraw this last citation, but did agree to reclassify the violation from "serious" to "other" and to reduce the proposed penalty of \$1700.00 for a serious violation to zero penalty for an "other" than serious violation.

14. On June 19, 1996, Respondent filed a written Notice of Contest to contest the citation for violation of Standard 29 CFR §1926.701(b).

15. Portions of Ms. Goo's video were shown at trial to support the citation. Mr. Messier provided testimony about his observations at the job site and about how Ms. Goo's video confirmed what he saw were employees in close proximity to the exposed or unguarded rebars.

16. Portions of the tape-recorded closing conference were played at trial. The transcript was also provided to the Board. At trial, Mr. Messier admitted that he may have told Respondent that areas that were not exposed to employees posed no impalement hazards, but he denied ever telling Respondent that he saw no impalement hazards at the job site. We find that the evidence presented by Respondent did not clearly show that Mr. Messier had indeed informed Respondent that there was no impalement hazard at the job site.

17. Mr. Messier submitted his photographs as exhibits. Mr. Messier's photographs depicted what he observed as impalement hazards posed by unguarded rebars and employee exposure to the hazards.

18. The unguarded rebars were in plain view. We find that Respondent knew or could have known about the hazard of the unguarded rebars.

CONCLUSIONS OF LAW

1. Standard 29 CFR §1926.701(b) provides as follows:

Reinforcing steel. All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

We conclude that Respondent violated Standard 29 CFR §1926.701(b). We base our conclusion on Mr. Messier's testimony about his observations and the photographs taken by him that showed the presence of a hazard and employee exposure to the hazard.

We further conclude that Respondent has not established any valid defense to the citation. Notably, we reject Respondent's contention that Complainant should be bound by the statements made by Mr. Messier at the closing conference that there was no impalement hazard at the job site.

We have found that the evidence presented by Respondent did not clearly show that Mr. Messier had advised Respondent that there was no impalement hazard. Even if he did, we conclude that Mr. Messier's statements during the closing conference are not sufficient to defeat the citation in this case, given the evidence presented by Complainant to support the citation, and Respondent's understanding that a determination of whether a citation would issue would be made by Mr. Messier's supervisor based on Mr. Messier's recommendations and information gathered at the inspection.

As for Respondent's contention that Complainant improperly based its citation on the videotape taken by Ms. Goo, we conclude that any improper use of the video was cured by Mr. Messier's testimony about what he had personally observed and photographed at the inspection independent of what was videotaped


by Ms. Goo and his testimony that Ms. Goo's videotape merely confirmed what he had seen on the job site.

2. Since Complainant had, for whatever reason, reclassified the subject violation as an "other" than serious violation at the informal conference, we will not disturb that determination.

ORDER

The citation for violation of Standard 29 CFR §1926.701(b) and its characterization as "other" is affirmed.

Dated: Honolulu, Hawaii, DEC 18 1998.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Robyn M. Kuwabe, Esq.,
for Complainant

Brian G.S. Choy, Esq.,
for Respondent

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.

