

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 96-043
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO No. C8955)
AND INDUSTRIAL RELATIONS,)	(Report No. 120611272)
Complainant,)	
)	
vs.)	
)	
ALL PARADISE TREE SERVICE,)	
Respondent.)	

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 LABOR APPEALS BOARD
 STATE OF HAWAII

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a written notice of contest filed by ALL PARADISE TREE SERVICE ("Respondent"), to contest a Citation and Notification of Penalty issued by the DIRECTOR of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, via the Division of Occupational Safety and Health ("Complainant").

The Director found serious violations of two Hawaii Occupational Safety and Health ("HIOSH") standards, Sections 12-94-3 and 12-94-4(c). The violations were grouped, and a penalty of \$1,500.00 for the violations, as grouped, was proposed.

The issues to be determined are:

(1) Whether Respondent violated HIOSH standard Section 12-94-4(c);

a. If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?

(2) Whether Respondent violated HIOSH standard Section 12-94-3;

a. If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?

(3) If the characterization of the grouped violations as "serious" was appropriate, was the imposition and the amount of the proposed \$1,500.00 penalty appropriate?

For the reasons stated below, we affirm the citation for violations of HIOSH standard Sections 12-94-4(c) and 12-94-3, affirm Complainant's characterization of the violations, and modify Complainant's imposition of the proposed penalty.

FINDINGS OF FACT

1. Respondent is a tree trimming business, owned and operated by Loren Johnson.

2. Sandy Johnson is an employee of Respondent.

3. On June 7, 1996, about 4:15 p.m., Complainant's compliance officer, Clayton Chun, observed Sandy Johnson working near electrical lines along Kalaniana'ole Highway, between Ainakoa Avenue and Waieli Street.

4. Sandy Johnson was trimming a tree while standing on the tree's branches.

5. The tree was situated on state property, but its limbs were overhanging privately owned property on Waikui Street.

6. Mr. and Mrs. Benjamin Mau owned the property on Waikui Street.

7. Respondent had been contracted by Mrs. Mau to trim the tree.

8. After observing Sandy Johnson working near the electrical lines, Mr. Chun introduced himself to Loren Johnson.

9. Mr. Chun further observed a piece of a branch, about five inches long, suspended in a power line ("subject power line") running alongside the recently trimmed tree.

10. Sandy Johnson had cut both ends of the suspended branch with a chain saw, and in so doing, had approached nearer than ten feet to the subject power line.

11. Mr. Chun subsequently contacted Jim Beavers, Director of Safety at Hawaiian Electric Company ("HECO"), to inquire as to the ownership of the subject power line.

12. In his letter dated June 10, 1996, Mr. Beavers identified the subject power line as a State of Hawaii, Department of Transportation, Highways Division ("DOT"), series street light line.

13. Mr. Beavers further indicated that there are only two business firms qualified by HECO to perform energized electrical work and as such, work within ten feet of high-voltage power lines.

14. Respondent is not one of the firms qualified to perform energized electrical work.

15. A high-voltage power line is one that is energized at a potential of over 300 volts to ground.

16. The subject power line could be energized at a potential of 2,400 volts.

17. The DOT has the ability to deenergize power lines.

18. Respondent never asked the DOT to deenergize the subject power line.

19. Respondent was never assured by the DOT that the subject power line was deenergized.

20. At the October 8, 1997 hearing before the Board, Mr. Beavers testified that series street light lines, which would become energized by photo cells responding to low ambient light, can be energized even though the lights which are connected to them are not illuminated.

21. Charles Lee, Supervisor of the DOT's Permit Section, testified that neither Respondent nor Mr. and Mrs. Mau notified the DOT that Respondent intended to approach nearer than ten feet to the subject power line on June 7, 1996.

22. Respondent and the DOT did not agree upon procedures to be followed in order for Respondent to perform its June 7, 1996 trimming job safely.

23. Mr. Beavers testified that if an individual in a tree using a chain saw contacted a 2,400 volt power line with the chain saw, the individual could suffer electrical burns or death. He further testified that if the individual himself contacted the 2,400 volt power line, the same result could occur.

24. We find the possibility of such an accident occurring to be a reasonable possibility.

25. Respondent knew or could have known of the violative condition with the exercise of reasonable diligence.

RULINGS ON COMPLAINANT'S PROPOSED FINDINGS OF FACT

1. Complainant's Proposed Findings of Fact 1, 5, 6, 9, 10, 12 through 18, 22, 23, and 25 through 27, are consistent with the Board's findings and are, therefore, approved.

2. Complainant's Proposed Findings of Fact 2 through 4, 7 through 8, 11, 19 through 21, 24, 28, and 29, are either inconsistent with the Board's findings or are immaterial and are, therefore, disapproved.

CONCLUSIONS OF LAW

1. Based on the evidence presented, we conclude that Respondent violated HIOSH standard Section 12-94-4(c). HIOSH standard Section 12-94-4(c), provides in full as follows:

(c) For all jobs where it is necessary for any work to be performed which would require a person to approach nearer than 10 feet to a power line or power facility energized at a potential of over 300 volts to ground, the owner of the power line or power facility shall be notified in writing. In not more than three working days following the receipt of the written notice, the owner of the power line or power facility and the tree trimmer shall agree upon the procedures to be followed in order to perform the work in a safe manner. No work shall be performed until the determination has been made, except in an emergency situation involving the saving of a human life.

Pursuant to HIOSH standard Section 12-94-4(a), "[a]ll power lines and power facilities around or near tree-trimming operations shall be considered as energized until assured to be

otherwise by a qualified representative of the owner of the power line or power facility."

Because the DOT never assured Respondent that the subject power line was deenergized on June 7, 1996, the presumption that it was energized applies. As such, the DOT should have been notified in writing of Respondent's intent to approach within ten feet of the subject power line on June 7, 1996.

The record indicates that neither Respondent nor Mr. and Mrs. Mau notified the DOT of Respondent's intent to approach nearer than ten feet to the subject power line before doing so on June 7, 1996, and Respondent and the DOT never agreed upon how Respondent could safely complete its June 7, 1996 trimming job.

Accordingly, we conclude that Respondent violated HIOSH standard Section 12-94-4(c).

2. A "serious violation" under Hawaii Revised Statutes ("HRS"), Section 396-3, is defined as follows:

a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation.

We have construed the term "serious violation" as any violation of a regulation which renders an accident with a substantial probability of death or serious injury possible. See Director v. Charles Pankow Builders, Ltd., OSAB 91-015 (Jan. 28, 1992).

We conclude that the violation was properly characterized as "serious", because of the possibility of an accident with a substantial probability of death or serious injury occurring.

3. We conclude that Respondent violated HIOSH standard Section 12-94-3. the standard requires employers engaged in the business of tree trimming to comply with Chapter 94, HIOSH standards. HIOSH standard Section 12-94-3, provides as follows:

Section 12-94-3 Compliance. Any employer engaged in the business, trade, or performance of tree or brush cutting, trimming, or removal, who hires one or more persons to perform the work, or any person who has advertised to be competent in this type of work and has solicited the work or any employee working as a tree trimmer shall be familiar with and shall comply with this chapter. Any owner or owner's agent who is not normally engaged in the business, trade, or performance of tree or brush cutting, trimming, or removal, but who hires one or more persons to perform the work shall comply with all relevant provisions of this chapter. It shall be the responsibility of the employer to supply all required safety devices. Compliance shall be also maintained with all other relevant provisions of the Hawaii Occupational Safety and Health Law and these standards.

HIOSH standard Section 12-94-4(c) falls under Chapter 94 of Title 12 of the Hawaii Administrative Rules, HIOSH standards. By violating HIOSH standard Section 12-94-4(c), Respondent failed to comply with Chapter 94, HIOSH standards. Based on the foregoing facts and conclusions, we conclude that Respondent also violated HIOSH standard Section 12-94-3.

4. The basis for Respondent's violation of HIOSH standard Section 12-94-3 is its violation of HIOSH standard Section

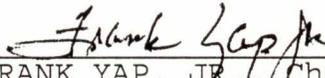
12-94-4(c). Because we have determined that Respondent's violation of HIOSH standard Section 12-94-4(c) was serious, we conclude that Complainant's characterization of Respondent's violation of HIOSH standard Section 12-94-3 as "serious" was also appropriate.

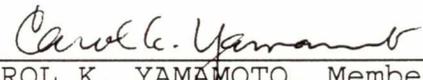
5. Because the characterization of the grouped violations as serious was appropriate, we conclude that the penalty of \$1,000.00 shall be assessed the Respondent.

ORDER

The Citation and Notification of Penalty is hereby affirmed as to the violation of HIOSH standard Sections 12-94-4(c) and 12-94-3, affirmed as to the characterization of the violations, and modified as to the imposition of the proposed penalty.

Dated: Honolulu, Hawaii, DEC 22 1998.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Robyn M. Kuwabe, Esq.,
for Complainant

Loren D. Johnson
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.

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

