

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of
DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

vs.

M.A. MORTENSON COMPANY,
Respondent.

CASE NO. OSAB 96-058
(OSHCO ID N1662)
(Inspection #310420840)

FILED
MAR 10 2010
HAWAII

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DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest, filed by M.A. MORTENSON COMPANY ("Respondent") to appeal Citations and Notification of Penalty issued by the Director of Labor and Industrial Relations, via the Hawaii Division of Occupational Safety and Health ("Complainant").

At the outset of the hearing on the above-entitled matter, Complainant stipulated to reduce the characterization of Citation 1, Item 1 from "serious" to "other-than-serious", in return for Respondent's withdrawal of its Notice of Contest of Citations 2, Items 1-5. The stipulation was placed on the record prior to the commencement of trial. As a result of the parties' stipulation, only Citation 1, Items 2a and 2b, remained in dispute.

The issues to be determined on appeal are:

(1) Whether Respondent's violation of Hawaii Occupational Safety and Health Standard §12-131-3(e) and

§12-131-3(h) should be characterized as a "serious" violation;
and

(2) If so, is the amount of the proposed \$500 penalty appropriate.

For the reasons stated below, we modify the characterization of the violation from "serious" to "other-than-serious" and the amount of penalty from \$500 to \$0.

FINDINGS OF FACT

1. On August 29, 1996, Respondent was the general contractor performing renovation work of the third floor labor and delivery facility at the office tower of the Kapiolani Medical Center.

2. On that date, Complainant inspected Respondent's jobsite at the Kapiolani Medical Center.

3. During the inspection, Complainant's compliance officer observed a trash chute on the third floor that was constructed by Respondent. The trash chute was used for dumping construction debris from the third floor renovation site to the ground floor below. The trash chute was located at the end of an 8- to 10-foot wide corridor between the main hospital building and the renovation site in the office tower. A large dumpster at the bottom of the first floor level collected the trash that was dumped into the chute.

4. The construction debris that was dumped into the chute consisted of drywall and ceiling tiles.

5. At trial, Respondent did not dispute that the trash chute was greater than 48 inches in height and was not protected by an intermediate guard rail across the opening, in violation of Standard §12-131-3(e) and -(h).

6. The chute was enclosed with wooden walls on three sides. The fourth side was open to the corridor and that was the side where trash was dumped.

7. Respondent's employees dumped trash into the chute two to three times a day.

8. Respondent's employees used a large laundry cart to empty trash into the chute. The cart would be pushed within two feet of the chute opening and then tipped over to allow the trash to fall into the chute. The cart was too large to fall into the chute opening.

Respondent's employees also used an industrial-sized pushbroom to push trash or debris into the chute.

When using the cart or pushbroom, Respondent's employees would come within two feet to several inches of the opening of the chute.

When either the cart or pushbroom was used to dispose of trash, the cart or pushbroom would always be positioned between the employee and the opening of the chute, and the employee would always be facing the opening.

9. Because the chute was constructed at an incline, a person would not be able to stand at the edge of the chute

opening without first hitting his or her head on an overhead plywood platform.

10. Complainant's representative testified that it was possible that an employee could have carried debris by hand and walked right up to the edge of the chute opening to dump the trash. It was Respondent's testimony that either the cart or pushbroom would be used to dump trash.

11. Complainant's witness contended that since employees came within two feet or less of the chute opening when they dumped trash, there was a possibility that someone could fall into the chute, and sustain injuries. Respondent's witness testified that there was a substantial probability that if someone fell into the chute, serious injuries, such as fractures, would result.

12. The only employees who were exposed to the hazard of the open chute were those who dumped trash into the chute.

13. Given the location of the trash chute as being separate and away from the construction site and other employees, the manner in which trash was dumped or pushed into the chute, the use of carts and industrial-sized pushbrooms to dispose of the trash, and the construction of the chute that made it difficult for a person to step up to the edge, we find that an employee falling into the chute while disposing trash with the cart or pushbroom was not a reasonable possibility. We further find that given the nature and type of construction debris that was being disposed of in the chute, the location of the

construction site as being separate and away from the chute, and the overhead platform above the chute, the possibility that an employee would hand-carry debris from the construction site, walk up to the edge of the chute, and fall in, was also not a reasonable one.

CONCLUSIONS OF LAW

1. Under Hawaii Revised Statutes ("HRS") §396-1, a violation is "serious" if there is a substantial probability that death or serious physical harm could result from a hazardous condition at the work place.

In Director v. Charles Pankow Builders, Ltd., OSAB 91-015 (Jan. 28, 1992), we 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. We concluded in Director v. Fritz's European Bakery, OSAB 96-025 (Oct. 6, 1998), that the possibility of the type of accident that could occur must at least be reasonably predictable in view of the type of work being done and the procedures, practices, and work patterns of the employer in performing that work.

In this case, we found that an accident in which someone falls into the chute while disposing trash was not a reasonable possibility.

Accordingly, based on our construction of the term "serious violation", as defined in HRS §396-1, the relevant caselaw, and the requirement enunciated in Fritz's European

Bakery that the alleged type of accident be a reasonable possibility, we conclude that Complainant has failed to establish all of the elements of a serious violation in this case.

Respondent's violation shall, therefore, be characterized as a "general" or "other-than-serious" violation.

2. Given our conclusion in #1 above, we further conclude that the amount of penalty shall be reduced from \$500.00 to \$0 for this violation.

ORDER

Complainant's characterization of the violation shall be modified from "serious" to "general" or "other-than-serious". The penalty to be imposed shall be modified from \$500.00 to \$0.

Dated: Honolulu, Hawaii, _____

MAR 10 1999


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member

EXCUSED
VICENTE F. AQUINO, Member

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

Peter L. Yee, 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

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



Decision and Order to a duly recognized representative
of the employees.