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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the matter of)	CASE NO. OSAB 97-002
DIRECTOR, DEPARTMENT OF)	(OSHCO No. N1622)
LABOR AND INDUSTRIAL RELATIONS,)	(Report No. 301421343)
Complainant,)	
)	
vs.)	
)	
KIEWIT PACIFIC COMPANY,)	
Respondent.)	
)	

FILED
LIR APPEALS BOARD
STATE OF HAWAII

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DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest by KIEWIT PACIFIC COMPANY ("Respondent") to contest three Citations and Notifications of Penalty issued to it by the Director of Labor and Industrial Relations, via the Division of Occupational Safety and Health ("Complainant").

The issues to be determined are:

- (1) Whether Respondent violated 29 CFR §1926.501(b)(4)(ii).
 - a. If so, is the characterization of the violation as "serious" appropriate. If not, what is the appropriate characterization, if any.
 - b. If so, is the imposition and amount of the proposed \$1,125.00 penalty appropriate.
- (2) Whether Respondent violated 29 CFR §1926.652(a)(1).
 - a. If so, is the characterization of the violation as "repeat" appropriate. If not, what is the appropriate characterization, if any.
 - b. If so, is the imposition and amount of the proposed \$10,000.00 penalty appropriate.



- (3) Whether Respondent violated Hawaii Occupational Safety and Health Standard §12-130-3(a)(5).
 - a. If so, is the characterization of the violation as "other" appropriate. If not, what is the appropriate characterization, if any.
- (4) Whether Respondent violated Hawaii Occupational Safety and Health Standard §12-141-4(a).
 - a. If so, is the characterization of the violation as "other" appropriate. If not, what is the appropriate characterization, if any.
- (5) Whether Respondent violated Hawaii Occupational Safety and Health Standard §12-141-6(a)(7)(D)(iv).
 - a. If so, is the characterization of the violation as "other" appropriate. If not, what is the appropriate characterization, if any.

For the reasons stated below, we reverse and vacate Citation 1, Item 1; Citation 3, Item 1; Citation 3, Item 2; and Citation 3, Item 3. We affirm Citation 2, Item 1, but reverse the characterization of "repeat" violation. We modify the penalty assessed for Citation 2, Item 1 to \$500.00.

FINDINGS OF FACT

1. On October 15 and 16, 1996, Complainant performed an occupational safety and health inspection of Respondent's jobsite at the Maui Marketplace.

2. Following the inspection, Complainant, on December 4, 1996, issued three citations against Respondent for various violations of the Hawaii Occupational Safety and Health Standards:

(a) Citation 1, Item 1 (uncovered holes):

Violation of 29 CFR §1926.501(b)(4)(ii) for not keeping holes in the ground covered.

Complainant characterized the violation as "serious", and imposed a proposed penalty of \$1,125.00.

(b) Citation 2, Item 1 (unprotected trench):

Violation of 29 CFR §1926.652(a)(1) for allowing employees to work in a portion of an unprotected trench that was 6 feet deep.

Complainant characterized the violation as "serious" and "repeat" and imposed a proposed \$10,000.00 penalty against Respondent.

(c) Citation 3, Item 1 (damaged scaffold):

Violation of §12-130-3(a)(5) of the Hawaii Occupational Safety and Health Standards for using a weakened or damaged scaffold.

Complainant characterized the violation as "other" and did not impose any penalty.

Citation 3, Item 2 (ground-fault Circuit interrupter):

Violation of §12-141-4(a) for not using a ground-fault circuit interrupter ("GFCI").

Complainant characterized the violation as "other" and did not impose any penalty.

Citation 3, Item 3 (unmarked tool):

Violation of §12-141-6(a)(7)(D)(iv) for not labeling or marking a double insulated tool.

Complainant characterized the violation as "other" and did not impose any penalty.

Citation 1, Item 1

29 CFR §1926.501(b)(4)(ii) - uncovered holes

3. At the inspection of Respondent's work site, Complainant observed holes in the ground that were 2 feet by 2 feet, and 6-8 inches deep.

4. The holes were located in the ground and not at a height or above any lower levels.

5. The holes were not covered.

6. 29 CFR §1926.501(b)(4)(ii) is part of 29 CFR, Subpart M, entitled "Fall Protection." Subpart M sets forth the requirements and criteria for fall protection on construction sites.

7. The heading for §1926.501 is entitled "Duty to have fall protection." Section 1926.501(b)(1-15) identifies fifteen work situations or conditions that are above ground and more than 6 feet above lower levels, for which fall protection is required or needed. "Holes" is listed under §1926.501(b)(4).

Citation 2, Item 2

29 CFR §1926.652(a)(1) - unprotected trench

8. At the inspection of Respondent's job site, Complainant observed men working in an unprotected portion of a trench.

9. Complainant measured the depth of the portion of the trench where he had observed employees. It was 6 feet deep.

10. Complainant tested the soil and determined that the excavation was dug out of type A soil, and not entirely out of stable rock.

11. 29 CFR §1926.652 is part of 29 CFR, Subpart P, entitled "Excavations." Subpart P applies to excavations, which are defined as any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.

12. Employees working in an unprotected trench at least 6 feet deep could suffer serious injury or death if dirt or soil caved in on them.

13. A penalty of \$500.00 is reasonable in this case for Respondent's violation of 29 CFR §1926.652(a)(1).

Prior Citation for Same Standard

14. Previously, on May 2, 1995, Respondent was cited for the same standard: 29 CFR §1926.652(a)(1).

15. The May 2, 1995 Citation was issued following an investigation by Complainant of a fatal accident occurring on Respondent's job site in a natural stream bed channel on the H-3 Halawa Valley project. In the H-3 project, Respondent's workers were constructing a wall along the stream bed channel when the wall collapsed onto a worker, killing him. At the site where the fatality occurred, Respondent was in the process of excavating the natural slopes of the stream channel, using a sloping system designed by a registered professional engineer. Employing an

engineer to design a protective system to protect employees in excavations is an option available under §1926.652(b)(4).

Complainant cited Respondent for a violation of §1926.652(a)(1) in May of 1995, because it did not agree with some of the recommendations made by the engineer.

The May 2, 1995 Citation did not involve trenching in the ground and did not involve any hazards associated with exposing employees to an unprotected trench in the ground.

16. The May 2, 1995 Citation was resolved by way of an Informal Settlement Agreement between Respondent and Complainant, filed on May 31, 1995. In the Informal Settlement Agreement, Complainant agreed to reduce the characterization of the violation from "serious" to "general" with no penalty. Also contained in the agreement was Respondent's statement that it does not admit to any violation of the cited standard for any litigation or purpose other than a subsequent proceeding under the Hawaii Occupational Safety and Health Law. Complainant and Respondent stipulated that the condition for which Respondent was cited in the May 2, 1995 Citation did not contribute to or cause the fatality that prompted the inspection and subsequent issuance of the Citation. Complainant and Respondent further stipulated that the agreed upon reduction to a general violation of 29 CFR §1926.652(a)(1) shall become a final order.

17. We credit the opinion of Respondent's expert, Walter Chun, to find that the condition and hazard presented in the May 2, 1995 citation for excavation in a stream bed channel

differed from the condition and hazard presented in the subject citation for excavation in a trench.

18. The characterization of the prior citation was reduced to general, while the characterization of the present citation was determined to be serious.

19. Although Respondent was cited for the same specific standard previously, the basis for the issuance of the previous citation differed from the basis that formed the present citation.

20. Based on the evidence, we find that the condition and hazard for which Respondent was cited in May of 1995 was not substantially similar to the condition and hazard for which Respondent was cited in this case.

Citation 3, Item 1
§12-130-3(a)(5) - damaged scaffold

21. At the inspection, Complainant observed that some of the cross braces on Respondent's scaffolds were slightly bent. The scaffolds in question were "EZ" form scaffolds, which are different from traditional form scaffolds that are built from the bottom up.

22. The purpose of the cross braces on this type of scaffold was for squaring and aligning, and not for structural stability.

23. Although the cross braces were slightly bent, it did not affect the structural integrity of the scaffolds.

24. The bent cross braces presented no hazard to employees.

25. The scaffolds were not damaged or weakened by the bent cross braces.

Citation 3, Item 2
§12-141-4(a) - GFCI

26. Respondent was required by the Standard to use a GFCI.

27. Complainant used a test switch to determine whether the GFCI was being used on Respondent's job site.

28. The test switch did not "flip" or trigger the GFCI.

29. Complainant was unable to determine whether it was the testing equipment that failed or that the GFCI had failed.

30. A load test could have been performed to determine if the GFCI was functional, but Complainant did not perform a load test.

31. Respondent had in place an assured grounding program at the time of the inspection that would have served as an acceptable alternative to a GFCI under the Standard.

32. Complainant did not inquire or determine whether an assured grounding program was being used at the time of the inspection.

Citation 3, Item 3
§12-141-6(a)(7)(D)(iv) - unmarked tool

33. Under the Standard, tools that are double insulated are not required to be grounded.

34. Double insulated tools must be marked or labeled as such under the Standard.

35. According to Complainant, employees need to know whether a tool has been grounded or is double insulated, because only a grounded tool or double insulated tool is safe for use. An ungrounded tool posed an electrical hazard.

36. At the inspection, Complainant observed a tool, an impact wrench, that was unmarked. Complainant did not know whether the tool was double insulated or one that must be grounded.

37. If the tool was grounded, then it did not require marking as a double insulated tool.

CONCLUSIONS OF LAW

1. 29 CFR §1926.501(b)(4) provides as follows:

(4) Holes.

(i) Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

(ii) Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

(iii) Each employee on a walking/working surface shall be protected from objects falling through holes (including skylights) by covers.

We read 29 CFR §1926.501(b)(4)(ii) in context with §1926.501(b)(4)(i) and §1926.501(b)(4)(iii) and with §1926.501 and Subpart M as a whole, and conclude that the hazard that subsection (b)(4)(ii) seeks to prevent applies only to holes that are at heights above lower levels. Accordingly, Respondent was

cited for a violation of a Standard that did not apply to the situation. Accordingly, we conclude that Respondent did not violate 29 CFR §1926.501(b)(4)(ii).

2. 29 CFR §1926.652(a)(1) provides as follows:

(a) Protection of employees in excavations.

(1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Based on the Complainant's findings at the time of the inspection, we conclude that Respondent violated 29 CFR §1926.652(a)(1) by exposing employees to an unprotected excavation.

a. We conclude that the characterization of the violation as repeat was not appropriate.

A violation is repeated if at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. Potlatch Corporation, 7 OSHC 1061, 1979 OSHD ¶ 23,294 (1979).

Complainant has the burden of showing substantial similarity of violations. Under Potlatch Corporation, a prima facie case of substantial similarity can be established by a

showing that the prior and present violations concerned citations for the same specific standard. However, a prima facie showing of substantial similarity may be rebutted by evidence that the prior and present violations involved dissimilar conditions or hazards.

We conclude in this case that Complainant has made a prima facie showing of substantial similarity by presenting evidence that there was a previous final order concerning a citation for the same specific standard. However, we believe Respondent has presented sufficient evidence to rebut the Complainant's prima facie showing that the subsequent citation involved a substantially similar condition or hazard that formed the basis for the prior citation.

Accordingly, we conclude that Complainant's characterization of the subsequent violation as "repeat" was not appropriate.

b. Having determined that the violation was not a repeat violation, we conclude that Respondent shall be assessed a penalty of \$500.00 for its serious violation of 29 CFR §1926.652(a)(1).

3. Section 12-130-3(a)(5) provides as follows:

Any scaffold damaged or weakened from any cause shall be immediately repaired and shall not be used until repairs have been completed.

Having determined that the slightly bent cross braces did not weaken or affect the structural stability of the scaffold and did not pose a hazard to employees, we conclude that

Complainant has not shown that Respondent violated §12-130-3(a)(5).

Since no violation has been shown, we do not reach the issue of characterization.

4. Section §12-141-4(a) of the Standards provides as follows:

The employer shall use either ground-fault circuit interrupters or an assured equipment-grounding program as specified in this section to protect employees on construction sites. These requirements are in addition to any requirements for equipment grounding conductors.

In this case, Complainant was unable to determine whether it was the test switch or the GFCI that failed. Complainant also failed to determine at the time of the inspection whether Respondent was using an assured equipment grounding program, instead of a GFCI, which is an acceptable alternative under the Standard. For these reasons, we conclude that Complainant has not shown that Respondent violated §12-141-4(a).

Having determined that no violation has been shown, we do not reach the issue of characterization.

5. Section §12-141-6(a)(7)(D)(iv) of the Standards provides, in part, as follows:

Listed or labeled portable tools and appliances protected by a system of double insulation, or its equivalent, need not be grounded. If such a system is employed, the equipment shall be distinctively marked to indicate that the tool or appliance utilizes a system of double insulation[.]

Complainant failed to show that the unmarked tool was, in fact, a double insulated tool that required marking. We, therefore, conclude that Complainant has not shown that Respondent violated §12-141-6(a)(7)(D)(iv).

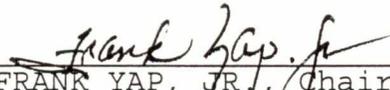
Having determined that no violation has been shown, we do not reach the issue of characterization.

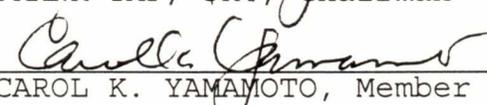
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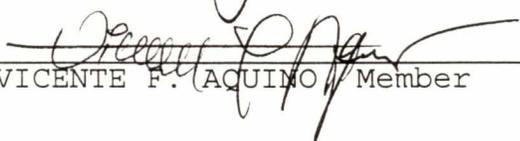
Citation 1, Item 1; Citation 3, Item 1; Citation 3, Item 2; and Citation 3, Item 3 are reversed and vacated. Citation 2, Item 1 is affirmed, but its characterization as "repeat" is reversed. The penalty for Citation 2, Item 1 is modified to \$500.00.

MAY 23 2000

Dated: Honolulu, Hawaii, _____.


FRANK YAP, JR., Chairman

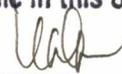

CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Leo B. Young, Esq.
for Complainant

Brian G.S. Choy, 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.



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.