LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. FLETCHER PACIFIC CONSTRUCTION COMPANY, Respondent.	)	CASE NO. OSAB 98-024 (OSHCO No. H2997) (Report No. 301424941)

DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest filed by FLETCHER PACIFIC CONSTRUCTION COMPANY (Respondent), to contest a Citation and Notification of Penalty (Citation) issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via its Division of Occupational Safety and Health (Complainant), on May 8, 1998.

The issues to be determined are:

(1) Whether Respondent violated Standard §12-110-2(f)(1)(A), as described in Citation 1, Item 1.

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

(b) If so, was the imposition and amount of the proposed $2,975.00 penalty appropriate.

We vacate the May 8, 1998 Citation because Complainant has not established that Respondent violated the standard, but even if there had been a violation, such violation was excused due to unpreventable employee misconduct.

FINDINGS OF FACT

Background

1. At approximately 4:10 a.m. on February 5, 1998,[1] a fire broke out in the Hawaiian Island Creations (HIC) store in the Ala Moana Center (AMC), a shopping complex in Honolulu.

2. At the time of the fire, AMC was owned by Daiei and managed by General Growth Management (GGM).

3. During this time period, AMC was undergoing a major renovation and expansion, including the addition of an upper mall level.

4. The JSM Group (JSM) was contracted by Daiei to serve as the construction manager for the entire project.

5. Respondent was contracted to JSM, through Daiei, to perform certain work on the project.[2]

6. KWL Services, Inc. (KWL), a subcontractor of Respondent, was performing welding and other "hot work" on the project.

7. "Hot work" could not proceed on the project work site without authorization from JSM.

8. The Honolulu Fire Department investigated the fire and prepared a fire investigation report dated May 29, 1998. The fire investigator determined that the February 5, 1998 fire was

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[1]This was toward the end of the work shift that had started at 9:00 p.m. the previous day.

[2]Respondent was one of several contractors on the project.

caused when "hot slag" (molten steel) from a cutting torch used on the upper floor fell through holes and ignited combustibles in the HIC store below.

The fire investigator determined that an employee of KWL was performing the "hot work" that caused the fire.

9. Only KWL employees were in the area where the "hot work" was being performed.

10. On February 2 or 3, 1998, a few days before the fire, KWL removed plywood covers over the holes in the floor and plugged the holes with insulation and debris.[3] Respondent had placed the plywood covers over the holes in the floor and secured them with caulking to prevent water penetration damage.

11. KWL did not have permission from Respondent to remove the plywood covers.

12. KWL did not submit the required documentation for the "hot work" that caused the fire on February 5, 1998. There is no "Daily Hot Work Check List" for February 4, 1998 and/or February 5, 1998.

13. KWL was responsible for providing a fire watch for its "hot work" activities on the morning of February 5, 1998,

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[3]According to Edward Kaeka, the KWL supervisor who made the decision to remove the plywood covers, the covers were interfering with the proper levelling of the structural steel frame, or grillage, that KWL was preparing for a tower crane.

According to Respondent's carpenter foreman, when he was informed that the covers had been removed, he did not believe there was a problem, because no "hot work" was being done in the area at the time.

when the fire occurred, but there was no KWL employee acting as a fire watch at the time. Edward Kaeka, a KWL vice president and night shift crew supervisor, the designated fire watch for KWL, had left the area where the "hot work" was being done to go to the parking lot.

14. KWL's last day on the project work site was February 5, 1998, after which Respondent terminated KWL's services.

15. Prior to February 5, 1998, Respondent had a fire prevention program in place for the entire project, which was intended to prevent fire hazards and violations of fire safety standards. This fire prevention program required, among other things, that combustible materials be removed from areas where cutting and welding activity was to be done, and the assignment of a competent fire watch person.[4]

16. Respondent had communicated the elements and requirements of its fire prevention program to its employees and subcontractors through nightly work safety meetings.

In addition, the "Daily Hot Work Check List" forms, as more fully described below, summarized the main requirements of Respondent's fire prevention program. These forms were filled out by KWL and signed by Mr. Kaeka.

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[4]The fire watch constantly monitors the cutting and welding activity and surrounding areas, and has the authority to stop work and to take actions necessary to abate hazards.

While Mr. Kaeka stated that he just filled in the date and time of the proposed "hot work" and signed the form, and was not aware of Respondent's fire prevention program, the compliance officer testified at trial that he believed that Mr. Kaeka, as a party to the "hot work" check lists and other related documents, had knowledge of Respondent's fire prevention program.

17. Respondent had established a system of "Notification of Intent to Proceed with Hot Work" and "Daily Hot Work Check List" forms. Respondent submitted completed "Notification of Intent to Proceed with Hot Work" forms together with a site specific welding and fire prevention plan at least 24 hours before the commencement of any "hot work." Respondent also required KWL to submit a "Daily Hot Work Check List" form to one of its safety administrators prior to commencing "hot work."

This system was designed to ensure that Respondent received notice of when "hot work" was performed so that it could monitor such work to make sure its fire prevention program was followed. KWL specifically confirmed its knowledge and awareness of Respondent's fire prevention guidelines when it filled out the "Daily Hot Work Check List" forms.

18. When violations of Respondent's fire prevention program were discovered, Respondent took immediate steps to correct them. Respondent had admonished KWL for an incident on or about November 24, 1997, when KWL was found to have been in violation of Respondent's fire prevention program. At that time,

one of Respondent's safety administrators stopped "hot work" by KWL, because it did not have a fire watch. Respondent's project engineer at the work site contacted KWL and demanded remedial action when KWL was performing "hot work" without a posted fire watch.

After KWL performed "hot work" without a posted fire watch on February 5, 1998, Respondent terminated its subcontract with KWL.

The Citation

19. On May 8, 1998, Complainant issued a Citation against Respondent for an alleged "serious" violation of Standard §12-110-2(f)(1)(A) of the Hawaii Occupational Safety and Health Laws.

Respondent was cited for allegedly failing to ensure compliance with the requirements of the standards of Part 3 of the Hawaii Occupational Safety and Health Standards title by its own employees and all subcontractor employees on the project.

Respondent allegedly failed to take special precautions to ensure fire prevention and protection enforcement actions to inspect and guard against fire hazards, where floor openings and cracks were not closed such that readily combustible materials on the floor below were exposed to sparks, and there was no required fire watch where welding or cutting was performed. Respondent was assessed a proposed $2,975.00 penalty.

20. Respondent timely contested the Citation to the Board.

21. According to the compliance officer's deposition and trial testimony, Respondent was cited on the basis of the multi-employer work site doctrine.[5]

The compliance officer had determined that Respondent was the general contractor with control over the work site, and as such, was responsible under Standard §12-110-2(f)(1)(A), for ensuring compliance from all of the personnel on the work site, including subcontractors, with safety and health standards in the work place.

The compliance officer indicated that Respondent, as the general contractor, had primary responsibility for fire prevention on the work site and had failed to safeguard against the fire hazards that led to the February 5, 1998 fire.

Respondent's defense

22. Respondent's first defense arises under the multi-employer situation. Respondent asserts that it cannot be held liable under the cited standard, because it was not the general contractor with control over the work site or the subcontractor's employees.

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[5]The compliance officer also stated that the citation was not issued on the basis of the general duty clause. The general duty clause refers to §12-110-2(a).

Respondent further asserts that under Complainant's Field Operations Manual (FOM), it cannot be held to have violated the cited standard, because it was not an exposing employer.

Assuming that Respondent was an exposing employer, however, Respondent contends that it still should not have been cited, because it satisfied the criteria set forth in the FOM for a legitimate defense to the issuance of the Citation.

Respondent's other defense is that even if it violated the cited standard, the affirmative defense of unpreventable employee misconduct applies to excuse its violation.

Opinion of Respondent's expert

23. Respondent's expert, Walter Chun, an occupational safety and health consultant, prepared an opinion report dated April 17, 1999, and also testified at his deposition and at trial.

In his report, Mr. Chun stated that the compliance officer had assumed that Respondent was the general contractor with control over the work site and had further assumed, under the cited standard, that Respondent was responsible for the fire hazards.

Mr. Chun indicated that in issuing a Citation against Respondent for a violation of Standard §12-110-2(f)(1)(A), Complainant is required to establish a multi-employer work site, where the general contractor is the exposing, controlling, creating, or correcting employer.

According to Mr. Chun, Respondent was neither the exposing employer nor the creating employer, because none of its employees were in the area and, in fact, Respondent did not know that the "hot work" was in progress. KWL had performed the "hot work" without authorization to proceed from JSM, the construction manager for the entire project.

Respondent was not the controlling employer, because "hot work" cannot proceed on the work site unless authorized by JSM.

Respondent was not the correcting employer, because the "hot work" that was performed on February 5, 1998, was not known to Respondent until the fire was discovered. KWL performed the "hot work" and controlled the employees conducting such work.

Because Respondent did not have employees exposed to the hazard of "hot slag" near combustibles and it did not have knowledge of such hazard, it could not have provided notice of the hazard to the creating, controlling, and/or correcting employers.

Because Respondent had no knowledge of the hazard and was reasonably diligent with regard to fire prevention and the safety precautions for "hot work," it was not in a position to inform its employees and KWL's employees on avoiding the dangers associated with the hazard.

Mr. Chun explained in his report that the extent of Respondent's reasonable diligence included the development and

implementation of a sound fire prevention program that provided for inspections, notifications, authorizations, and precautions for "hot work" and that Respondent reasonably expected that such procedures would be followed by KWL.

Mr. Chun's report provided the bases for his opinion, supporting information and opinions, and a list of the documents he reviewed in formulating his opinion.

At trial, Mr. Chun opined that there was insufficient evidence to find Respondent to be the general contractor with control over the subcontractors.

Both in his report and at trial, Mr. Chun opined that there was evidence in the record to support the defense of unpreventable employee misconduct. As Mr. Chun noted, KWL had performed the "hot work" on February 5, 1998, without proper notification and authorization, and Respondent did not know that "hot work" was in progress on February 5, 1998.

24. We accept Mr. Chun's opinion. We find that the evidence presented by Complainant does not refute Mr. Chun's expert opinion.

25. Based on Mr. Chun's opinion, we find that Respondent was not the general contractor with control over the work site or KWL's employees, and that Respondent was not an exposing, creating, controlling, or correcting employer.

26. Based on the record, we find that Respondent has established work rules designed to prevent the violation; that it

has adequately communicated these rules to its employees; that it has taken steps to detect and correct violations, especially if there were incidents of prior noncompliance; and that it has effectively enforced the rules when violations have been discovered.

CONCLUSIONS OF LAW

We conclude that Respondent did not violate Standard §12-110-2(f)(1)(A). This standard provides in relevant part:

> (f) Prime contractor and sub-contractor responsibilities.
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> (1) By contracting for full performance of a contract, the prime contractor assumes all obligations prescribed as employer responsibilities under the law, whether or not any part of the work is subcontracted.
>
> (A) Where one contractor is selected to execute the work of a project, that contractor shall ensure compliance with the requirements of the standards of part 3 of this title from the contractor's own employees as well as from all subcontractor employees on the project.

In order to hold Respondent responsible under Standard §12-110-2(f)(1)(A), Complainant must establish that Respondent had control over the work site. See IBP, Inc. v. Herman, 144 F.3d 861 (D.C. Cir. 1998). On this project, all of the work was overseen by JSM, the owner's construction manager, and to some extent by the property manager, GGM. Respondent did not exercise control over the "hot work" that was being performed by KWL.

Respondent did not have control over KWL. KWL was responsible for supervising its own employees and ensuring that they followed applicable safety standards and rules. At the end of each work shift, when authorized "hot work" was performed prior to February 5, 1998, KWL certified in the "Daily Hot Work Check List" forms that the appropriate "hot work" permit had been obtained; that work platforms were safely constructed and properly prepared; fire fighting equipment was provided; and that the competent fire watch person, i.e., Mr. Kaeka, understood his responsibilities. Mr. Kaeka did not submit the required "hot work" documentation for the "hot work" performed on the morning of February 5, 1998.

Respondent's ability to terminate KWL's contract for safety violations is insufficient evidence of control so as to impose liability upon Respondent under the multi-employer work site doctrine. See IBP, Inc. v. Herman, supra.

Under the FOM, Complainant must establish that Respondent is the exposing employer, or is a non-exposing, creating, controlling, or correcting employer, for Respondent to be liable under Standard §12-110-2(f)(1)(A).

According to the FOM, on multi-employer work sites, citations shall be issued only to employers whose employees are exposed to hazards (the exposing employer). FOM, Chapter V.F.1.

Additionally, the following employers shall be cited, whether or not their own employees are exposed:

(1) The employer who actually creates the hazard (the creating employer);

(2) The employer who is responsible, by contract or through actual practice, for safety and health conditions on the work site; i.e. the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer);

(3) The employer who has the responsibility for actually correcting the hazard (the correcting employer).

Complainant must also show that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence.

The evidence in this case shows that Respondent was not the exposing employer, because none of its employees were exposed to the hazard created by KWL's "hot work." No employees of either Respondent or KWL were present in the HIC store where the fire occurred. None of Respondent's employees were exposed to the "hot slag" near combustible materials.

Even, if, however, Respondent were an exposing employer, it should not have been issued a citation, because it met all of the criteria for a legitimate defense under Chapter V.F.2. of the FOM. The elements of a legitimate defense are:

a. The employer did not create the hazard;

b. The employer did not have the responsibility or the authority to correct the hazardous condition;

c. The employer did not have the ability to correct or remove the hazard;

d. The employer can demonstrate that the creating, the controlling, and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which their employees are exposed;

e. The employer has instructed and, where necessary, informed employees how to avoid the dangers associated with it when the hazard was known, or with the exercise of reasonable diligence, could have known.

(1) Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard.

(2) When extreme circumstances justify it, the exposing employer shall have removed their employees from the job to avoid citation.

If all of the criteria for a legitimate defense are met, then the exposing employer should not be cited. See FOM, Chapter V.F.3.

Mr. Chun opined that Respondent met elements (a) through (c) of the legitimate defense and that elements (d) and (e) did not apply to Respondent.[6]

The FOM suggests that citations be issued to the employers who are responsible for creating the hazard and/or are in the best position to correct the hazard or to ensure its correction. See FOM, Chapter V.F.3. In this case, KWL was the

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[6]Even if Respondent were not the exposing employer, it still could have been issued a citation if it was the creating, controlling, and/or correcting employer, and knew of the hazardous condition or could have known of it with reasonable diligence. The same facts used in the legitimate defense analysis confirm that Respondent was not the creating, controlling, and/or correcting employer.

employer who was in the best position to correct the hazard, not Respondent.[7]

Based on Mr. Chun's opinion, we conclude that Respondent did not violate Standard §12-110-2(f)(1)(A), because Complainant has not established that Respondent was the general contractor with control over KWL's "hot work" on the project. Complainant also has not established that Respondent was an exposing employer, as required under the FOM. Assuming that Respondent was an exposing employer, Respondent satisfied the FOM's requirements for a legitimate defense.

Even if, however, Respondent had violated the cited standard, we conclude that Respondent's violation was excused under the affirmative defense of unpreventable employee misconduct.

The elements of this defense are: 1) the employer has established work rules designed to prevent the violation; 2) it has adequately communicated these rules to its employees; 3) it has taken steps to detect and correct violations, especially if there were incidents of prior noncompliance; and 4) it has effectively enforced rules when violations have been discovered. The employer bears the burden of proving this defense. Director v. Kiewit Pacific Company, Case No. OSAB 94-009 (March 1, 1996).

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[7]KWL was cited for violations of Standards §§12-126-4(a)(3) and 12-126-4(b)(3)(A), for failure to post a fire watch and to observe fire mitigation measures. KWL did not contest these citations and penalties.

Based on the record, we conclude that Respondent has satisfied the requirements of this defense. Accordingly, even if there had been a violation of the cited standard, such violation was excused.

Having concluded that Respondent did not violate the cited standard, we do not reach the characterization and penalty issues.

ORDER

The May 8, 1998 Citation issued against Respondent is hereby vacated.

Dated: Honolulu, Hawaii, MAR 0 8 2001.

EXCUSED
RANDALL Y. IWASE, Chairman

CAROL K. YAMAMOTO, Member

VICENTE F. AQUINO, Member

Frances Lum, Esq./Leo Young, Esq.
for Complainant

Brian 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.

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on MAR 0 8 2001.