

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)
DIRECTOR, DEPARTMENT OF LABOR) CASE NO. OSAB 96-056
AND INDUSTRIAL RELATIONS,) (OSHCO No. C4756)
Complainant,) (Rep. No. 120601943)
vs.)
KIEWIT PACIFIC COMPANY,)
Respondent.)

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 Citations and Notifications of Penalty, issued by the Director of the Department of Labor and Industrial Relations ("Director"), via the Division of Hawaii Occupational Safety and Health ("Complainant").

The issues on appeal are:

(1) Whether Respondent violated Hawaii Occupational Safety and Health Standard §12-125-7(e) (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 \$5,000.00 penalty appropriate.

(2) Whether Kiewit violated Hawaii Occupational Safety and Health Standard §12-125-7(e) (2).

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

(3) Whether Kiewit violated Hawaii Occupational Safety and Health Standard §12-125-7(e)(5).

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

(4) Whether Kiewit violated Hawaii Occupational Safety and Health Standard §12-134-2(e)(3).

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

(5) Whether Kiewit violated Hawaii Occupational Safety and Health Standard §12-134-2(i)(6).

(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 \$5,000.00 penalty appropriate.

(6) Whether Kiewit violated Hawaii Occupational Safety and Health Standard §12-134-2(o)(2).

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

For the reasons stated below, we affirm Citation 1, Item 1a for violation of Standard §12-125-7(e)(1), Citation 1, Item 1b for violation of Standard §12-125-7(e)(2), and Citation 1, Item 1c for violation of Standard §12-125-7(e)(5).

We affirm the characterizations and the penalty of \$5,000.00 for Respondent's violations of Standards §12-125-7(e)(1), §12-125-7(e)(2), and §12-125-7(e)(5).

We vacate Citation 1, Item 1d for violation of Standard §12-134-2(e)(3), Citation 1, Item 2a for violation of Standard §12-134-2(i)(6), and Citation 1, Item 2b for violation of Standard §12-134-2(o)(2). We also vacate the Notification of Penalty of \$5,000.00 for the grouped violations of Standards §12-134-2(i)(6) and §12-134-2(o)(2).

FINDINGS OF FACT

1. Respondent was the general contractor on the H-3 tunnel project. The project included work on an exploratory tunnel that was 1.1 miles long with one opening at Haiku and the other at Halawa. The exploratory tunnel ran underground, below the H-3 freeway tunnels. The exploratory tunnel measured 13 feet in height and width.

2. There were "elevator shafts" that connected the underground tunnel to the above-ground tunnel.

3. On August 2, 1996, two of Respondent's employees were working in one of the underground exploratory tunnel's elevator shafts. The two employees accessed the elevator shaft

via a man lift. Their job was to perform "chipping" in the elevator shaft. The two employees were at that time working near the middle of the tunnel, but closer to the Haiku end.

4. Neither of the two employees could see the end of the tunnel from where they worked.

5. While the two were working in one of the elevator shafts of the underground tunnel, a third employee came walking through the tunnel to inform them that Mike Levoy, the person in charge of the underground crew and blasting operations for the project, would be conducting blasting operations at the Haiku end of the tunnel. The two employees were told that it would be safe to stay in the tunnel because the wind was blowing toward the Haiku side of the tunnel. They were not told exactly when the blasting would occur.

6. When the blast went off, the two employees were coming down from the man lift, in preparation for a meal break. Upon reaching the ground, another blast went off. The two then saw clouds of smoke and dust moving toward them from the Haiku end of the tunnel. The two employees had difficulty breathing and seeing because the smoke and dust were so thick. Both fell to the ground, overcome by smoke and dust from the blast. When the air began to clear, the two employees managed to walk out the Haiku end of the tunnel.

7. Upon their exit, the two employees were taken to the hospital for treatment of respiratory problems. After

treatment at the hospital, the two employees returned to the job site but there was no evidence they resumed work in the tunnel that day. Later that night, the two employees experienced shortness of breath and nausea at home. The following day, both returned to the hospital for further medical treatment. Physicians determined that the employees sustained physical injury to the lungs and pulmonary system. Both were diagnosed with non-cardiac pulmonary edema that resulted from inhalation of toxic fumes and dust created by the blast.

8. After the accident, one of the injured employees was off work for about one week. The other was in "critical care" in the hospital for two to three weeks.

9. The two employees suffered serious physical injuries as a result of the August 2, 1996 incident.

CITATIONS FOR VIOLATIONS UNDER CHAPTER 125

10. Respondent was cited for violations under Chapter 125 of the Standards. Chapter 125 regulates the use of explosives and activities relating to blasting. We find that Chapter 125 applies to Respondent's activities on the date of the August 2, 1996 incident.

Citation 1, Item 1a
Violation of Standard §12-125-7(e)(1)

11. Standard §12-125-7(e)(1) requires, among other things, that Respondent follow or conform to a code of blasting signals. The code requires that a warning signal, a blast

signal, and an all-clear signal be given in each blasting operation.

12. The two employees who were in the tunnel did not hear any horn or other signal to warn them of the impending blasting operation.

13. Employees who were working in the area of the blast were interviewed by Complainant. All but one denied that any audible warning system was used before the blast on August 2, 1996.

14. Based on the evidence, we find that no audible warning signals were used prior to the blasting operation.

15. Levoy, Respondent's blaster-in-charge, was responsible for enforcing and complying with safety rules and standards. Levoy did not follow or conform to the code of blasting signals, which requires a warning signal, a blast signal, and an all clear signal to be given in each blasting operation.

16. Respondent failed to comply with Standard §12-125-7(e) (1).

Citation 1, Item 1b
Violation of Standard §12-125-7(e) (2)

17. This Standard required Respondent to make certain that all employees are at a safe distance, or under sufficient cover, and then give a loud warning signal before firing a blast.

18. Levoy did not give a loud warning signal, and did not make certain that all employees were at a safe distance or under sufficient cover before firing the blast.

19. Respondent failed to comply with Standard §12-125-7(e) (2).

Citation 1, Item 1c
Violation of Standard §12-125-7(e) (5)

20. This Standard required Respondent's blaster to ascertain that all employees are out of the blast area before firing a blast.

21. The exploratory tunnel was underground and part of or within the blast area.

22. Levoy did not make certain that all employees were away or out of the underground blast area before firing a blast.

23. Respondent failed to comply with Standard §12-125-7(e) (5).

Employer's Actual or Constructive Knowledge of Violations

24. Levoy was the third highest ranking employee of Respondent on the H-3 project. Levoy was the highest ranking employee on the job site at the time of the blast.

25. Levoy knew or should have known the presence of a hazardous or violative condition when he failed to give warning signals prior to the blast and to evacuate the two employees from the tunnel before the blasting. Levoy's knowledge is imputed to Respondent because of his supervisory and/or management position.

Characterization of Violations

26. The employees who were inside the tunnel were exposed to hazardous and unsafe conditions.

27. The hazard of smoke and dust inhalation from a blast is one of the hazards that the cited Standards were designed to prevent.

28. Respondent's violations of Standards §12-125-7(e)(1), §12-125-7(e)(2), and §12-125-7(e)(5) resulted in an accident that caused serious physical harm to employees.

Unpreventable Employee Misconduct Defense

29. Levoy was in charge of blasting for Respondent on August 2, 1996.

30. Levoy supervised the blasting operations. He was responsible for the enforcement of safety rules and the safety of all employees with respect to blasting operations.

31. Levoy was a supervisor who supervised others on behalf of Respondent at the time of the blast.

32. Respondent had established work rules and a blasting plan designed to prevent violations of the Standards. Respondent's safety policy required Levoy to give warning signals and to evacuate the exploratory tunnel before blasting is conducted near or around the tunnel. No person holding a position higher than Levoy supervised, observed, or monitored Levoy's blasting activities. Levoy never attended Respondent's supervisor safety meetings. We find that Respondent did not do

enough to detect and correct violations by its supervisors, and did not take all feasible steps to monitor and enforce Levoy's compliance with its safety procedures or the Standards, and to prevent the unsafe activity.

33. Levoy was disciplined by Respondent after the accident for not following safety rules.

Penalty

34. Respondent's alleged violations of Standards §12-125-7(e) 91), §12-125-7(e) (2), §12-125-7(e) (5), and §12-134-2(e) (3) were grouped as Citation 1, Items 1a-1d. Because of the serious characterizations of the items and other factors, Complainant assessed a penalty of \$5,000.00 for the grouped violations.

35. Respondent did not take a position as to the appropriateness of the penalty if some or all of the items from 1a-1d under Citation 1 were sustained.

36. We find that a penalty of \$5,000.00 for Respondent's violation of Citation 1, Items 1a-1c is appropriate in this case.

CITATIONS FOR VIOLATIONS UNDER CHAPTER 134

Citation 1, Item 1d Violation of Standard §12-134-2(e) (3)

37. This Standard requires Respondent to designate at least one person responsible for keeping an accurate count of employees underground in case of emergency.

38. Levoy was the person designated by Respondent to keep an accurate count of employees working in the underground tunnel.

39. Respondent complied with Standard §12-134-2(e)(3) by designating a person who is responsible to keep an accurate count of employees working in the underground tunnel.

Citation 1, Item 2a
Violation of Standard §12-134-2(i)(6)

40. This Standard required Respondent to use ventilations systems to clear the air of smoke and fumes from the affected blasting area, before work can be resumed in that area.

41. No evidence was presented that work resumed in the tunnel after the two blasts were fired.

42. Complainant failed to establish a violation of Standard §12-134-2(i)(6).

Citation 1, Item 2b
Violation of Standard §12-134-2(o)(2)

43. This Standard required Respondent to quantitatively test the air for air quality before employees can be allowed back into the area where blasting occurred.

44. No evidence was presented that employees were allowed to enter the tunnel or work area after the two blasts were fired.

45. Complainant failed to establish a violation of Standard §12-134-2(o)(2).

CONCLUSIONS OF LAW

Respondent asserted unpreventable employee misconduct as an affirmative defense to the violations. To establish this defense, Respondent must show that: (1) it has established work rules designed to prevent violations of the Standards; (2) it adequately communicated these rules to its employees; (3) it has taken steps to detect and correct violations; and (4) it has effectively enforced rules when violations have been discovered. Director v. Kiewit Pacific Company, Case No. OSAB 94-009 (OSHC ID C6595) (March 1, 1996). When the misconduct is committed by a supervisory employee, the employer must also show that it took all feasible steps to prevent the unsafe activity, including adequate instruction and supervision. Field & Associates, Inc. OSHRC Docket No. 99-1951 (Jan. 2, 2001), citing Archer-Western Contractors, Ltd. 15 OSHC 1013, 1017 (1991). "Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision. . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." Id.

We conclude that Respondent failed to establish the defense of unpreventable employee misconduct. We found that Respondent did not do enough to detect and correct violations by its employees, including its supervisors, and did not take all

feasible steps to prevent unsafe activity, including adequate instruction and supervision of its supervisors.

Having determined that the affirmative defense of unpreventable employee misconduct has not been proven in this case, we make the following conclusions:

1. Section 12-125-7(e)(1) of the Standards required that a "code of blasting signals, equivalent to table 125-4, shall be posted on one or more conspicuous places at the operation, and all employees shall be required to become familiar with the code and conform to it." We conclude that Respondent violated Hawaii Occupational Safety and Health Standard §12-125-7(e)(1), when it failed to conform to the code of blasting signals.

(a) We conclude that the characterization of the violation as "serious" is appropriate.

(b) We conclude that a penalty of \$5,000.00 for grouped violations of Citation 1a - 1c is appropriate.

2. Section §12-125-7(e)(2) of the Standards provides that the blaster-in-charge must first make certain that all employees are at a safe distance, or under sufficient cover, and then give a loud warning signal before firing a blast. We conclude that Respondent violated Hawaii Occupational Safety and Health Standard §12-125-7(e)(2).

(a) We conclude that the characterization of the violation as "serious" is appropriate.

3. Section §12-125-7(e) (5) of the Standards provides that "[b]efore firing an underground blast, warning shall be given, and all possible entries into the blasting area, and any entrances to any working place where a drift, raise, or another opening is about the hole through, shall be carefully guarded. The blaster shall ascertain that all employees are out of the blast area before firing a blast." We conclude that Respondent violated Hawaii Occupational Safety and Health Standard §12-125-7(e) (5) when it failed to ascertain that all employees were out of the blast area before firing a blast.

(a) We conclude that the characterization of the violation as "serious" is appropriate.

4. Section 12-134-2(e) (3) of the Standards require that there be at least one designated person responsible for securing immediate aid and keeping an accurate count of employees underground in case of emergency. We conclude that Respondent did not violate Hawaii Occupational Safety and Health Standard §12-134-2(e) (3), because Levoy was the designated person to perform the duties identified in this Standard.

(a) Having concluded that there was no violation, we do not reach the issue of characterization.

5. Section 12-134-2(i) (6) of the Standards provides that "[f]ollowing blasting, ventilation systems shall exhaust smoke and fumes to the outside atmosphere before work is resumed in affected areas." We conclude that Respondent did not violate

Hawaii Occupational Safety and Health Standard §12-134-2(i)(6), because there was no evidence that work resumed in the affected areas after the blast.

(a) Having concluded that there was no violation, we do not reach the issue of characterization.

(b) Having concluded that there was no violation, we do not reach the issue of penalty.

6. Section 12-134-2(o)(2) of the Standards provides that "[f]ollowing blasting, an employee shall not enter a work area until the air has been quantitatively tested, and the air quality meets the requirements of subsection (h)[.]" We conclude that Respondent did not violate Hawaii Occupational Safety and Health Standard §12-134-2(o)(2), because there was no evidence that employees entered the tunnel following the blast but before the air quality was tested.

(a) Having concluded that there was no violation, we do not reach the issue of characterization.

ORDER

Citation 1, Item 1a for violation of Standard §12-125-7(e)(1), Citation 1, Item 1b for violation of Standard §12-125-7(e)(2), and Citation 1, Item 1c for violation of Standard §12-125-7(e)(5) are affirmed.

The characterizations and Notification of Penalty of \$5,000.00 for Respondent's grouped violations of Standards

§12-125-7(e)(1), §12-125-7(e)(2), and §12-125-7(e)(5) are also affirmed.

Citation 1, item 1d for violation of Standard §12-134-2(e)(3), Citation 1, Item 2a for violation of Standard §12-134-2(i)(6), and Citation 1, Item 2b for violation of Standard §12-134-2(o)(2), together with the Notification of Penalty of \$5,000.00 for Respondent's grouped violations of Standards §12-134-2(i)(6) and §12-134-2(o)(2) are hereby vacated.

Dated: Honolulu, Hawaii, MAR 20 2001.

EXCUSED

RANDALL Y. IWASE, Chairman

Carol K. Yamamoto

CAROL K. YAMAMOTO, Member

Vicente F. Aquino

VICENTE F. AQUINO, Member

J. Gerard Lam, Esq.
for Complainant

Brian G.S. Choy, Esq.
for Respondent

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on MAR 20 2001.

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.

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

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