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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. METCALF CONSTRUCTION COMPANY, INC., Respondent.	)	CASE NO. OSAB 99-029(M) (OSHCO No. Y0816) (Report No. 120656392)

ORDER ADOPTING PROPOSED DECISION AND ORDER

On January 26, 2001, the Hawaii Labor Relations Board, acting as the Hearings Officer for the Labor and Industrial Relations Appeals Board, filed a Proposed Findings of Fact, Conclusions of Law, and Order ("Proposed Order"). Certified copies of the Proposed Order were served on the parties. The parties were afforded ten (10) working days in which to file written exceptions to the Proposed Order. Exceptions were filed by Complainant, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS on February 1, 2001. On March 6, 2001, Respondent, METCALF CONSTRUCTION COMPANY, INC., filed its memorandum in opposition. A hearing in this matter was set for April 5, 2001.

Having considered the exceptions and upon review the record, the Labor and Industrial Relations Appeals Board hereby adopts the Proposed Order in toto.

Dated: Honolulu, Hawaii, APR 09 2001.

RANDALL Y. IWASE, Chairman

CAROL K. YAMAMOTO, Member

VICENTE F. AQUINO, Member

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on APR 09 2001.

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

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. METCALF CONSTRUCTION CO., INC., Respondent.	)	CASE NO. OSAB 99-029(M) (OSHCO ID Y0816) (Inspection No. 120656392) PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This occupational safety and health case is before the Hawaii Labor Relations Board (Board), sitting as hearings officer for the Labor and Industrial Relations Appeals Board (LIRAB), on a written notice of contest filed by METCALF CONSTRUCTION CO., INC. (Respondent), contesting a Citation and Notification of Penalty issued by the DIRECTOR of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, State of Hawaii, via the Division of Occupational Safety and Health (Complainant).

The issues to be determined are:

(1) Whether Respondent violated Standard § 29 CFR 1926.501(b)(1), as cited 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, is the imposition and amount of the proposed $300.00 penalty appropriate?

(2) Whether Respondent violated Standard § 29 CFR 1926.1052(c)(1)(ii), as cited in Citation 1, Item 2.

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

b. If so, is the imposition and amount of the proposed $300.00 penalty appropriate?

On October 27, 2000, the Board held a hearing on the appeal of the Citation issued by Complainant. The parties were given full opportunity to present evidence to the Board. On November 30, 2000, the parties submitted post-hearing briefs to the Board. After thorough consideration of the record in the case, the Board makes the following proposed findings of fact, conclusions of law, and order and recommends that Citation 1, Item 1 and Citation 1, Item 2 be reversed and vacated.

PROPOSED FINDINGS OF FACT

1. Respondent was, for all times relevant, the general contractor of the construction of a luxury residential townhouse structure located at 71 Makawao Avenue, Pukalani, Maui, Hawaii, known as the Gardens Upcountry. Respondent retained subcontractors in various trades at the worksite.

2. On June 16, 1998 Complainant performed an occupational safety and health inspection of Respondent's jobsite at 71 Makawao Avenue, Pukalani, Maui.

3. More than two months after the inspection, Complainant, on August 26, 1998, issued two citations against Respondent for violations of the Hawaii Occupational Safety and Health (HIOSH) Standards:

   a. Citation 1 Item 1
   Violation of 29 CFR 1926.501(b)(1) for having the second floor walkway and floor opening unguarded.

   Complainant characterized the violation as "serious," and imposed a penalty of $300.00.

   b. Citation 1 Item 2
   Violation of 29 CFR 1926.1052(c)(1)(ii) for having a wooden stairway with over four risers not equipped with stairrail on the exposed side.

Complainant characterized the violation as "serious," and imposed a penalty of $300.00.

4. The inspection of Respondent's jobsite was a result of a complaint filed by an anonymous source who provided photographs of the jobsite. While two alleged violations were specifically mentioned in the complaint, the inspector, HIOSH Compliance Officer James Yamada (Yamada), at the direction of his supervisor, conducted a "wall-to-wall" or complete inspection of the jobsite. The citations involved only one townhouse unit in the entire eight unit project.

5. Yamada testified that on the morning of the inspection the unit in question lacked stair rails on the open side of stairs leading to a second floor landing ten feet above the ground. Rails were similarly absent from the open end of the landing. Yamada climbed to the landing and took photographs. Two of the photographs were admitted into evidence and establish the absence of the railings and the presence of workers alleged to have been employed by an air conditioning subcontractor. Visible in one of the photographs was a substantial amount of stacked sheetrock on the second floor landing.

6. Yamada testified that he inspected each of the units in the luxury townhouse complex being constructed. He could not however, testify as to whether any of the other units in the project lacked fall protection. His testimony was that no such observations were made in the other units because no work was being done.

7. Respondent does not deny the lack of safety rails, at the time of the inspection, in the unit for which the citation was issued. It thus appears that Complainant has established a prima facie case for the alleged violations.

8. Respondent's witness, Keith Taylor (Taylor), general foreman of the project, testified however that the requisite safety rails had been in place but were removed on the morning of the inspection to permit a sheetrock subcontractor, Pacific Tradewinds, to move approximately sixty sheets of sheet rock weighing sixty to eighty pounds each to the second floor for installation.

9. Taylor testified that the rails would have made the transfer of the sheetrock impracticable without creating substantial additional hazards. Such hazards included the likelihood of strain and sprain injuries caused by maneuvering sheetrock around stairway railings and lifting it over the landing railings. Further, Taylor testified that the installation of sheetrock required the subcontractor to subsequently install scaffolding. Such scaffolds would make the safety railings unnecessary until the scaffolding was taken down at which time the permanent railings would be installed.

10. Taylor further testified that he was aware of the fall hazard created by the removal of the railings and accordingly counseled Pacific Tradewinds employees to exercise caution. He also testified that yellow tape had been placed at the areas at risk but the tape had to be removed to accommodate the movement of the sheetrock.

11. Taylor testified that he advised Yamada that the railings had been temporarily removed to accommodate movement of the sheetrock and that Yamada viewed the removed railings. Yamada denied having been so advised or seeing any evidence of railings, or their removal, or any yellow tape. Yamada further opined that alternative means (delivery by lift or crane prior to the installation of outer walls) could have been utilized to move the sheetrock to the second floor.

12. Respondent's expert, Walter Chun (Chun), testified on behalf of Respondent and submitted a written report on the inspection. Chun opined that the details and schedule of construction would have made removal of the guardrails feasible and reasonable under the circumstances and that the employees' awareness of the removed guardrails was a reasonable form of abatement. Chun also disputed Yamada's suggested alternative to the delivery of sheetrock as unreasonable.

13. Respondent does not contest that the requisite railings were not in place at the time of the inspection. Respondent asserts however that the railings had previously been in place and were necessarily removed temporarily to accommodate the transfer of sheetrock to the second floor landing. Yamada's testimony neither refutes nor corroborates Respondent's factual representations, other than with respect to conflicting testimony regarding whether he was advised of the temporary nature of the alleged violation. Accordingly, based on the weighing of the evidence and credibility of testimony we find that the requisite guardrails were absent temporarily to accommodate the movement of sheetrock to the second floor of the inspected unit under construction.

PROPOSED CONCLUSIONS OF LAW

1. Complainant has the burden of proving by a preponderance of the record that a violation has occurred. The Respondent has the burden of proving any affirmative defense.

2. Complainant has established that the standard applies, that there was a failure to comply with the standard, an employee had access to the violative

conditions, and that the employer knew of the condition. Complainant has thus established a prima facie violation.

3. The gist of the employer's defense is that the transport of the sheetrock to the second floor was a practical impossibility if the railings had been left intact. The employer has thus raised the affirmative defense of impossibility.

4. To establish the affirmative defense of impossibility the Respondent must prove that: 1) compliance was functionally impossible or would preclude performance of required work, and 2) alternative means of employee protection are unavailable. Mintz, OSHA History, Laws and Policy, 529, (1984).

5. In the instant case we conclude that the Respondent was in compliance prior to the inspection and that continued compliance would have precluded performance of required work. We further conclude that Respondent attempted to abate the hazard by means of warning and yellow tape as well as the subsequent installation of scaffolding. Accordingly, Respondent has carried its burden under the affirmative defense of impossibility and we conclude that Respondent therefore did not violate the provisions of §§ 29 CFR 1926.501(b)(1) and 29 CFR 1926.1052(c)(1)(ii).

PROPOSED ORDER

In accordance with the foregoing findings of fact and conclusions of law, we recommend that Citation 1, Item 1 and Citation 1, Item 2 be reversed and vacated.

DATED: Honolulu, Hawaii, January 22, 2001.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law and Order may file exceptions with LIRAB, pursuant to Hawaii Revised Statutes § 91-9, within ten days of the service of a certified copy of this document. The exceptions shall specify which proposed findings or conclusions are being excepted to with full citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments may be scheduled by LIRAB in its discretion. In such event, the parties will be so notified.

Copies sent to:

Herbert B.K. Lau, Deputy Attorney General
Brian G.S. Choy, Esq.