

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of	)	CASE NO. OSAB 99-011
DIRECTOR, DEPARTMENT OF LABOR	)	(OSHCO No. N1662)
AND INDUSTRIAL RELATIONS,	)	(Report No. 301427019)
Complainant,	)	
	)	
vs.	)	
	)	
FLETCHER PACIFIC CONSTRUCTION	)	
COMPANY,	)	
Respondent.	)	

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 STATE OF HAWAII  
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DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a April 12, 1999 notice of contest from a Citation and Notification of Penalty, issued against FLETCHER PACIFIC CONSTRUCTION COMPANY ("Fletcher"), by the DIRECTOR of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, via the Hawaii Division of Occupational Safety and Health ("Director") on March 30, 1999.

The issues to be determined are:

- (1) Whether Fletcher violated Standard 29 CFR §1926.501(a)(2), 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 \$5,000.00 penalty appropriate; and
- (2) Whether Fletcher violated Standard 29 CFR §1926.503(c), as described 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, was the imposition and amount of the proposed \$5,000.00 penalty appropriate.

For the reasons stated below, we vacate Citation 1, Items 1 and 2.

#### FINDINGS OF FACT

1. Fletcher was the general contractor on the Ala Moana Shopping Center upper level expansion project. The project involved the construction of an upper level from Neiman Marcus, which was the diamond head direction of the mall, to Sears, which was on the Ewa direction of the mall. The upper level was to be built on top of the existing roof of the "Block C" mall level building.

2. Swanson Steel ("Swanson") was a steel erector and Fletcher's subcontractor on the project. It was Swanson's job to lay a metal pan decking for a cantilevered walkway on the upper level. The metal pan decking is made up of sheets of metal panels that are welded into place.

3. Simon Colotario ("Simon") was a Fletcher employee and an experienced construction worker knowledgeable in layout work. Simon was trained by Fletcher on the rules for four proper uses of fall protection and on how to use various types of fall protection equipment, including the retractable lanyard.

4. Fletcher's Exhibit F-82 is a blueprint or plan of Block C for the upper level. The numbers on the grid in Exhibit F-82 represent vertical column lines. The area from line E-2 to F represents the existing roof and building. The area from line E-2 to the edge in the Makai direction represents the cantilevered walkway.

5. Swanson was to lay a metal pan decking for a cantilevered walkway that consisted of two rows or sections of metal panels. The upper row or section closest to the existing roof area was to be covered with 3 ft. x 3 ft. metal panels. The lower row or section was to be covered with 3 ft. x 6 ft. metal panels.

6. There was a 25-foot drop from edge of the cantilevered walkway to the mall level below. The distance between line E2 and the edge was 9 feet. The distance between vertical column line 37 and 38 was 24 feet.

7. About a week prior to October 8, 1998, Swanson had laid a row of eight 6 ft. x 3 ft. metal panels from the edge, on the lower section, between vertical column lines 37 and 38. These metal panels were placed over support beams. According to Robert Hensler, Swanson's representative, Nelson studs were shot into the beams at the foot of the 6-foot panels, right at the edge of the deck walkway. These Nelson studs are shown in Director's Exhibit 5.

8. There were cable lines that ran at line E-2 between columns in the Ewa-Diamond Head direction. These cable lines were located 9 feet in from the edge.

9. On October 8, 1998, Simon was performing layout work on the upper level cantilevered walkway. The job required him to drop plumb lines from the edge at column line 43, 42, 41, 40, 39, 38, and 37, and then mark the edge of the walkway. Simon started at column line 43 and worked his way toward 37.

10. Before Simon was assigned this task, Fletcher had reminded him to "tie off" and use his safety equipment. Because his work required him to be on the upper level on October 8, 1998, Simon wore a full body harness and had his personal 6-foot lanyard with him on that day.

11. According to Simon, he accessed the edge at each column line by walking on the roof of the existing building, up to the E-2 line. When he reached the E-2 line, Simon then crouched down low and carefully made his way to the edge at each vertical column line. He then hooked up his 6-foot lanyard to a Nelson stud at the edge of the walkway. After hooking up at the Nelson stud, Simon dropped his lines from the edge. According to Simon, that was the process he followed when he performed his layout work on October 8, 1998.

12. Fletcher did not tell Simon to hook up at the Nelson studs that were at the edge of the cantilevered walkway. Simon had decided to do this on his own.

13. Simon admitted that when he went beyond the E-2 line and got within 6 feet of the edge, he was not tied off and, hence, not using any fall protection. He used fall protection only when he was up at the edge, because that was where the Nelson studs were located. Safety rules and training required Simon to use fall protection whenever he was within 6 feet of an edge with a fall hazard of at least 6 feet. Simon was aware of the rule, and was trained to comply with this rule. Simon admitted that what he did on October 8, 1998, violated fall protection safety rules and went against what Fletcher had trained him to do.

14. The evidence shows that Simon dropped his last plumb line at vertical column line 37. According to Simon, he then unhooked his lanyard from the Nelson stud at column line 37, and attempted to make his way back into the building's roof top. Instead of walking straight back into the roof area, Simon angled off and walked toward Neiman Marcus, along the row of 6 ft. x 3 ft. panels of the metal pan decking, and in the direction of the stairway. When Simon reached the sixth panel, the panel shifted and slid off the support beams. Because he was not tied off to anything, Simon fell to the mall level below.

15. An investigation after the accident revealed that the sixth 6 ft. x 3 ft. panel on the metal pan decking between vertical column line 37 and 38 had not been welded into place. Swanson admitted that it had somehow missed that panel. Swanson did not know that one of the panels was not welded down. All

other panels on that row of 6 ft. x 3 ft. panels between vertical column line 37 and 38 had been welded down in place.

16. The location where Simon fell was within 6 feet of the edge that had a fall hazard of more than 6 feet.

17. Fletcher, in contracting with Swanson Steel to build the metal pan decking, had expected and required Swanson to follow the engineer's drawings, the specifications, and plans for the decking, in order to ensure structural integrity and strength of the decking.

18. Had Simon followed Fletcher's safety rules for using proper fall protection, he would not have traversed that part of the metal pan decking and the accident would not have occurred. Based on his training, Simon knew that he should have used a longer retractable 10-foot lanyard, which Fletcher had available on the job site for Simon, instead of his 6-foot lanyard, which was too short. Simon readily acknowledged that using his 6-foot lanyard in the manner that he did on October 8, 1998, violated Fletcher's safety rules and training.

According to Tracy Lawson, Fletcher's safety director at the time of the accident, Simon should have used a longer 10-foot retractable lanyard and tied off at the cable lines at line E-2. This way, he would have been tied off and protected as he made his way to the edge, which was 9 feet from the E-2 line. Once Simon finished dropping the plumb lines at the vertical column lines, he should have turned and walked straight towards the Mauka direction, into the roof area, unhooked himself at the

cable line, and then moved on to the next vertical column line and hooked up again at the next spot on the cable line. Simon would not have been able to walk along the metal pan decking from vertical column line 37 to 38, had he used the 10-foot lanyard, because the sixth panel was 18 feet to the right of vertical column line 37, and the retractable 10-foot lanyard would have been too short to allow him to walk on the metal pan decking in that direction.

19. There was nothing unique or unusual about the jobsite where Simon was performing layout work. Simon had experience doing layout work under similar circumstances in prior construction projects.

Citation 1, Item 1

20. Citation 1, Item 1 was issued against Fletcher for violation of 29 CFR §1926.501(a)(2). This standard required Fletcher to determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely.

21. The accident in this case occurred because one of the metal panels was mistakenly not welded into place. It was not due to any structural weakness of the metal pan decking. Since the part of the decking that was welded down supported Simon's weight when he walked on it, and based on evidence presented by Fletcher, it appears that had the sixth panel been welded into place, it would have been strong enough to support Simon. We find that there would have been structural weakness if

the panels held together were not strong enough to support employees working on that surface. Because the accident here was caused by a panel that had not been secured, and not by structural weakness of the decking, we find that the cited standard does not apply to this case.

Citation 1, Item 2

22. Citation 1, Item 2 was issued against Fletcher for violation of 29 CFR §1926.503(c). This standard requires Fletcher to retrain its employees if there are changes in the workplace that render previous training obsolete, or changes in the types of fall protection systems or equipment to be used that render previous training obsolete, or inadequacies in the employee's knowledge or use of fall protection systems or equipment.

23. Fletcher was cited for failing to provide retraining on the use of fall protection due to changes in the workplace that rendered prior training obsolete or due to inadequacies in Simon's knowledge and understanding of the use of fall protection.

24. We find that the Director failed to show that changes in the workplace required retraining on use of fall protection, or that Simon's knowledge of fall protection was inadequate so as to require retraining. By his own testimony, Simon knew that where he was working required him to tie off and that the manner in which he tied off on October 8, 1998, was

wrong and violated Fletcher's safety rules regarding use of proper fall protection.

#### CONCLUSIONS OF LAW

1. 29 CFR §1926.501(a)(2) provides:

The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

We conclude that Fletcher did not violate Standard 29 CFR §1926.501(a)(2). This Standard applies to structural integrity of a walking or working surface. In this case, we found that the hazard or accident was not caused by structural weakness of the metal pan decking, but to a failure to secure one panel of the metal decking. We are aware of a Standard that addresses the failure to properly lay or secure metal decking, but the Standard that Fletcher was cited for in this case did not, in our view, apply to this case.

Accordingly, given our conclusion in #1, we do not reach the issues of characterization of violation or penalty.

2. §1926.503(c) provides:

Retraining. When the employer has reason to believe that any affected employee who has already been trained does not have the understanding and skill required by paragraph (a) of this section, the employer shall retrain each such employee. Circumstances where retraining is required include, but are not limited to, situations where:

(1) Changes in the workplace render previous training obsolete; or

(2) Changes in the types of fall protection systems or equipment to be used render previous training obsolete; or

(3) Inadequacies in an affected employee's knowledge or use of fall protection systems or equipment indicate the employee has not retained the requisite understanding or skill.

We conclude that Fletcher did not violate §1926.503(c). The Director failed to establish the circumstances that require retraining on the use of fall protection in this case.

Given our conclusion in #2, we do not reach the issues of characterization of violation or penalty.

ORDER

The Citation and Notification of Penalty, Items 1 and 2, issued against Fletcher on March 30, 1999, is hereby vacated.

**MAY 11 2001**

Dated: Honolulu, Hawaii, \_\_\_\_\_.

EXCUSED

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RANDALL Y. IWASE, Chairman

*Carol K. Yamamoto*  
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CAROL K. YAMAMOTO, Member

*Vicente F. Aquino*  
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VICENTE F. AQUINO, Member

Erik D. Eike, Esq.  
for Respondent

Leo B. Young, Esq.  
for Complainant

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 MAY 11 2001 ✓

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

*[Signature]*  
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