

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)
)
DIRECTOR, DEPARTMENT OF LABOR)
AND INDUSTRIAL RELATIONS,)
)
Complainant,)
vs.)
)
MIKE ROWLAND FRAMING,)
)
Respondent.)
_____)

CASE NO. OSAB 2001-21
Insp. No. 302958335
OSHCO ID C4756

DECISION AND ORDER

This Occupational Safety and Health case came before the Hawaii Labor Relations Board ("HLRB"), acting as hearings officer for the Labor and Industrial Relations Appeals Board ("LIRAB"), on a written notice of contest filed by Respondent, MIKE ROWLAND FRAMING ("Rowland"), contesting a Decision issued by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS ("Director"), via the Hawaii Division of Occupational Safety and Health ("HIOSH"), dated April 10, 2001.

The issues to be determined are:

1. Whether Rowland violated Standard 29 CFR §1926.501(b)(13) as described in Citation 1, Item 1a.
 - a. If so, is the characterization of the violation as "serious" appropriate and if not, what is the appropriate characterization?

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b. If so, is the imposition and amount of the proposed \$600.00 penalty appropriate?

2. Whether Rowland violated Standard 29 CFR §1926.502(d)(16)(iii) as described in Citation 1, Item 1b.

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

3. Whether Rowland violated Standard 29 CFR §1926.503(b)(1) as described in Citation 2, Item 1.

a. If so, is the characterization of the violation as "other" appropriate and if not, what is the appropriate characterization?

The instant case was consolidated for the purposes of hearing with OSAB 2001-26(WH), Director, Department of Labor and Industrial Relations v. Metcalf Construction Company, Inc.

HLRB conducted hearings on the cases from November 14, 2001 through November 16, 2001. The parties were provided full opportunity to present testimony and introduce documentary evidence for consideration. After thorough consideration of the testimony, evidence and arguments presented by the parties, HLRB issued a "Proposed Findings of Fact and Conclusions of Law, and Order" in the above-captioned matter on February 22, 2002.

On February 27, 2002, HLRB issued an "Errata" to correct minor errors in the "Proposed Findings of Fact and Conclusions of Law, and Order."

On March 4, 2002, the Director filed with LIRAB his written exceptions to HLRB's Proposed Findings of Fact, Conclusions of Law, and Order.

On March 6, 2002, Rowland filed with LIRAB its written exceptions to HLRB's Proposed Findings of Fact, Conclusions of Law, and Order.

On October 28, 2002, Rowland withdrew its exceptions to the Proposed Findings of Fact, Conclusions of Law, and Order.

A hearing on the Director's exceptions was held on October 31, 2002, before LIRAB. Having heard the Director's exceptions, and being advised of its premises, we hereby amend HLRB's Proposed Findings of Fact and Conclusions of Law, and Order, and issue the following final Decision and Order.

For the reasons stated below, we affirm Citation 1, Item 1a, the characterization of the violation as "serious", and the proposed penalty of \$600.00. We also affirm Citation 2, Item 1 and the characterization of the violation as "other". We vacate Citation 1, Item 1b.

FINDINGS OF FACT

1. Rowland is engaged in the business of erecting framing structures on construction projects. At the time of

inspection, Rowland was a subcontractor of Metcalf Construction Company Inc. ("Metcalf"), the general contractor, at the Alii Lani condominium townhouse project located on Alii Drive near the intersection of Lunapule Street in Kailua-Kona, Hawaii. Metcalf was constructing two-story residential structures at the work site.

2. On December 6, 2000, Charles Clark ("Clark"), a compliance officer from HIOSH, attempted a complaint inspection of Metcalf.

3. Prior to entering the work site, Clark parked his vehicle on the side of Alii Drive to observe the site. While parked there, Clark observed a worker on the second floor of an uncompleted structure constructing a wall frame for the structure. Clark videotaped the worker. The worker was later identified as Robert Kaula ("Kaula"), an employee of Rowland.

4. Clark then proceeded to drive to the work site. While there, Clark observed two workers pulling materials off the elevated tines of a forklift. Clark again videotaped his observation. The workers were later identified as Reed Arnold ("Arnold") and Timothy Rivera ("Rivera"), both of whom were Rowland employees.

5. Clark attempted to conduct an opening conference with Metcalf, but was denied entry to the work site. On

December 18 and 19, 2000, Clark returned to Metcalf's work site with a search warrant and conducted his inspection.

6. During the inspection, Clark observed Eric Iwahashi ("Iwahashi"), another Rowland employee, standing on the top-plate of a wall frame on the second story of a structure performing truss work. Clark observed that Iwahashi was wearing a body harness attached to a 16 ft. lanyard. Clark believed that the lanyard was too long and would not have protected Iwahashi if he fell from the top plate to the ground floor.

7. At the time of the inspection, Rowland was working under Metcalf's fall protection plan ("FPP"). Metcalf's FPP contains requirements for the use of non-conventional fall protection, such as safety monitors or designated Controlled Access Zones ("CAZs").

Iwahashi was listed in Metcalf's records as having been trained by Metcalf's safety consultant on fall protection. Iwahashi was also documented in the records as someone who was authorized to work on roof trusses.

Rowland's employees were trained by Metcalf on fall protection, but Rowland was unable to produce at the inspection proper certification records to verify that Kaula, Rivera, and Arnold received this training. The documents that Rowland submitted after the inspection were deficient and failed to comply with the requirements of the standard.

8. At the time of inspection, Kaula was assembling the stud walls on the second floor of the unit. Kaula was performing this work within six feet of the exposed edge, without any conventional fall protection. If Kaula was using non-conventional fall protection measures, then we find that he was not using them in compliance with Metcalf's FPP, since no safety monitor was observed and no documentation of training or authorization to work within a CAZ was provided.

9. At the time of inspection, Arnold and Rivera were unloading materials from the tines of a fork lift. Such work was being done within six feet from an exposed edge, without any conventional fall protection. If Arnold and Rivera were using non-conventional fall protection measures, then we find that they were not using them in compliance with Metcalf's FPP, since no safety monitor was observed, and no documentation of training or authorization to work within a CAZ was provided.

10. At the time of inspection, Iwahashi was performing truss work that was covered by Metcalf's FPP, and was, therefore, not required to use conventional fall protection. Iwahashi, however, did use conventional fall protection in the form of a harness and 16 ft. lanyard. He did so in an abundance of caution to protect himself from a 20 ft. fall from the exterior of the building, and not a shorter fall from the interior of the building.

CONCLUSIONS OF LAW

1. Standard 29 CFR §1926.501(b)(13) requires that each employee engaged in residential construction activities six (6) feet or more above lower levels to be protected by guardrail system, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative protection measure. If the employer demonstrates that it is infeasible or a greater hazard is created if any one of these systems is used, then the employer is required to develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

2. We conclude that Rowland violated Standard 29 CFR §1926.501(b)(13), because Kaula, Arnold, and Rivera were exposed to a fall hazard while engaged in the above-noted construction activities without any of the required fall protection. While Kaula, Arnold, and Rivera could have used non-conventional means of fall protection under Metcalf's FPP, we have found that the requirements of the plan were not met. Since the FPP had not been adhered to, Kaula, Arnold, and Rivera should have used conventional fall protection, but they did not do so. Accordingly, Citation 1, Item 1a is affirmed.

3. The characterization of the violation as "serious" is appropriate.

4. The imposition and amount of the \$600 penalty is appropriate.

5. Standard 29 CFR §1926.502(d)(16)(iii) requires that personal fall arrest systems when stopping a fall shall be rigged such that an employee can neither free fall more than six feet, nor contact any lower level.

6. We conclude that Rowland did not violate the provisions of this standard. This standard applies when use of conventional fall protection is required. In the instant case, although Iwahashi was utilizing conventional fall protection in the form of a harness and lanyard, he was performing work that was covered by Metcalf's FPP, and was not required to use conventional fall protection. Iwahashi used conventional fall protection in an abundance of caution to protect himself from the risk of a 20 ft. fall from the exterior of the building, and not from a shorter fall from the interior of the building.

7. Having concluded that there was no violation of the foregoing standard, we do not reach the issue of characterization.

8. Standard 29 CFR §1926.503(b)(1) requires that written certification records be provided as verification with paragraph (a) of this section, which shall contain the name or other identity of the employee trained, the date(s) of the

training, and the signature of the person who conducted the training or signature of the employer.

9. We conclude that Rowland violated the provisions of this standard. Although Rowland was covered for fall protection under Metcalf's FPP, and its employees were trained by Metcalf on fall protection, under our reading of the standard, the ultimate responsibility to certify employees and to provide proper certification records falls on the employer. Rowland was unable to produce the certification records when it was asked to do so at the inspection. The records that were later produced by Rowland were deficient and did not comply with the requirements of the standard.

10. Having concluded that Rowland violated this standard, we further conclude that the characterization of this violation as "other" was appropriate.

ORDER

1. Citation 1, Item 1a for violation of 29 CFR §1926.501(b)(13) is affirmed.


2. The characterization and proposed \$600 penalty are also affirmed.

3. Citation 1, Item 1b for violation of 29 CFR §1926.502(d)(16)(iii) shall be vacated.

4. Citation 2, Item 1 for violation of 29 CFR §1926.503(b)(1) is affirmed.

5. The characterization of the violation as "other" is affirmed.

Dated: Honolulu, Hawaii, NOV 13 2002.


RANDALL Y. IWASE, Chairman


CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Herbert B.K. Lau, 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 NOV 13 2002.

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.