

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)
DIRECTOR, DEPARTMENT OF LABOR)
AND INDUSTRIAL RELATIONS,)
Complainant,)
vs.)
DECOITE TRUCKING, INC.,)
Respondent.)
_____)

CASE NO. OSAB 2001-040 (M)
(OSHCO No. M2732)
(Report No. 302955182)

FILED
LIR APPEALS BOARD
STATE OF HAWAII

02 MAR -1 PM 2:45

ORDER ADOPTING PROPOSED ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

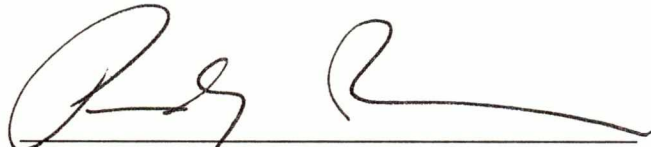
On January 3, 2002, the Hearings Officer for the Labor and Industrial Relations Appeals Board filed a Proposed Order Granting Respondent's Motion to Dismiss and/or for Summary Judgment. Certified copies of the Proposed Order were served upon the parties the same day and received shortly thereafter. Pursuant to Section 91-11, Hawaii Revised Statutes, the parties were afforded ten (10) working days in which to file written exceptions to the Proposed Order.

On January 22, 2002, Complainant, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, filed its written exceptions to the Proposed Order. On January 30, 2002, the Board issued a Notice of Hearing, setting this matter to be heard on February 28, 2002.

The Board, having heard the parties respective positions, and having considered and reviewed the record before us, hereby

adopts the Proposed Order Granting Respondent's Motion To Dismiss
And/Or For Summary Judgment in toto.

Dated: Honolulu, Hawaii, MAR 01 2002.

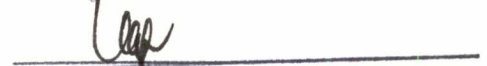

RANDALL Y. IWASE, Chairman


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 MAR 01 2002 ✓.

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 |) | CASE NO. OSAB 2001-040(M) |
| |) | (OSHCO ID M2732) |
| DIRECTOR, DEPARTMENT OF LABOR |) | (Inspection No. 302955182) |
| AND INDUSTRIAL RELATIONS, |) | |
| |) | PROPOSED ORDER GRANTING |
| Complainant, |) | RESPONDENT'S MOTION TO DIS- |
| |) | MISS AND/OR FOR SUMMARY |
| vs. |) | JUDGMENT |
| |) | |
| DE COITE TRUCKING, INC., |) | |
| |) | |
| Respondent. |) | |
| <hr/> | | |

**PROPOSED ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT**

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board), acting as hearings officer for the Labor and Industrial Relations Appeals Board (LIRAB), on an August 20, 2001 written notice of contest from a citation and notification of penalty (Citation) issued against DE COITE TRUCKING, INC. (DE COITE or Respondent), by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (DIRECTOR), via the Hawaii Occupational Safety and Health Division (HIOSH) on April 26, 2001.

On November 1, 2001, Respondent filed a Motion to Dismiss and/or for Summary Judgment seeking to have the citation dismissed due to the inapplicability of the cited standard. The Board conducted a hearing on the motion on November 26, 2001.

Based on a thorough review of the record of the case the Board proposes the following findings of fact, conclusions of law, and order.

PROPOSED FINDINGS OF FACT

1. Respondent is a trucking company owned and operated by Richard De Coite. It provides dump-truck hauling services.
2. On March 19, 2001, Respondent hired David Backen (Backen) as a mechanic.

3. In November 2000, Respondent purchased a 1982 Ford beverage delivery truck with the intention of removing its engine and installing it in one of Respondent's excavators.
4. This case involves an accident resulting in the death of Backen. Backen died trying to remove the engine from the truck Respondent bought in November 2000. Respondent planned to remove the truck's engine and have it installed in a 225-Caterpillar excavator.
5. The truck's engine could be accessed by tilting its riding compartment (cab-over) forward thereby exposing the engine housed below. The cab-over had two lift-assist springs attached to its underside which helped to push the cab-over up and keep it open along with a cab retaining arm. The cab-over weighed more than 1,000 pounds.
6. Like all vehicles, the truck in this case had a bar that held the cab-over in the open position. The elbow-shaped mechanism, called a "cab retaining arm," propped the cab in the open position. To prevent the failure of the cab retaining arm, a lock assembly bolts into the cab retaining arm at its elbow, preventing it from collapsing.
7. On March 26, 2001, Backen died after the cab-over fell on his chest. The two lift-assist springs were cut, presumably by Backen, and were on the ground near the truck. Two people tried but could not lift the cab-over off Backen until a forklift was used. Backen, however, had no pulse and was taken by ambulance to a hospital where he was pronounced dead.
8. Upon investigation, the DIRECTOR concluded that the accident was a result of the failure of the Respondent to engage the locking assembly on the cab retaining arm.
9. Accordingly, on July 26, 2001, the DIRECTOR cited Respondent under Hawaii Administrative Rules (HAR) § 12-81-2(c) for the following violation:

Citation 1 item 1 Type of Violation: Serious

Heavy machinery or equipment, or parts thereof, which were suspended or held aloft by use of slings, hoists, or jacks were not substantially blocked or cribbed to prevent falling or shifting before employees were permitted to work under or between them; i.e., the truck cab-over was not properly blocked or secured to prevent falling or shifting before employee was permitted to work under it.

10. Respondent was ordered to abate the condition and pay a \$2,000 penalty. Respondent received the Citation on August 2, 2001. On August 20, 2001, Respondent timely filed a contest of the Citation with HIOSH.

DISCUSSION

DE COITE argues in its motion to dismiss that the cited standard is inapplicable because 1) the vehicle is not “heavy machinery or equipment,” 2) the cab-over was not “held aloft by use of slings, hoists, or jacks,” and 3) the cab retaining arm is not a sling, hoist or jack. Respondent’s written motion and oral argument appropriately¹ focused on the last argument, insisting that the cab retaining arm does not satisfy the definition of “jack” found in another section of HAR.²

The DIRECTOR contends that the identified definition is not controlling since it occurs in a different subsection of the regulations and that the Board should therefore utilize a dictionary definition³ that arguably encompasses the cab retaining arm. The DIRECTOR further argues that the Board should defer to the administrative agency’s construction of its own regulation unless the construction is palpably erroneous.

The dispositive issue is therefore whether the “cab retaining arm” is a “jack” for the purposes of HAR §12-81-2(c). In determining the scope of the cited standard, the Board is persuaded that the applicable rules of construction are identified by the Fifth Circuit Court of Appeals in Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 528 F.2d 645, 649 (1976):

The respondents contend that the regulations should be liberally construed to give broad coverage because of the intent of Congress to provide safe and healthful working conditions for employees. An employer, however, is entitled to fair notice in

¹The Board finds the other arguments somewhat specious and adopts the DIRECTOR’s arguments with regard to “heavy machinery” and “held aloft.” Common sense dictates that the beverage delivery truck with its 1,000 pound cab-over be considered “heavy machinery or equipment, or parts thereof,....” Further, DE COITE does not contest that cab retaining arm was the only support holding the cab-over in the open position after the springs had been cut off. The cab-over was therefore necessarily “held aloft” by the cab retaining arm.

²HAR § 12-79-1 states “ ‘Jack’ means an appliance for lifting or lowering or moving horizontally a load by application of a pushing force. Jacks may be of the following types: Lever and ratchet, screw and hydraulic[.]”

³According to Merriam Webster’s Collegiate Dictionary, the definition of “jack” includes “something that supports or holds in position.”

dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents. *Secretary v. California Stevedore and Ballast Co.*, OSHRC Docket No. 72 (June 16, 1972) (employers entitled to rely on standard's clear language, uncolored by additional subjective criteria). A regulation should be construed to give effect to the natural and plain meaning of its words. *Johnson v. Udall*, C.D.Cal., 1968, 292 F.Supp. 738, 750. See *Commissioner v. Wodehouse*, 1949, 337 U.S. 369, 69 S.Ct. 1120, 93 L.Ed. 1419, reh. denied, 338 U.S. 840, 70 S.Ct. 31, 94 L.Ed. 514 (tax regulation); *M. Kraus & Bros., Inc. v. United States*, 1946, 327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. 894 (criminal prosecution for violation of maximum price regulation).

If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. *Brennan v. Occupational Safety and Health Review Commission*, 5 Cir., 1973, *supra*; *Meehan v. Macy*, 1968, 129 U.S.App.D.C. 217, 392 F.2d 822; 4 Davis, *Administrative Law Treatise* s 30.12. Cf. *Cole v. Young*, 1956, 351 U.S. 536, 76 S.Ct. 861, 100 L.Ed. 1396 (ambiguity in Executive Order is fault of government and is resolved against it). We recognize that OSHA was enacted by Congress for the purpose stated by the respondents. Nonetheless, the Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.

In construing "jack" within the context of HAR § 12-81-2(c), the Board must therefore look to the natural and plain meaning of the word in order to ensure that employers are given fair warning of the conduct the regulation prohibits or requires. This standard is consistent with the statutory rule of construction identified in Hawaii Revised Statutes (HRS) § 1-14.⁴

⁴HRS §1-14 states:

The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use and meaning.

HAR §12-81-2(c) identifies the “general requirements” for HAR Title 12, Subtitle 8, Part 2, Chapter 81, “MOTOR VEHICLES, MECHANIZED EQUIPMENT, AND MARINE OPERATIONS.” The chapter includes requirements governing motor vehicle braking systems, head and tail lights, windshields and wipers, seat belts, dump bodies, operating levers, and fenders. HAR § 12-81-3, Motor Vehicles. It further addresses, rim wheels, HAR § 12-81-4, powered industrial trucks, HAR § 12-81-5, and roll-over protective structures for agricultural vehicles, HAR § 12-81-6. The cited section therefore clearly occurs within the context of regulations governing equipment relating to motor vehicles.

The Board concludes that within this context, that of motor vehicle equipment and maintenance, the “natural and plain meaning” of “jack” can only be that proposed by Respondent. If anyone were told that the cab-over was held aloft by a “jack,” the only available “natural and plain” understanding would be that it was held aloft by “an appliance for lifting or lowering or moving horizontally a load by application of a pushing force.” A rod, stick or other implement simply used to “support or hold in position” would neither come to mind nor make any sense within this context.

The breadth of the DIRECTOR’s proposed definition of “jack” would also make surplusage of the regulations’ specific reference to “slings” and “hoists,” thereby running afoul of the rule of construction against surplusage. In Re Ainoa, 60 Haw. 487, 591 P.2d 607 (1979). Further, the breadth of the proposed definition would provide no specific guidance to employers and leave interpretation solely in the hands of the DIRECTOR. This would run afoul of Diamond Roofing’s instruction that construction provide “a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.”

Accordingly, the Board concludes that the cited standard is inapplicable to the instant citation and recommends that the citation be dismissed. However, at oral argument, the DIRECTOR represented that a dismissal without prejudice would still permit the amendment or reissuance of the citation based on alleged violations of the general duty clause. DE COITE represented that it would raise no procedural objections should the citation be so amended or reissued. It is therefore recommended that dismissal be without prejudice.

PROPOSED CONCLUSIONS OF LAW

1. The DIRECTOR has the burden of proof as to each of the alleged violations. To establish a prima facie violation of standard, [the DIRECTOR] must prove by a preponderance of the evidence that the cited standard applies, there was a failure to comply with the cited standard, an employee had access to the violative condition, and the employer knew or should have known of the condition with the exercise of reasonable diligence.

2. The DIRECTOR contends that Respondent violated HAR § 12-81-2(c) which states:

Heavy machinery or equipment, or parts thereof, which are suspended or held aloft by use of slings, hoists, or jacks shall be substantially blocked or cribbed to prevent falling or shifting before employees are permitted to work under or between them.

3. The Board concludes that the standard relied upon by the DIRECTOR is inapplicable because the truck's cab-over was not held aloft by the use of slings, hoists or jacks. The cab retaining arm is not a jack.

PROPOSED ORDER

The Board recommends that Respondent's motion to dismiss and/or for summary judgment be granted without prejudice and the citation underlying the instant appeal be dismissed.

DATED: Honolulu, Hawaii, January 3, 2002.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

J. Gerard Lam, Deputy Attorney General
Jeffrey S. Harris, Esq.