

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

vs.

KIEWIT PACIFIC COMPANY,

Respondent.

CASE NO. OSAB 97-002
OSHCO NO. N1622
INSPECTION NO. 301421343

DECISION NO. 13

FINAL DECISION ADOPTING
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

FINAL DECISION ADOPTING PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 19, 2006, the Hawaii Labor Relations Board (Board) issued its Proposed Findings of Fact, Conclusions of Law, and Order in this matter. As the time limit for the filing of exceptions to the proposed order has passed without exceptions being filed by any party, the Board hereby adopts its Proposed Findings of Fact, Conclusions of Law, and Order and affirms the instant citation, characterization, and penalty imposed.

DATED: Honolulu, Hawaii, June 13, 2006.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



EMORY J. SPRINGER, Member



KATHLEEN RACUYA MARKRICH, Member

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AND INDUSTRIAL RELATIONS,)	
)	PROPOSED FINDINGS OF FACT,
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PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter is before the Hawaii Labor Relations Board (Board) on remand from the First Circuit Court upon instruction from the Intermediate Court of Appeals in S.C. No. 24226, In the Matter of Director, Department of Labor and Industrial Relations v. Kiewit Pacific Company. This case arose from a Citation and Notification of Penalty issued on December 4, 1996 to Respondent KIEWIT PACIFIC COMPANY (KIEWIT) by Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS' (DIRECTOR) Division of Hawaii Occupational Safety and Health (HIOSH) for failing to cover shallow holes in the ground floor of its construction site. The DIRECTOR found KIEWIT thereby violated, inter alia, 29 CFR 1926.501(b)(4)(ii) in Citation 1 Item 1. KIEWIT filed a contest of the Citation and Notification and Penalty and on May 23, 2000, the Labor and Industrial Relations Appeals Board (LIRAB) reversed and vacated Citation 1 Item 1 finding, inter alia, that 29 CFR 1926.501(b)(4)(ii) applied to holes at heights above the lower levels. On June 21, 2000, the DIRECTOR then appealed LIRAB's decision to the First Circuit Court and on February 26, 2001, the First Circuit Court affirmed LIRAB's decision.

The DIRECTOR then appealed to the Hawaii Supreme Court which assigned the case to the Intermediate Court of Appeals. On January 8, 2004, the Court of Appeals found that 29 CFR 1926.501(b)(4)(ii) applied to tripping hazards caused by shallow holes on the ground level. The Intermediate Court of Appeals thereupon reversed and vacated Citation 1 Item 1 relating to the unprotected walking/working surface and remanded the

issues 1a and 1b¹ to the Circuit Court with the instruction to remand the issues of characterization and penalty back to LIRAB for hearing. On May 28, 2004, the Circuit Court issued an Order Remanding Matter to the Hawaii Labor Relations Board² Pursuant to the Notice and Judgment on Appeal, Filed by the Intermediate Court of Appeals on February 23, 2004.

On November 22, 2004, the DIRECTOR, by and through his counsel, advised the Board of the remand of this case and requested the Board to schedule a status conference to discuss the settlement of the case or to schedule the case for hearing. On November 24, 2004, the Board scheduled a status conference in this matter on December 8, 2004. The status conference, however, was continued to permit the parties to explore a settlement on the remaining issues in this case. Having failed to reach a settlement, the Board conducted a hearing in this matter on August 29, 2005.

After the parties addressed the scope of these proceedings, the Board indicated that it was inclined to conclude that the reversal of the Circuit Court's opinion and remand to the Board did not compel a conclusion that a violation occurred. Thus the issues before the Board were whether a violation occurred as stated in Citation 1 Item 1; if so, whether the characterization of serious is appropriate; and, if so, whether the \$1,125.00 fine is appropriate. Transcript of 8/29/05 hearing (Tr. 8/29/05), pp. 24-25. The parties stipulated that the Board was entitled to consider the entire prior evidentiary record. Tr. 8/29/05, pp. 23, 25, 90. The Board provided the parties with the full opportunity to present evidence and argument to the Board.

The DIRECTOR presented its HIOSH Compliance Officer David Nelson (Nelson) as a witness before the Board and subsequent to the hearing on September 26, 2005, submitted a copy of HIOSH's Field Operating Manual in effect in 1996 in response to KIEWIT's objections to the DIRECTOR's Exhibit No. 3. Thereafter, the DIRECTOR filed

¹In its Decision and Order, dated May 23, 2000, LIRAB set forth, inter alia, the following issues for determination:

- (1) Whether Respondent violated 29 CFR §1926.501(b)(4)(ii).
 - a. If so, is the characterization of the violation as "serious" appropriate. If not, what is the appropriate characterization, if any.
 - b. If so, is the imposition and amount of the proposed \$1,125.00 penalty appropriate.

²In 2002, the jurisdiction to hear HIOSH contests pursuant to Hawaii Revised Statutes (HRS) Chapter 396 was transferred from the LIRAB to the Hawaii Labor Relations Board.

Proposed Findings of Fact and Conclusions of Law on October 11, 2005 and KIEWIT filed Proposed Findings of Fact and Conclusions of Law on October 12, 2005.³

Based upon a thorough review of the evidence and arguments submitted, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. At all relevant times, KIEWIT was an employer as defined in HRS § 396-3, employed employees as defined in HRS § 396-3, and was subject to the requirements of HRS Chapter 396, the Hawaii Occupational Safety and Health Law, and related administrative rules.
2. At all relevant times, KIEWIT maintained a workplace located at the Maui Marketplace, 270 Dairy Road, Kahului, Hawaii 96732.
3. On October 15 and 16, 1996, the DIRECTOR, through HIOSH's Compliance Officer David Nelson, inspected KIEWIT's worksite located at the Maui Marketplace.
4. On December 4, 1996, the DIRECTOR issued a Citation and Notification of Penalty to KIEWIT for violating five occupational safety and health standards.
5. On December 16, 1996, KIEWIT filed its notice of contest of the entire Citation and Notification of Penalty.
6. On May 27, 1998, LIRAB conducted a contested case hearing in this matter.
7. On May 23, 2000, LIRAB issued a Decision and Order affirming Citation 2 Item 1, the violation of 29 CFR § 1926.652(a)(1) for allowing employees to work in a portion of an unprotected trench that was six feet deep but reduced the "serious" and "repeat" characterization to a "serious" characterization and

³With respect to the DIRECTOR's Proposed Findings of Fact and Conclusions of Law, filed on October 11, 2005, the Board accepts Findings of Fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and Conclusions of Law 1, 2, 3, 4, and 5.

With respect to KIEWIT's Proposed Findings of Fact, Conclusions of Law and Order, filed on October 12, 2006, the Board accepts Findings of Fact 1, 2, 3, 4, 5, 7, 8, 11, and Conclusions of Law 1. The Board rejects KIEWIT's remaining Findings and Conclusions as they do not properly characterize the record or fail to support the instant decision.

the penalty from \$10,000.00 to \$500.00. LIRAB also reversed and vacated four other citations, including Citation 1 Item 1 which states as follows:

Citation 1 Item 1 Type of Violation: Serious

29 CFR 1926.501(b)(4)(ii) [Refer to chapter 12-121.2, HAR]
Each employee on a walking/working surface was not protected from tripping or stepping into holes; i.e., only 5 of 13 holes (2' by 2', approximately 6-8" deep) were provided with covers.

Location: Retail buildings E & F

Date By Which Violation Must be Abated: 12/09/96
Proposed Penalty: \$1125.00

LIRAB agreed with KIEWIT and concluded that the above standard did not apply to holes at ground level.

8. On June 21, 2000, the DIRECTOR filed an appeal to the First Circuit Court contesting LIRAB's Decision and Order.
9. On February 26, 2001, the First Circuit Court filed its Decision and Order Affirming the Decision of the Department of Labor and Industrial Relations Appeals Board Dated May 23, 2000 and entered Final Judgment on April 3, 2001.
10. On April 25, 2001, the DIRECTOR filed an appeal from the First Circuit Court's judgment relating to Citation 1 Item 1 to the Supreme Court. The Supreme Court then assigned the case to the Intermediate Court of Appeals.
11. On January 8, 2004, the Intermediate Court of Appeals issued an Opinion concluding that LIRAB erred by finding that 29 CFR § 1926.501(b)(4)(ii) was inapplicable to the holes on the ground floor. The Appeals Court agreed with the DIRECTOR's application of the instant standard to the ground level holes and stated:

We vacate in part, affirm in part, and remand. The April 3, 2001 final judgment and the underlying February 26, 2001 decision and order of the circuit court are vacated insofar as they affirm the LIRAB's reversal of Citation 1, Item 1, but are otherwise affirmed. The circuit court shall remand to the LIRAB with instructions to decide the issues (1(a) and 1(b), quoted above) it left unresolved in the wake of its reversal.

104 Hawai'i 22, 37, 94 P.3d 530, 545 (2004).

12. In its discussion, the Intermediate Court of Appeals did not determine whether a violation of the standard occurred but rather, that the standard applied to the facts before it. Thus, the unresolved issues remanded to the Board are whether a violation occurred as stated in Citation 1 Item 1; and if so, whether the characterization of "serious" is appropriate; and whether the \$1,125.00 fine is appropriate.
13. On May 28, 2004, the First Circuit Court remanded the case to the Board with instructions to decide the unresolved issues.
14. Pursuant to the Board's instruction, the DIRECTOR presented evidence on the issues of whether KIEWIT violated 29 CFR § 1926.501(b)(4)(ii), as well as the characterization of the citation and the amount of the penalty.
15. 29 CFR § 1926.501(b)(4)(ii) states as follows:

Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

16. KIEWIT's worksite was a large, football field size-concrete pad on the ground, bordered on one side by a high Concrete Masonry Unit (CMU) wall, which was being built by workers standing on an adjacent scaffold system.
17. There were holes on the concrete pad that were two feet by two feet and six to eight inches deep. Eight out of 13 holes did not have any protection against a stepping into or tripping hazard.
18. KIEWIT knew or should have known that uncovered holes posed a potential hazard because the uncovered holes were open to plain view and because KIEWIT placed a four-by-four inch piece of wood inside some of the holes.
19. KIEWIT's employees were exposed to the hazards posed by open holes on the ground floor in the following manner:
 - a. Two employees assigned to cutting CMU blocks to various sizes and the mortar mixer frequently walked past open holes;
 - b. 15 - 20 masons, standing on a scaffold system to build a CMU shell wall, walked in groups past open holes while entering or exiting the worksite during their work shifts;

- c. a Gradall forklift, transporting pallets of CMU blocks past open holes to the CMU shell wall, could have one of its tires enter an open hole causing a pallet of CMU blocks to spill.
- 20. Workers stepping or tripping in uncovered holes could suffer a serious injury, a severe sprain or strain, which in turn, would have caused injured worker to miss several work days.
- 21. A Low Severity, Lesser Probability and a Gravity Based penalty of \$1,500 discounted 25% for good faith appropriately resulted in a penalty of \$1,125.00.
- 22. Respondent, except for cross-examining Nelson, did not present any testimony from witnesses on the remand.

PROPOSED CONCLUSIONS OF LAW

- 1. The Board has jurisdiction over this contested case pursuant to HRS § 396-11 and the First Circuit Court's May 28, 2004 Order remanding this case to the Board.
- 2. KIEWIT is an employer within the meaning of HRS § 396-3.
- 3. To establish a violation of a standard, the DIRECTOR must prove by a preponderance of evidence that: "(1) the standard applies, (2) there was a failure to comply with the cited standard, (3) an employee had access to the violative condition, and (4) the employer knew or should have known of the condition with the exercise of due diligence." Director v. Honolulu Shirt Shop, OSAB 93-073 at 8. (Jan. 31, 1996).
- 4. The DIRECTOR proved by a preponderance of evidence that KIEWIT violated 29 CFR § 1926.501(b)(4)(ii) by establishing that the cited standard applies; KIEWIT failed to comply with the standard; KIEWIT's employees had access to the hazard; and KIEWIT knew or should have known of the hazard with the exercise of reasonable diligence.
- 5. The Board concludes that the DIRECTOR met the burden of proving that KIEWIT violated the standard as described in Citation 1 Item 1.
- 6. The Board concludes that the DIRECTOR met his burden of proving that a severe sprain or strain constitutes a "Serious" violation and the penalty imposed is appropriate.

PROPOSED ORDER

The Board therefore affirms the instant citation, characterization, and penalty.

Citation 1 Item 1, for violation of 29 CFR § 1296.501(b)(4)(ii), the characterization as Serious, and penalty of \$1,125.00 are affirmed.

DATED: Honolulu, Hawaii, May 19, 2006.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


EMORY J. SPRINGER, 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 the Board, pursuant to HRS § 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 the Board in its discretion. In such event, the parties will be so notified.

Copies sent to:

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