

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

v.

AKAMAI HOMES, INC.,

Respondent.

CASE NO. OSH 2005-18

DECISION NO. 16

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 27, 2005, the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (“DIRECTOR”), through the Hawaii Occupational Safety and Health (HIOSH) Division issued a Citation and Notification of Penalty (Citation) to Respondent AKAMAI HOMES, INC. (“AKAMAI”). Board Exhibit (Bd. Ex.) 1. The Citation resulted from Inspection No. 308485465 conducted on April 4, 2005 and alleged a serious violation of 19 CFR 1926.501(b)(13) relating to fall protection and proposed a \$300 penalty. Id. On July 5, 2005, AKAMAI, by its President George W. Thorp, Jr. (“Thorp”), contested the Citation and on August 5, 2005, HIOSH filed the Notice of Contest with the Hawaii Labor Relations Board (“Board”) for its review. Id.

The Board conducted an initial conference on August 26, 2005 where Complainant was represented by counsel and Respondent was represented by its President. The parties designated the following issues to be determined in this contest:

Citation 1, Item 1 - 29 CFR 1926.501(b)(13)

- a. Whether Respondent violated 29 CFR 1926.501(b)(13) as described in Citation 1, Item 1, issued on June 27, 2005?
- b. Whether the characterization of the violation as “Serious” is appropriate? If not, what is the appropriate characterization?
- c. Whether the imposition and amount of the \$300.00 penalty is appropriate? If not, what is the appropriate penalty?

The Board conducted a hearing on December 7, 2005 and on February 21, 2006, the parties filed closing briefs with the Board. Based on a thorough review of the entire record, the Board makes the following findings of fact, conclusions of law, and order affirming the DIRECTOR's Citation.

FINDINGS OF FACT

1. AKAMAI was, at all times relevant, a construction company which was contracted to do the framing and siding work as well as the flooring for the general contractor at the Kai Nani condominium construction site located at 91-255 Kalaeloa Blvd., Kapolei, Hawaii 96707. Transcript of hearing 12/7/05 ("Tr.") p. 19. At all relevant times, Thorp was the President of AKAMAI.
2. On April 4, 2005 at approximately 9:40 a.m., HIOSH Safety Compliance Officer Hervie Messier ("Messier") was driving up Makakilo Drive to another construction site when he passed the Kai Nani condominium construction site where he observed several men working on the second floor of an open-sided structure¹ without any apparent fall protection system in place. Tr. pp. 13-14. Messier parked near the site and confirmed that the workers were working without wearing any personal fall arrest system and there were no guardrails or safety net system on the structure. Tr. p. 16.
3. Vertical Construction is the general contractor of the Kai Nani condominium project where a group of two-story four to six-plex condominium units were being built. Tr. pp. 14-15.
4. According to Messier, condominiums are considered residential construction because the structures are designed for habitation or residential use. Tr. p. 15.
5. Two workers were working on the deck of the second floor which was approximately ten feet above the ground. Id. The ground around the perimeter of the structure was littered with construction material, rocks and dirt.

¹Messier described the open-sided structure, Tr. p. 15:

When I came on the site, the first floor had been completed and there was decking on the second floor area, where the men were working, but there was nothing around the perimeter of the structure as far as guard rails at that time. And as I got closer to the site, I could see that the workers were not wearing harnesses or any other type of fall protection.

6. Messier opined that if a worker fell, the most common injury would be fractures of the arms or legs and the worse possible consequence would be death. Tr. p. 17.
7. Messier observed the work being performed on the second floor deck for approximately six to eight minutes before entering the jobsite. Tr. p. 17. At the time, the workers were putting plywood sheets on some of the floor openings, which is leading edge work. Tr. p. 26.
8. Messier conducted an opening conference with Vertical Construction's foreman Malcolm Marmac ("Marmac"). Tr. p. 18. Marmac identified AKAMAI as the employer of the workers on the second floor deck.
9. AKAMAI's foreman Todd Lethford ("Lethford") was not on the site at the time and was called as Respondent's representative. Tr. pp. 18-19. Messier conducted an opening conference with him. *Id.* Tr. pp. 18-19. Lethford informed Messier that the workers had been installing floor sheeting, i.e., the process of laying plywood sheets to construct a floor. Tr. p. 26.
10. Messier conducted a walk-around inspection with Lethford and Marmac at 10:00 a.m. Tr. pp. 19-20.
11. Messier also took photographs of the site. Tr. pp. 23-26. Exhibit 4 depicts one of the employees working near the edge of the second floor apparently plugging an electric drill into a power cord. Tr. p. 61. The employee's back faces the nearby edge of the structure which was estimated to be 6-7 feet away. Tr. p. 28. The worker had been installing floor sheeting² and may have been preparing to install the exterior sidewalls at some point in the future. Tr. p. 29. The worker was not wearing any personal fall arrest system at the time and the edge of the second floor was not protected by any guardrail or safety net system. Tr. pp. 29, 31. The worker was working in the area during the entire inspection from 9:40 to 10:00 a.m. Messier considered the employee to be exposed to a fall hazard because of the lack of conventional fall protection. Tr. pp. 31-32.
12. Messier testified that the laying of floor sheeting is considered leading edge work. Tr. p. 32. Under HIOSH standards, leading edge work is exempted from the use of conventional fall protection if an employer has an acceptable fall protection plan describing the leading edge work. In addition, the plan

²The floor sheeting is a standard piece of plywood usually four feet by eight feet; used as the sub-flooring for the second floor of a house under construction before a finished floor is put on it. Tr. pp. 26 - 27.

must specify why conventional fall protection would pose a greater hazard or be infeasible. Tr. p. 36. Then the employer must institute a controlled access zone or use a safety monitor. Tr. pp. 35-37, 68-69.

13. Messier testified that in this instance the use of conventional fall protection (guardrail, safety net or personal fall arrest system) was not infeasible, nor did it pose a greater hazard. Tr. p. 41. He opined that there was adequate area for anchorage points after the sheeting was installed, hence a personal fall arrest system could have been used. Tr. p. 41. He stated that a worker could have secured an anchor in the flooring behind him after it was completed. Tr. p. 57. He also stated that guardrails could have been easily installed around the perimeter of the structure or on the open areas in the interior of the structure. Tr. pp. 41, 72. He also believed there was no reason why they couldn't have put a safety net around the exterior of the building. Tr. p. 41. Thus, Messier believed that conventional fall protection, guard rails, nets, personal fall protection was not infeasible and could have been used and did not create a greater hazard. Tr. pp. 43, 47.
14. Lethford indicated that Respondent was using a fall protection plan. Tr. p. 50. When Messier asked for the plan, Lethford did not produce the plan. Tr. pp. 43-44, 51, 71. Neither Lethford nor Marmac asserted that conventional fall protection was either infeasible or created a greater hazard for leading edge work. Tr. pp. 42, 51.
15. Respondent has a fall protection plan which was not produced during the inspection but the plan does not meet the requirements of the relevant standard because the plan does not explain why conventional fall protection presents a greater hazard or is infeasible for floor sheeting as required by the federal regulations. Tr. p. 126. Moreover, the plan is not site specific and fails to describe each location at the Kai Nani project where conventional fall protection cannot be used and further, fails to name the particular employees who Respondent designated to enter the controlled access zone.³ Tr. pp. 126-28.
16. Although Messier observed a sign on the first floor exterior of a building⁴ that stated there was a controlled access zone, there was no evidence of a control

³A controlled access zone is a line with a cable or tape with a breaking strength of at least 200 pounds that runs not more than ten feet between supports and it's an indication where the edge work is and to warn personnel about the edge of the structure. Tr. p. 44.

⁴The sign was on a different building and was not the basis for the citation at issue. Tr. p. 84.

line on the second floor deck along the leading edge or that only certain workers were permitted by training to enter the controlled access zone. Tr. pp. 45, 51.

17. Neither Lethford nor Marmac pointed out to Messier that a safety monitor⁵ was in use. Tr. pp. 48, 51. Any safety monitor is supposed to wear an orange helmet. Tr. p. 133. Messier did not see any worker wearing an orange helmet on the second floor. Tr. p. 49. Although he did see a worker wearing an orange helmet doing some carpentry work on the first floor, the worker could not have been acting as a safety monitor for the second floor workers. Tr. p. 50.
18. During the walk-around, Lethford said the company was using a fall protection plan and they would use a controlled access zone for leading edge work. Tr. p. 50.
19. Messier interviewed one employee who informed him that to the best of his recollection, there were no safety lines or personal fall protection or guard rails used that day or the week preceding. Tr. p. 52. The employee could not recollect any fall protection training. Tr. p. 60.
20. The penalty was calculated in accordance with established procedures employed by HIOSH inspectors. Messier deemed the fall hazard as medium in severity because Messier believed the most likely potential injury was an arm or leg fracture, and less than a fatality and would not require long-term hospitalization. Tr. pp. 78, 83. Messier was of the opinion that the probability of an accident occurring was “lesser” or low as there were only two workers exposed to the hazard. Id. This resulted in a gravity -based penalty of \$2,000 which was reduced by mitigating factors of the size, good faith and history of Respondent. Id. A 60% reduction was given because of the size of the Respondent, a 15% reduction was given for good faith (i.e., Messier was informed that the Respondent would eliminate the hazard immediately), and a 10% reduction was given because Respondent was not cited by HIOSH during the past three years. Thus, the final proposed penalty amounted to \$300.
21. Thorp was not at the job site during Messier’s inspection (Tr. p. 119) and testified the workers had a controlled access zone. Tr. p. 105. In addition, the

⁵An employee trained to be a monitor who warns other workers who go near a potential fall area to stop and back up or move into a different area. Tr. p. 47. The monitor does not perform any other work but only controls the safety and movement of employees in the potential fall zone. Tr. pp. 47-48.

company has a safety program,⁶ a safety manual, and safety training for its workers which is updated regularly at tool box meetings. Tr. pp. 98, 106.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contested case pursuant to HRS §§ 396-3 (Supp. 2002) and 396-11.
2. AKAMAI 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. 29 CFR 1926.501(b)(13) (Hawaii Administrative Rules Chapter 121.2 pertaining to fall protection) applies to the instant case. That section provides in part:

Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan that meets the requirements of paragraph (k) of §1926.502.

Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan that complies with §1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

⁶Counsel for HIOSH agreed that AKAMAI had the semblance of a fall protection plan. Tr. p. 109; Ex. A. HIOSH’s counsel, however, disagreed that the plan met all the elements of the standard and that it was being implemented. Tr. p. 109.

5. The DIRECTOR established that construction activity was being conducted at the Kai Nani project on the date of the inspection and that AKAMAI was a subcontractor engaged in the framing work, siding work, and the flooring for the general contractor, Vertical Construction. Condominiums are considered residential construction because they are designed for human habitation or residential use. Thus, the Board concludes that the standard applies to the instant facts.
6. Messier observed a worker within 10 feet of the second floor edge with his back to the edge. In addition, other workers installing the floor sheeting and performing leading edge work were not protected by conventional fall protection systems and were exposed to the fall hazard presented by the unguarded edges of the second floor.
7. The DIRECTOR proved by a preponderance of evidence that conventional fall protection, in the form of guardrails, safety nets or personal fall arrest systems, was not used to protect AKAMAI's two workers performing floor sheeting on the second floor which was more than six feet from the ground.
8. Although Respondent contended that it was exempt from using conventional fall protection because they were complying with 29 CFR 1926.502(k)⁷

⁷29 CFR 1926.502(k) provides as follows:

“Fall protection plan.” This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work (See 1926.501(b)(2), (b)(12), and (b)(13)) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment. The fall protection plan must conform to the following provisions.

1926.502(k)(1)

The fall protection plan shall be prepared by a qualified person and developed specifically for the site where the leading edge work, precast concrete work, or residential construction work is being performed and the plan must be maintained up to date.

1926.502(k)(2)

Any changes to the fall protection plan shall be approved by a qualified person.

1926.502(k)(3)

A copy of the fall protection plan with all approved changes shall be maintained at the job site.

regarding fall protection plans, AKAMAI failed to demonstrate that conventional fall protection equipment was infeasible or created a greater hazard, thus the exception provided in the foregoing standard is inapplicable. In addition, AKAMAI's fall protection plan fails to conform to the standard which requires that AKAMAI to develop the plan specifically for the Kai Nani work site and failed a copy of the plan at the jobsite as none was produced pursuant to Messier's request. AKAMAI's plan also fails to identify a location which could be classified as a controlled access zone and does not identify workers designated to enter and work in the controlled access zone. Thus, the Board concludes that Respondent's fall protection plan does not conform to the requirements of 29 CFR 1926.502(k).

9. The Board finds Messier's opinion testimony credible as he believed guardrails could have been erected around the perimeter of the second floor. In addition, anchor points could have been installed in the plywood floor sheets behind the workers after they were installed. The Board rejects Respondent's argument that lanyards would have constituted a tripping hazard because the workers were taught to install the plywood sheets quickly. Respondent also argued that exterior walls were a substitute for guardrails although none had been erected and most of the floor sheeting had been installed.
10. AKAMAI failed to establish that it implemented a controlled access zone

1926.502(k)(4)

The implementation of the fall protection plan shall be under the supervision of a competent person.

1926.502(k)(5)

The fall protection plan shall document the reasons why the use of conventional fall protection systems (guardrail systems, personal fall arrest systems, or safety nets systems) are infeasible or why their use would create a greater hazard.

1926.502(k)(6)

The fall protection plan shall include a written discussion of other measures that will be taken to reduce or eliminate the fall hazard for workers who cannot be provided with protection from the conventional fall protection systems. For example, the employer shall discuss the extent to which scaffolds, ladders, or vehicle mounted work platforms can be used to provide a safer working surface and thereby reduce the hazard of falling.

pursuant to 29 CFR 1926.502(k)(7)⁸ since it did not prove that it set up a

⁸29 CFR 1926.502(g) provides for controlled access zones as follows:

“Controlled access zones.” Controlled access zones [See 1926.501(b)(9) and 1926.502(k)] and their use shall conform to the following provisions.

1926.502(g)(1)

When used to control access to areas where leading edge and other operations are taking place the controlled access zone shall be defined by a control line or by any other means that restricts access.

1926.502(g)(1)(I)

When control lines are used, they shall be erected not less than 6 feet (1.8 m) nor more than 25 feet (7.7 m) from the unprotected or leading edge, except when erecting precast concrete members.

1926.502(g)(1)(ii)

When erecting precast concrete members, the control line shall be erected not less than 6 feet (1.8 m) nor more than 60 feet (18 m) or half the length of the member being erected, whichever is less, from the leading edge.

1926.502(g)(1)(iii)

The control line shall extend along the entire length of the unprotected or leading edge and shall be approximately parallel to the unprotected or leading edge.

1926.502(g)(1)(iv)

The control line shall be connected on each side to a guardrail system or wall.

1926.502(g)(2)

When used to control access to areas where overhand bricklaying and related work are taking place:

1926.502(g)(2)(I)

The controlled access zone shall be defined by a control line erected not less than 10 feet (3.1 m) nor more than 15 feet (4.5 m) from the working edge.

1926.502(g)(2)(ii)

The control line shall extend for a distance sufficient for the controlled access zone to enclose all employees performing overhand bricklaying and related work at the working edge and shall be

control line or any other means to restrict access on the second floor.

11. Respondent did not have a safety monitoring system conforming to 29 CFR 1926.502(h) in place on the second floor to observe the workers. There was no evidence that a safety monitor with an orange helmet was present on the second floor observing the workers and capable of warning the workers of imminent fall hazards.

approximately parallel to the working edge.

1926.502(g)(2)(iii)

Additional control lines shall be erected at each end to enclose the controlled access zone.

1926.502(g)(2)(iv)

Only employees engaged in overhand bricklaying or related work shall be permitted in the controlled access zone.

1926.502(g)(3)

Control lines shall consist of ropes, wires, tapes, or equivalent materials, and supporting stanchions as follows:

1926.502(g)(3)(I)

Each line shall be flagged or otherwise clearly marked at not more than 6-foot (1.8 m) intervals with high-visibility material.

1926.502(g)(3)(ii)

Each line shall be rigged and supported in such a way that its lowest point (including sag) is not less than 39 inches (1 m) from the walking/working surface and its highest point is not more than 45 inches (1.3 m) [50 inches (1.3 m) when overhand bricklaying operations are being performed] from the walking/working surface.

1926.502(g)(3)(iii)

Each line shall have a minimum breaking strength of 200 pounds (.88 kN).

1926.502(g)(4)

On floors and roofs where guardrail systems are not in place prior to the beginning of overhand bricklaying operations, controlled access zones shall be enlarged, as necessary, to enclose all points of access, material handling areas, and storage areas.

12. The Board concludes that Respondent knew of the unguarded perimeter of the second floor and fall hazard presented by the leading edge work on the second floor.
13. Based on the foregoing, the Board concludes that AKAMAI violated the fall protection requirement of 29 CFR 1926.501(b)(13).
14. HRS § 396-3 defines a “serious violation” as:

...a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation.
15. A violation is serious if it is substantially probable that harm will be serious in the event an accident occurred. Pack River Lumber Co., 1974 75 OSHD §19.323 (1975).
16. The Board agrees with Messier that if a worker fell 10 feet from the second floor to the ground, a worker would likely sustain a fracture, or at worse, death. Falls from that height would result in serious injury.
17. The Board concludes that the Respondent knew or should have been able to detect the violative condition of the unguarded perimeter because it was in plain view. According to Respondent’s fall protection plan, Respondent had knowledge of the necessity for fall protection while performing leading edge work.
18. The Board concludes that Messier properly calculated the proposed penalty, i.e., considering the severity of an injury if an accident occurred (a fracture) of medium severity and low probability resulting in a gravity-based penalty of \$2,000. The penalty was then adjusted because of Respondent’s size (25-30 employees for a 60% reduction), good faith (15% reduction) and history (10% reduction.) This resulted in an 85% reduction of the \$2,000 penalty resulting in a \$300 penalty.

ORDER

Based on the foregoing, the Board affirms Citation 1, Item 1, for violation of 29 CFR 1926.501(b)(13), the characterization, and penalty of \$300.00.

DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS v. AKAMAI
HOMES
CASE NO. 2005-18
DECISION NO. 16
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATED: Honolulu, Hawaii, September 5, 2006.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


EMORY J. SPRINGER, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Decision at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this order to a duly recognized representative of the employees.

Copies sent to:

Herbert B.K. Lau, Deputy Attorney General
George Thorp, Jr.