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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

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| In the Matter of |) | CASE NO. OSAB 96-057 |
| DIRECTOR, DEPARTMENT OF LABOR |) | (OSHCO ID N1662) |
| AND INDUSTRIAL RELATIONS, |) | (Inspection #120610647) |
| Complainant, |) | |
| |) | |
| vs. |) | |
| |) | |
| PACIFIC ERECTORS, INC., |) | |
| Respondent. |) | |

FILED
 LAB APPEALS BOARD
 STATE OF HAWAII
 JUN - 8 1996 P 1:10

DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest filed by PACIFIC ERECTORS, INC. (Respondent), to contest Citations and Notifications of Penalty issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via its Division of Occupational Safety and Health (Complainant), on July 8, 1996.

The issues to be determined are:

- (1) Whether Respondent violated Standard §12-136-2(cc) (4) (B).
 - (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 \$875.00 penalty appropriate.
- (2) Whether §12-136-2(cc) (4) (B) is selectively and/or arbitrarily enforced.
- (3) Whether Respondent violated Standard §12-133-2(b) (2).
 - (a) If so, is the characterization of the violation as "other" appropriate.

Complainant filed a motion in limine to prohibit discussion relating to multiple lifts. The Board heard the motion at the outset of trial and denied the motion.

We conclude that Respondent did not violate Standards §§12-136-2(cc)(4)(B) and 12-133-2(b)(2). Accordingly, we vacate the July 8, 1996 Citations and Notifications of Penalty.

FINDINGS OF FACT

1. On May 21, 1996, Complainant's compliance officer inspected the Circuit City project in Aiea, Hawaii. A three-story building was being constructed at that site. Respondent was engaged in steel erection activities on the project.

2. As a result of this inspection, Respondent was cited for a serious violation of Standard §12-136-2(cc)(4)(B) [Citation 1, Item 1], and an other-than-serious violation of Standard §12-133-2(b)(2) [Citation 2, Item 1].¹ Respondent was assessed a proposed penalty of \$875.00, for the alleged serious violation. No penalty was assessed for the other-than-serious violation. Respondent timely contested the citations.

Standard §12-136-2(cc)(4)(B)

3. At the time of the inspection, a crane was hoisting two steel beams to their connection point on the roof level of the structure. The beams were rigged one above the other, seven feet apart. Respondent was using a method of lifting known in the steel erection industry as "multiple lift rigging" (MLR).

¹Citation 1, Item 2 was deleted and is not before us.

MLR is an alternative to single lifting of individual structural members. With MLR, multiple pieces of steel are lifted at one time.

4. Respondent's employee was on the roof level, guiding the lower beam into position. This employee was a "connector", an ironworker who performs the connecting of the structural steel members. Once the lower beam was in place, the connector began to bolt the beam. After the connector had bolted both ends of the beam, the upper beam was lowered to allow the connector to remove the lower beam from the sling hook. This initial connection process lasted approximately eight minutes.

5. Complainant's compliance officer testified at trial. According to the compliance officer, during the entire time it took for the lower beam to be positioned, connected, and unhooked, the upper beam was directly above the connector's head.

6. The Hawaii Occupational Safety and Health Standards has a chapter dealing specifically with steel erection (Chapter 133).

7. The safety standard in question, however, is found in Chapter 136, under the section dealing with crane operations and more specifically, under §12-136-2(cc)(4), entitled "Holding the load."

8. Standard §12-136-2(cc)(4)(B) does not permit a person "to stand or pass under a load on the hook." Complainant cited Respondent for allegedly violating this standard, on the

basis that the connector was working under the suspended load of the upper beam.

9. According to the compliance officer, Chapter 133 does not address the subject of suspended loads and there are no standards, either in Chapter 133 or any other chapter, dealing specifically with the subject of MLR.

10. Standard §12-136-2(cc)(3)(F) provides that "[t]he operator shall avoid, as far as practicable, carrying loads over people". While this standard is also in Chapter 136, under the paragraph entitled "Moving the load", Respondent was not cited under this standard. The compliance officer indicated that Respondent was cited under Standard §12-136-2(cc)(4)(B), and not Standard §12-136-2(cc)(3)(F), because of the extended time period that the worker was exposed to the load passing overhead.

11. Respondent presented evidence about the nature of the steel erection process and to show that if MLR is used, then the connectors cannot avoid being under the load while working, because they must do so in order to perform their work.

12. Complainant has not shown that Chapter 136 applies to Respondent's steel erection activities in this case, when there is a specific chapter, Chapter 133, dealing with steel erection.

13. Respondent has indicated that if Chapter 136 applies to its steel erection activities at all, then it is

Standard §12-136-2(cc)(3)(F) which governs the entire steel erection process.

14. Complainant has not established a prima facie violation of the cited standard.

Standard §12-133-2(b)(2)

15. At the time of the inspection, two connectors were on the roof level, finishing the connection of a beam. There was an open area below the connectors, because the third floor level did not have any temporary decking. The second floor level had temporary decking, but there was an opening in the deck for the elevator shaft. The roof level was approximately 32 feet above the second floor level.

16. The safety standard in question requires the use of safety nets below areas where employees are working more than 25 feet above a floor, ground, or water and the use of temporary floors is not practicable. Respondent was cited for allegedly violating this standard, on the basis that it had not installed safety nets and safety nets were required to protect the connectors working on the roof level from possibly falling 32 feet.

17. According to the compliance officer, a safety net should have been installed in the area over the second floor level opening.

18. It is undisputed that the connectors were using a personal fall arrest system consisting of a wire choker as an

anchorage point, a full body harness, and lanyard, and were 100% tied off while they were working on the roof level.

19. The compliance officer acknowledged that so long as the connectors were tied off, the connectors would not fall to the safety net and would not ever reach the net.

20. Because the connectors were completely tied off at all times while they were working on the roof level, we find that a safety net was not required.

21. While Complainant has established a prima facie violation of the cited standard, we find that because a safety net was not required, Complainant's showing of a prima facie violation has been rebutted.

CONCLUSIONS OF LAW

1. We conclude that Respondent did not violate Standard §12-136-2(cc)(4)(B), because Complainant has not met her burden of proof. To establish a prima facie violation of a standard, Complainant 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 could have known of the condition with the exercise of reasonable diligence.

Complainant has not proven that Chapter 136 applies in this case. Complainant contends that the Director promulgated separate subsections in Chapter 136 to address the different hazards encountered at the different phases of steel erection.

Complainant asserts that the hazard of a "load in transit" is addressed by Standard §12-136-2(cc)(3)(F), while the hazard of a "suspended load" is addressed by Standard §12-136-2(cc)(4)(B). Complainant further asserts that Standard §12-136-2(cc)(4)(B) expressly prohibits a suspended load directly above a connector. Complainant, however, has not presented any factual evidence to support this position. Moreover, based on our reading of Chapter 136 and the fact that there is a steel erection chapter, we are not persuaded that Chapter 136 was intended to apply to steel erection activities and to MLR.

Even if, however, we accepted Complainant's position that Chapter 136 applies to steel erection activities, we agree with Respondent that the applicable standard under that chapter is §12-136-2(cc)(3)(F), based on the nature of the steel erection process, Complainant's position that it is not challenging the practice of MLR, and that fact that it is unavoidable for the connectors not to work under the load.

Complainant, therefore, has not established a prima facie violation of Standard §12-136-2(cc)(4)(B).

Having concluded that Respondent did not violate the cited standard, we do not reach the characterization, penalty, and selective and/or arbitrary enforcement issues.

2. We conclude that Respondent did not violate Standard §12-133-2(b)(2), because Complainant's showing of a

