

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of )  
 DIRECTOR, DEPARTMENT OF LABOR )  
 AND INDUSTRIAL RELATIONS, )  
 Complainant, )  
 vs. )  
 BUCK ROOFING, INC., )  
 Respondent. )

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CASE NO. OSAB 95-055(H)  
 (OSHCO No. N0727)  
 (Report No. 103857777)

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 STATE OF HAWAII  
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DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest filed by BUCK ROOFING, INC. ("Respondent"), to contest an Amended Citation and Notification of Penalty issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via its Division of Occupational Safety and Health ("Complainant"), on August 14, 1995.

The issues to be determined are:

- (1) Whether Respondent violated Standard 29 CFR §1926.501(b)(10). (Whether a hazard existed. Whether Respondent knew or should have known about the existence of a hazard and exposure of its employees. Whether compliance is feasible. Whether any employee of Respondent was exposed.)
  - (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 \$1,225.00 penalty appropriate.

On May 24, 1996, the Board denied Respondent's motion for summary judgment, filed May 3, 1996.

Having considered the evidence adduced at trial and in the record, the Board concludes that Respondent did not violate the cited standard and dismisses the Amended Citation and Notification of Penalty issued on August 14, 1995.

#### FINDINGS OF FACT

1. On June 15, 1995, Complainant inspected the Ke Kumu Elua construction project at Ke Kumu Place, Waikoloa, Hawaii. Kikai Construction (Kikai) was the general contractor for the project. Gary Sine was Kikai's job superintendent. Kikai subcontracted the roofing work on the project to Respondent.

2. As a result of this inspection, Complainant issued an Amended Citation and Notification of Penalty (Amended Citation) against Respondent on August 14, 1995, for an alleged violation of Standard 29 CFR §1926.501(b)(10),<sup>1</sup> and assessed a proposed penalty of \$1,225.00.

3. Complainant's basis for citing Respondent for an alleged violation of the safety standard was that on the date of the inspection, Complainant's compliance officer observed an individual working on a roof approximately 20 feet from the ground without proper fall protection.

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<sup>1</sup>This standard pertains to the fall protection requirements for roofing work on low-slope roofs.

The compliance officer determined that Ryan Haili, the individual working on the roof, was an employee of Respondent, based on statements made by Mr. Sine and by Mr. Haili himself.

4. Respondent timely contested the Amended Citation.

5. Respondent's defense is that Mr. Haili was not an employee of Respondent on June 15, 1995.

6. Respondent employed Mike Funes and Mr. Haili to work on the subcontract for the Ke Kumu Elua construction project from February 8, 1995 to April 5, 1995. By the first week of April 1995, the work on Respondent's subcontract was completed.

7. In June 1995, Mr. Sine contacted Mr. Funes about some wind damage to the roof. Mr. Funes and Mr. Haili were roommates. Mr. Funes and Mr. Haili discussed the wind damage. On June 15, 1995, Mr. Haili went back up on the roof to correct the problem. No one from Respondent directed Mr. Haili to work on that day. He did not inform any one from Respondent that he was going to work. He did not receive any pay on that date.

8. Mr. Haili was not an employee of Respondent on June 15, 1995.

#### CONCLUSIONS OF LAW

We conclude that Respondent did not violate Standard 29 CFR §1926.501(b)(10). In order to prove a violation of this standard, Complainant must show that the cited standard applies,

there was a failure to comply with the cited standard, employees had access to the violative condition, and the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. See Director v. Honolulu Shirt Shop, OSAB 93-073 (January 31, 1996).

Complainant, however, has not shown that an employee of Respondent had access to the alleged violative condition, because Mr. Haili, the individual observed on the roof on the date of the inspection, was not an employee of Respondent. In April 1995, the roofing portion of the project was completed and Mr. Haili stopped working for Respondent. While Mr. Haili went up on the roof on June 15, 1995, he did so voluntarily and was not paid on that day. He was neither required nor directed by Respondent to work at the construction project on June 15, 1995.

Under the Hawaii Occupational Safety and Health Law, Chapter 396 of the Hawaii Revised Statutes (HRS), an "employee" is defined to mean "every natural person who is required or directed or permitted or suffered by any employer to engage in any employment, or to go to work or be at any time in any place of employment." HRS §396-3. See also §12-50-2 of the Hawaii Occupational Safety and Health Standards. Because Respondent did not require, direct, permit, or suffer Mr. Haili to work at the

construction project on June 15, 1995, Mr. Haili was not an employee of Respondent under HRS §396-3.

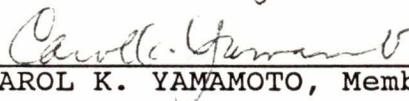
Having concluded that Respondent did not violate Standard 29 CFR §1926.501(b)(10), we do not reach the remaining sub-issues.

ORDER

The Amended Citation issued on August 14, 1995, is hereby dismissed.

Dated: Honolulu, Hawaii, MAR 17 1998.

  
FRANK YAP, JR., Chairman

  
CAROL K. YAMAMOTO, Member

  
VICENTE F. AQUINO, Member

Leo Young, Esq.  
for Complainant

Jeffrey Harris, Esq./Clayton Kamida, Esq.  
for Respondent

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. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

