STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. GLOBAL CONSULTANTS & COATINGS, Respondent.	CASE NO. OSAB 2002-34 DECISION NO. 4 FINDINGS OF FACT, CONCLUSIONS OF LAW

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This is a contested case that arises out of a Citation and Notification of Penalty issued by the Complainant, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), by and through the Hawaii Division of Occupational Safety and Health (HIOSH), on October 2, 2002 against GLOBAL CONSULTANTS & COATINGS (Respondent or GLOBAL). By letter dated October 18, 2002, the Respondent's sole proprietor, John Phelps (Phelps), proceeding pro se, contested the citation.

On November 1, 2002, the Hawaii Labor Relations Board (Board) received GLOBAL's Notice of Contest from HIOSH.

After the parties had an opportunity for discovery, a *de novo* hearing was held before the Board on April 21, 2003 and May 2, 2003, pursuant to Hawaii Revised Statutes (HRS) § 396-11(h). The parties were provided full opportunity to present testimony and introduce documentary evidence for the Board's consideration. On June 30, 2003, the Director submitted a post hearing position statement in lieu of closing arguments. GLOBAL did not submit a post hearing statement.

After thorough consideration of the testimony, evidence and arguments presented by the parties, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. At all times relevant, GLOBAL operates as a small business painting company, whose sole proprietor is John Phelps.

2. On September 20, 2002, Edward Vidad (Vidad), a HIOSH compliance officer of the Department of Labor and Industrial Relations (DLIR) conducted a partial inspection at 79 Nimitz Highway, Honolulu, Hawaii where GLOBAL was contracted to paint the exterior of the Hale Awa Kamoku building. The painting contract began on or about September 13, 2002, and was completed on October 9, 2002.

3. Just prior to starting an opening conference, Vidad saw Phelps and Scott Hansen (Hansen), an employee of GLOBAL, from across Nimitz Highway painting for approximately 15 to 20 minutes on a concrete awning of the Hale Awa Kamoku building. Vidad photographed both Phelps and Hansen standing on ladders on a concrete awning engaged in painting the exterior of the building around the windows. The concrete awning or eyebrow is a walking working surface. Neither Phelps, nor Hansen were using any kind of conventional fall protection such as self-restraining systems, harnesses or lanyards.[1] Vidad also saw Hansen walking the length of the awning carrying a ladder approximately three feet from the edge of the awning. He photographed Hansen working on the ladder that was set up two-and-one-half feet from the unguarded edge.

4. Although Vidad was on his way to another inspection, he stopped to conduct a partial inspection of GLOBAL because he observed an imminent hazard.[2]

---

[1]"Conventional fall protection" generally refers to standard types of fall protection such as guardrail systems, safety net systems, and personal fall arrest systems. See, e.g., 29 CFR § 1926.501(b)(2).

[2]Vidad testified that the basis for his conclusion that there existed an imminent hazard is as follows:

> There were several things. First off, I noticed that there was no fall protection in regards to the awning that they were working on. As far as the condition, the situation as well, the awning was approximately 11 feet off the ground. Within that area that they were working, the awning did come right over the highway there. And a fall that would occur could potentially become even more severe in regards to them falling into the way of traffic." Transcript Vol. I, dated April 21, 2003, (Tr. Vol. I) p. 17, Lines 20-25 and p. 18, Lines1-4.

5. During the inspection, Vidad measured the concrete awning to be approximately eight feet wide, and 40 feet long, and approximately 11 feet high above ground, and covering the street level side walk below. Vidad interviewed Hansen, who confirmed that he was working on the awning and painting windows for 20 minutes approximately two feet from the unguarded edge when working on the ladder.

6. The ground surface beneath the awning is a concrete sidewalk. A three-foot high concrete divider bordered the sidewalk and the asphalt road and bike path on Nimitz Highway, where the speed limit is 35 miles per hour and traffic at the time of the inspection, between 12:00 p.m. to 1:35 p.m., was moderate to heavy.

7. During the inspection, Vidad spoke with Phelps, who was also painting on the concrete awning with Hansen. Vidad informed Phelps of the hazardous condition that was in violation of the HIOSH standard. Phelps took the position with Vidad, and before the Board, that because he was the sole owner, and not an employee, the fall protection standards do not apply to him. Phelps did not dispute that the fall protection standards applied to his employee, Hansen.

8. Phelps admitted that before Vidad began the inspection, both Phelps and Hansen were wearing fall protection, i.e., full body harnesses, while painting from the aerial scaffolding. When they began painting on the awning, Phelps removed his full body harness. Phelps did not know when Hansen removed his fall protection gear, but did not rebut Vidad's pre-inspection observations of Hansen painting on the awning within two and one-half feet from the unguarded edge without any kind of fall protection.

9. Based on his inspection, Vidad opined that the severity of the possible injury, i.e., falling into oncoming traffic on Nimitz Highway, was high, the probability was greater, and the gravity was 10. Vidad calculated a Gravity Based Penalty of $5,000 which he discounted 60 percent given the size of GLOBAL (i.e., four employees), and ten percent for accident history. This resulted in a penalty of $1,500 and characterized the violation as "serious."

10. A second fall hazard that Vidad saw and photographed, was GLOBAL employee Jeff Tario (Tario) in a 35-foot, Simon boom or manlift owned by GLOBAL. Tario was not wearing a full body harness or safety belt with a lanyard because he just went up for a few minutes to do a quick paint spot inspection; and he believed the standard requiring the use of fall protection on the manlift prevented him from having an avenue of escape and increased the chance of being pinned under the boom in the event of a flip over. (Tr. Vol. II,[3] p. 134)

---

[3]Vol. II is the transcript from the hearing held on May 2, 2003.

11. During the inspection, Phelps did not inform Vidad that the manlift had no anchor point to explain why Tario could not use his fall protection. According to Vidad, Phelps simply believed the use of fall protection while working from the manlift was stupid. In fact, when Vidad asked Tario if there was a point for him to attach to, he was told there was. Vidad informed Tario that the lanyard could not be wrapped around and tied to itself, but needed to be tied to the lift. Tario produced a body belt, and tied off before the inspector closed the inspection.

12. Tario testified that he was not wearing a body belt because there was no anchor point on the lift. Consequently, to satisfy the inspector and abate the hazard, Tario testified that he tied off to the railing of the lift by hooking the lanyard around the pipe or railing even though he believed this was in violation of the fall protection standard. The Board does not credit the testimony of Tario to support a finding that the aerial lift had no anchor point from which to tie off. The Board gives greater weight to the testimony of Vidad who asked Tario during the investigation whether there was a point for him to attach to.

13. Based on the inspection, Vidad opined that the severity of a fall from the boom given oncoming traffic was high, the probability lesser, and the Gravity Based Penalty $2,500, which he discounted sixty percent for company size, and ten percent for accident history. This resulted in a penalty of $750, and characterized the violation as serious.

14. On October 2, 2002, HIOSH cited GLOBAL based on Hansen's exposure to an 11-foot fall from the concrete awning that was not protected with guardrail systems, safety net systems, or personal fall arrest systems, as required under 29 CFR 1926.501(b)(1), and Hawaii Administrative Rules (HAR) § 12-121.2.

15. HIOSH also cited GLOBAL based on Tario's failure to wear a body belt and lanyard attached to the boom when he was working from the aerial lift, as required under 29 CFR 1926.453(b)(2)(v), and HAR § 12-130.1.

16. By letter dated October 18, 2002, GLOBAL timely contested the citation.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contested case pursuant to HRS §§ 396-3 (Supp. 2002) and 396-11.

2. 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).

3. Standard 29 CFR 1926.501(b)(1) requires that an employee on a walking/working surface (horizontal and vertical surface), with an unprotected side or edge which is six feet or more above a lower level, shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. We conclude that the Director proved by a preponderance of evidence that GLOBAL violated the provisions of this standard.

4. Standard 29 CFR 1926.453(b)(2)(v) requires that a body belt be worn and a lanyard attached to the boom or basket when working from an aerial lift. We conclude that the Director proved by a preponderance of evidence that GLOBAL violated the provisions of this standard.

5. The characterization of both violations as "serious" and the penalties imposed, are appropriate.

ORDER

1. Citation 1, Item 1 for a violation of 29 CFR 1926.501(b)(1), the characterization and proposed penalty of $1,500.00, are affirmed.

2. Citation 1, Item 2 for a violation of 29 CFR 1926.453(b)(2)(v), the characterization and proposed penalty of $750.00, are affirmed.

DATED: Honolulu, Hawaii, November 4, 2003.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, 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:

Leo B. Young, Deputy Attorney General
John Phelps
Painter's Union