

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 95-069
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO NO. C8955)
AND INDUSTRIAL RELATIONS,)	(REP. NO. 103896007)
Complainant,)	
)	
vs.)	
)	
BUCK ROOFING COMPANY, INC.,)	
Respondent.)	
_____)	

FILED
 LIR APPEALS BOARD
 STATE OF HAWAII
 ←
 '98 MAY 12 10:54

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 a Citation and Notification of Penalty issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via the Division of Occupational Safety and Health ("Complainant").

The issues before us are:

- (1) Whether Respondent violated Occupational Safety and Health Standard §29 C.F.R. 1926.501(b)(10);
- (2) If so, is the characterization of the violation as "serious" appropriate; and
- (3) If so, was the imposition and amount of the proposed \$525.00 penalty appropriate.

For the reasons stated below, we affirm the citation and penalty.

FINDINGS OF FACT

- 1. Between October 11, 1995 and October 13, 1995, Clayton Chun, Complainant's compliance officer, inspected the

Iwalani Village Project, a residential construction project at Kapolei.

2. The general contractor for the project was Robert M. Kaya, Inc. Respondent was the roofing subcontractor.

3. At the October 11, 1995 inspection, Complainant observed in plain view four of Respondent's employees performing roofing work on the roofs of four different homes or structures without fall protection. The roofs of these structures were low-slope roofs with unprotected sides and edges 6 feet or more above the lower levels.

4. At the October 11, 1995 inspection, Complainant took photographs of Respondent's employees. The photographs showed the employees working on roofs without fall protection. Complainant issued Respondent a citation and assessed a penalty of \$525.00.

5. We credit Complainant's testimonial evidence regarding the calculation of the penalty, including the factors that were considered in the calculation.

6. We credit the testimonial evidence from Complainant to find that there was a substantial probability that death or serious injury could result from not using fall protection in this case.

7. Brian Miyake was project superintendent for the general contractor and oversaw the subcontractors, including Respondent. Mr. Miyake was on the job site daily and had his foremen inspect Respondent. Mr. Miyake observed Respondent's

employees not using proper fall protection on at least five occasions prior to July 21, 1995. He had warned Respondent that its employees were repeatedly disregarding the fall protection requirements. In a July 21, 1995 letter to Respondent's president, Buck Schipa, Mr. Miyake demanded that Respondent take immediate action to ensure compliance with OSHA fall protection standards, because it was apparent that its employees were disregarding the safety measures.

8. George Hoopai was the supervisor in charge of Respondent's employees on the Iwalani project. On the day that Complainant observed the alleged fall protection violation, Mr. Hoopai was out sick and was not at work.

9. Mr. Hoopai testified that he was aware that his employees were not using fall protection prior to October 11, 1995, and that was the reason he emphasized fall protection in the weekly safety meetings.

10. Mr. Schipa and Mr. Hoopai testified about Respondent's safety program, its emphasis on fall protection, and the disciplinary actions taken on those who do not comply with the safety rules. Mr. Schipa testified that the four employees who were observed by Complainant on October 11, 1995, were disciplined for their noncompliance with the fall protection requirements. According to Mr. Schipa, those four employees were "laid off". Upon further questioning, however, Mr. Schipa testified that the employees were "laid off" when the project was completed. He did not lay them off before that because they were

skilled roofers and he needed them to complete the job. Two of the four employees have since been rehired by Respondent to work on another project.

11. Respondent asserted two defenses to the violation: that the alleged violation observed by Complainant on October 11, 1995, was an isolated incident, and that Respondent did not have knowledge or constructive knowledge of the hazardous condition on October 11, 1995.

12. To prove its defense of isolated incident and no knowledge or constructive notice of the hazardous condition, Respondent presented evidence that it took reasonable and adequate safety measures by providing safety training, instructing its employees to use fall protection, and enforcing the rule via discipline. We find that Respondent failed to prove its defenses.

13. We find that Respondent's employees' failure to use fall protection on October 11, 1995, was a hazardous condition that Respondent knew or could have known with the exercise of reasonable diligence. The employees were working unprotected on the roofs in plain view. That Respondents' employees did this on several previous occasions was also known to Respondent. Even though Mr. Hoopai was not present on October 11, 1995 to witness or discover the hazardous condition, any representative of Respondent could have discovered the hazardous condition with reasonable diligence.

14. Based on the testimony from Mr. Schipa, we find that Respondent's "disciplinary" actions had no punitive effect because the employees were allowed to finish the project. Once the project was completed, there was no more work to be done. So being laid off at the end of a project, together with the frequency in which Respondent's employees were observed not using fall protection, indicate to us that Respondent did not enforce the fall protection requirements and acquiesced in the employees' practice of not complying with the fall protection standard.

15. Based on the testimony from Mr. Hoopai, the testimonial and documentary evidence from Mr. Miyake, and Respondent's apparent acquiescence of employee noncompliance, we find that Respondent's failure to use fall protection on October 11, 1995, was not an isolated incident.

CONCLUSIONS OF LAW

1. Based on the foregoing findings, we conclude that Respondent violated §29 C.F.R. 1926.501(b)(10) on October 11, 1995.

For the reasons stated above, we reject Respondent's defense of isolated incident and no actual or constructive knowledge of the hazardous condition.

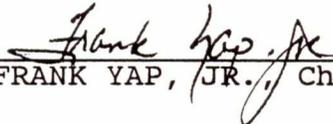
2. We conclude that the violation was properly characterized as "serious", because of the substantial probability of death or serious injury that could result from not using fall protection in this case.

3. We conclude that the penalty of \$525.00 was appropriate.

ORDER

The Citation and Notification of Penalty, issued by Complainant on November 1, 1995, is affirmed. **MAY 12 1998**

Dated: Honolulu, Hawaii, _____.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Leo B. Young, Esq.,
for Complainant

Clayton A. 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.