

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSH 2003-6
DIRECTOR, DEPARTMENT OF LABOR)	DECISION NO. 6
AND INDUSTRIAL RELATIONS,)	FINDINGS OF FACT, CONCLUSIONS
Complainant,)	OF LAW, AND ORDER
vs.)	
HAWAIIAN DREDGING CONSTRUCTION)	
CO.,)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board), pursuant to a written notice of contest from a citation and notification of penalty issued against HAWAIIAN DREDGING CONSTRUCTION CO. (HDCC or Respondent) by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Hawaii Division of Occupational Safety and Health (HIOSH) on May 14, 2003.

The Board held an initial conference on June 4, 2003. Board Order No. 49 set forth the issues as follows:

Whether Respondent violated Hawaii Administrative Rules § 12-110-2(f)(1)(A) as described in Citation 1, Item 1.

- 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 \$1,100.00 penalty appropriate?

The Board conducted a hearing in this matter on November 25, and 26, 2003. Having reviewed the record and provided all parties a full and fair opportunity to be heard, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. HDCC was for all relevant times the general contractor for the construction of a three phase project at the Queen's Medical Center (Queen's) in Honolulu, Hawaii known as the Front Lot and Mabel Smyth Medical Campus improvements Project (Project). The Project covers an area of approximately 98,980 square feet and consists of: demolishing the existing main entry roadway to Queen's; erecting a structural steel porte cochere structure with landscaping and pedestrian walkways at the new entrance to Queen's; and constructing a pedestrian walkway, parking and surrounding landscaping at the Mabel Smyth Auditorium.
2. Allen DeLaura (DeLaura) has been employed for 33 years by HDCC and at all relevant times was the HDCC's General Superintendent for the Queen's Project. DeLaura was in charge of the day-to-day activities at the Project, including jobsite safety. As part of his daily routine, he conducted safety inspections of the job site at least two to three times a day—at the start of the work day, after lunch and at the end of the day. This has been his practice for all projects.
3. For the Queen's Project, HDCC had a carpenter foreman and a mason foreman under DeLaura's supervision who were also responsible for inspecting the job site for safety. DeLaura's senior foreman, Richard Galanto, was instructed to do a safety inspection at least once a day, and to receive subcontractors as they arrived on the job. Transcript (Tr.) Vol. II, pp. 19-22.
4. DeLaura, has had training in the use, erection and dismantling of scaffolds during his career with HDCC while in the carpentry trade. This includes having been designated as a competent person for scaffolds at least a dozen times during his career with HDCC. DeLaura has personally participated in the erection and dismantling or use of scaffolds. And as a Superintendent, he periodically conducted demonstrations on the erection and use of scaffolds. Tr. Vol. II, pp. 26-27.
5. According to DeLaura, HDCC required that all of its subcontractors have the necessary site specific safety manual filed with HDCC prior to working on the project. For work on the porte cochere HDCC installed a secured ladder for access to the roof. Also HDCC installed a cable tie system at the very top of the roof so that employees working on the roof could tie off using a lanyard and harness. DeLaura also conducted weekly safety meetings, called "tool box meetings," usually every Monday morning, to which subcontractors were invited. It was not mandatory because most "subs came from other projects. They weren't necessarily there at 7:00 when [HDCC] held their safety meetings." Tr. Vol. II, pp. 22-23.

6. Steve Brooks (Brooks), HDCC's Director of Safety, was responsible for the company-wide development of policies and procedures to comply with state and federal Occupational Safety and Health Administration requirements. Brooks was responsible for periodically inspecting HDCC's construction projects throughout the State, for providing safety training, and for accident investigation.
7. Honolulu Shipyard, Inc.- Mechanical Division (HSI) was subcontracted to furnish and install sheet metal roofing, flashing and copper gutters along the perimeter of the roof and the end of the roof line on the new porte cochere being built at the main entrance to Queen's.
8. David Ramos (Ramos) was HSI's job site foreman with supervisory authority over three HSI employees. As such, Ramos was in charge of erecting and dismantling the scaffolds on the job site. Ramos Deposition Transcript dated October 30, 2003 (Ramos Depo Tr.), pp. 10-11. Ramos confirmed that when HSI first started the job, DeLaura made it a practice of doing walk around inspections three times a day. On one such inspection, DeLaura instructed HSI to remove its scaffold that was used at the shipyard that "he felt was not good." Thereafter, HSI rented a Safway scaffold. *Id.*, pp. 40-42.
9. In addition to the rented Safway scaffold, on or about March 17, 2003, HSI erected and used a second scaffold at the Queen's Project job site. Ramos Depo. Tr. p. 18. According to Ramos, the HSI scaffold was only used to install the gutters on the makai or Waikiki end of the porte cochere roof on March 17, 2003, and again on March 18, 2003, at the other "mauka" end of the porte cochere. Ramos Depo. Tr. pp. 34-35. At both ends of the porte cochere where the HSI scaffold was used, it was level because it sat on dirt (*Id.*, p. 33) and workers stood on the lower work deck which was five feet off of the ground and used the higher deck at a height of seven -eight feet to hold tools and materials. The HSI employees did not use the HSI scaffold at any other time, other than the estimated six hours per day, when it was putting up the gutters on both ends of the porte cochere. *Id.*, pp. 31, 58, 66.
10. On March 18, 2003, Brooks conducted an unscheduled safety inspection of the Queen's Project. He observed HSI employees working on the roof of the porte cochere without the proper fall protection equipment. Brooks photographed Ramos and the HSI employees on the roof and directed Ramos and the other HSI employees to come down and obtain the correct lanyards before continuing with the work. Ramos Depo. Tr. pp. 44-45. According to Ramos, during Brooks' inspection he asked Ramos about the erection of the Safway scaffold. Ramos also verified Brooks' photographs of HSI workers on the Safway scaffold. Ramos Depo. Tr. pp.46-49. Ramos confirmed that at the time of Brooks' photograph of the Safway scaffold, the HSI scaffold was not in the area and the photo also shows the front gutters on the mauka end were already installed.

Ramos Depo. Tr. p. 46. Brooks also observed and warned workers of the landscaping subcontractor to wear hard hats on the Project even if they were not working on or near the porte cochere and made sure that they complied with the rules. Brooks also asked Ramos who HSI's competent person for scaffolding was and was told by Ramos that he was the competent person.

11. The record does not support a finding that Brooks saw the HSI scaffold or employees working on the HSI scaffold during his inspection. Brooks, in fact, denies seeing the scaffold and although Ramos stated that Brooks put his hand on the HSI scaffold, the Board finds his deposition testimony unreliable because it is based on his apparent mistaken belief that Brooks was on the jobsite on March 17th as well as March 18th.¹ In addition, Ramos equivocates regarding

¹At his deposition, Ramos testified as follows:

Q [By Mr. Lau] Who was doing the inspections for Hawaiian Dredging?

A. [By Mr. Ramos] Steve.

Q. Steve Brooks?

A. Yes.

Q. Do you know one Allen Delaura (sic)?

A. Yes.

Q. Was he also performing inspections for Hawaiian Dredging for safety purposes?

A. To my knowledge, no. I thought he was the, running the—he is the main man. He is he foreman on the job.

Q. Okay.

A. Steve, he introduced himself to me as the safety guy, the safety officer, for the job.

Q. And you were aware that part of Steve's duties was to inspect the entire job site for safety?

A. Yes.

Q. Did Steve inspect the job site on March 17, if you recall? If you recall.

A. Yes, he was there every day.

* * *

Q. How about the day before the inspection, on March 18th, was he there?

A. Yes.

Q. Do you know if he saw the HSI scaffold?

A. Yes.

Q. How do you know that?

A. Because every day he would—while we was working, he would

regarding DeLaura and his conducting of daily safety inspections, i.e., initially testifying that DeLaura did not conduct daily inspections, but then remembering that at the start of the job, DeLaura directed HSI to remove a pipe scaffolding typically used at the shipyard.

12. On March 19, 2003, sometime around 7:00 a.m., DeLaura conducted his early morning walk through inspection through the porte cochere area and saw no work activity or HSI employees.

13. On March 19, 2003, HIOSH Safety Compliance Officer Hervie Messier (Messier) inspected the HDCC worksite. When Messier walked onto the worksite at around 10:00 a.m., he observed Ramos and HSI's steel worker climbing the frame of the HSI scaffold from the ground to access the roof of the porte cochere. This took just a "few moments" or about a minute, according to Messier. Tr. Vol. I, p. 28. The scaffold was approximately 15 feet high and five feet wide. Rollers were attached to the base of each leg. One six foot frame was set on the top of another six foot frame. The wheels also gave the scaffolding additional height. Two planks were laid across the frame to act as work platforms. The lower plank was used as a work deck was approximately six feet from the ground. The higher plank was eight feet from the ground. From a distance of about 30 yards he saw that the scaffold did not have an access ladder to the scaffold or a diagonal cross brace at the base to prevent the scaffold from racking, i.e., collapsing because of the lack of lateral support. Before proceeding to HDCC's field office for an opening conference, Messier took several photographs of the scaffold from different angles sitting in a concrete area fronting Queen's. Messier took no photographs of the scaffold with HSI employees.

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- A. Yes.
- Q. Do you know if he saw the HSI scaffold?
- A. Yes.
- Q. How do you know that?
- A. Because every day he would – while we was working, he would come over there to see if it was all hooked up onto the roof.
- Q. But how do you know he saw or observed the HSI, this particular scaffold?
- A. He didn't – well, I have no proof of his, that he knew that was our scaffold, but he was there touching it. He was there with me, used to lean on it.

Ramos Depo. Tr. pp. 36-37.

14. When Messier saw Ramos, he had just rolled out the HSI scaffold from a corner area. Ramos testified that, “We was finished already, and I just rode it out to the concrete area to take it back down, and that is when they caught us.” Ramos Depo. Tr. pp. 17-18. HSI did not use or work on the HSI scaffold after they finished the gutter and roof work on March 18, 2003.² This is some time after DeLaura made his early morning walk through inspection, and explains why DeLaura did not see the HSI scaffold in the condition and at the location where Messier found it on inspection.

²At his deposition, Ramos testified as follows:

- Q. [By Mr. Lau] On March 19, during the morning of March 19 prior to the HIOSH inspection, did anybody use that HSI scaffold?
- A. [By Mr. Ramos] On the 19th?
- Q. Yes, in the morning before the HIOSH inspection.
- A. Oh, just before the HIOSH inspection, we rode, we rode it out to here already, the concrete. We was going to take it down.
- Q. And your –
- A. And then that is when he came, and he said – and that is when I guess he told us all that.
- * * *
- A. And he said he seen somebody on the scaffold, but that person was on the scaffold to take apart the scaffold.
- Q. Was that explained to Mr. Messier?
- A. Yes. I told him, but he said he seen us up there for I think he said 15 minutes or longer. To my knowledge, I know he said he seen us up there, not us but one person up there.
- Q. Did he identify that person as an HSI employee?
- A. Yes. Because I told him to get down there, you know.
- Q. Oh, you saw that HSI employee, too?
- A. Yeah. We was over there. We was getting ready to take it down.
- Q. And do you recall specifically informing Mr. Messier that the employee was on top the scaffold for the purpose of dismantling?
- A. No, I didn’t tell him that.
- Q. What did you tell him about? Did you tell him anything about the –
- A. I didn’t tell him anything. He just said our scaffold is unsafe, so that is why I called him down right way, you know. . . .

Ramos Depo. Tr. pp. 21-23.

15. When Messier arrived at the HDCC field office, he met with DeLaura, who asked if Messier could wait while he called in Brooks to be present for the inspection. While waiting, Messier reviewed HDCC's OSHA 200 logs and the worksite safety documents. All required documents were in order. At around 10:30 a.m., Messier began an opening conference and his walkaround inspection with Brooks accompanying him.
16. Upon approaching the scaffold with Brooks, Messier saw the same sheet metal worker climb off the scaffold to the ground. This lasted no more than 45 seconds. According to Messier, Brooks did not see the employee as they approached the scaffold. Messier relied on Ramos, who told him that he was not a "competent person" for scaffolding and that the scaffold in question was on site for two days.
17. Upon inspection of the HSI scaffold Messier measured the top deck to be eight feet from the ground. The lower deck was estimated to be six feet from the ground. Besides lacking an access ladder and missing a diagonal brace, Messier found that the scaffold was not plumb and level presenting a fall hazard to the workers on the scaffold. The scaffold was on rollers and lacked an adjustable screw jack wheel to level the scaffold, thus Messier determined with a inclinometer that the scaffold was six degrees off center. The tilt in the scaffold was due to the tilt of the concrete floor of the porte cochere where the scaffold was located. Messier's photograph of the scaffold also shows the wheels were locked in position.
18. DeLaura never saw HSI employees use the scaffold in question and would not have allowed them to use the scaffold to access the roof. On two different occasions he stopped HSI employees from using their scaffolding due to deficiencies he observed and they responded by renting a scaffold that met HDCC's concerns, the Safway scaffold. This scaffold was not cited by the inspector and was located on the other side of the porte cochere. DeLaura was there when Brooks had concerns with the Safway scaffold and its use and spoke to the HSI employees utilizing the scaffold to be sure that they knew what they were doing.
19. On April 7, 2003, the Director issued a Citation and Notification of Penalty against HSI for failing to provide proper access to the scaffold platforms, failing to have a diagonal brace on the scaffold, failing to properly level the scaffold and failing to have a competent person for the inspection, erection, and use of the scaffold. Each of these violations was characterized as "Serious" and penalties totaled \$1,500. HSI agreed to a reduction of its penalty, rather than contest the citation.

20. Messier issued the instant citation to HDCC under the Multi-Employer Responsibility or general duty clause of the regulations when he was told by HSI employees that there was no competent person for scaffolding on site, and the scaffold in question was on site for two days prior to the inspection. Messier testified that Brooks should have seen the scaffolding and known that it did not meet HIOSH standards, even though he did not know whether or not DeLaura or Brooks had knowledge of or were aware that HSI employees were using a defective scaffold. Brooks told him that he must have “overlooked” the scaffold when he did his inspection the day before. Messier also testified under questioning by the Board that he had no way of knowing where the scaffolding was kept prior to the inspection on March 19, 2003.
21. The Board finds that Brooks did not see the HSI scaffold during his inspection on March 18, 2003, because it was not in the location where Messier saw it in open view the morning of March 19, 2003 when Ramos moved it out to the concrete area to dismantle it. This is also confirmed by Brooks’ photograph of the Safway scaffold during his inspection, which shows the gutters on the mauka end were already completed, and the HSI scaffold was not in the area where Messier found it.
22. Messier testified that HIOSH’s policy and his practice in all instances where a subcontractor is cited for a serious violation, he always cites the general contractor for a violation of the general duty clause. He exercises no discretion and such practice of citing the general was at the instruction of his supervisors.
23. On April 7, 2003, HIOSH issued the instant Citation and Notification of Penalty for violation of HAR § 12-110-2(f)(1)(A) which states:

Where one contractor is selected to execute the work of a project, that contractor did not ensure compliance with requirements of the standards of part 3 of this title from the contractor’s own employees as well as from all subcontractor employees on the project; i.e., sub contractor employees were using 8 foot high mobile scaffold constructed of fabricated frame components without an access ladder, diagonal bracing, and not leveled.

The characterization of violation was “Serious” and the penalty imposed was \$1,100.

24. HAR § 12-110-2(f)(1)(A) provides:

Prime contractor and sub-contractor responsibilities.

- (1) By contracting for full performance of a contract, the prime contractor assumes all obligations prescribed as employer responsibilities under the law, whether or not any part of the work is subcontracted.
 - (A) Where one contractor is selected to execute the work of a project, that contractor shall ensure compliance with the requirements of the standards of part 3 of this title from the contractor's own employees as well as from all subcontractor employees on the project.

DISCUSSION

To establish a violation of a standard, the Director must prove: “(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.”

Actual knowledge of a violative condition is not required to establish a violation. Knowledge is presumed where an employer knows or should have known of a violative condition with the exercise of reasonable diligence. Director v. Honolulu Shirt Shop, OSAB 93-073 at 8 (Jan. 31, 1996); see also Director v. Charles Pankow Builders, Ltd., OSAB 91-015 (Jan. 28, 1992) (employer could have known of the violation with the exercise of reasonable diligence); MCC of Florida, Inc., 1981 OSCH § 25,420 (constructive knowledge demonstrated where violation detectable through exercise of reasonable diligence). Indeed, “[a]n employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative conditions.” N&N Contractors, Inc. v. Occupational Safety & Health Review Com’n., 255 F.3d 122, 127 (4th Cir. 2001). “Factors relevant in the reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules.” Id.

There is no evidence to support a conclusion that HDCC had actual knowledge of the use of the scaffold in question. More specifically, the Director could not rebut testimony by HSI's foreman that the HSI scaffold for which HSI was cited, was not used at any time on March 19, 2003 in the condition and at the location where it was inspected by Messier. Ramos had finished using the HSI scaffold to put up gutters on the mauka end of

the porte cochere on March 18, 2003. When he saw Messier on March 19, 2003, he had just brought out the scaffold to dismantle. DeLaura would not have seen the scaffold during his early morning walk through because it was not in the location where Messier found it. Accordingly in order to affirm the citation the Board must find constructive knowledge, i.e., that HDCC should have known of the violative condition or HDCC failed to use “reasonable diligence.”

Based on the record, the Board concludes that HDCC exercised reasonable diligence in having all safety documentation for the project, including a site specific safety manual for HSI, in order at the Project office. The General Superintendent was knowledgeable on safety requirements and inspected the Project site several times a day and could elaborate to the Board’s satisfaction his enforcement not once but twice on scaffolding used by HSI, including requiring HSI to rent a scaffold that met safety requirements for the job at hand. In addition, HDCC employed a Safety Officer to assure compliance and such Safety Officer inspected the Project, in addition to the Superintendent, to assure compliance and cited examples of how he worked with the subcontractors including HSI to insure safety compliance. In addition, weekly safety meetings were conducted and included the subcontractors.

Furthermore, the Director failed to show by a preponderance of evidence that Brooks saw the HSI scaffold during his inspection on March 18, 2003, and therefore, should have known it violated the scaffolding standards. The Board finds that Brooks could not have seen the HSI scaffold during his inspection on March 18, 2003, because it was not in the location where Messier saw it in open view the morning of March 19, 2003 when Ramos moved it out to the concrete area to dismantle it and saw Messier. This is also confirmed by Brooks’ photograph of the Safway scaffold during his inspection, which shows the gutters on the mauka end were already completed, and the HSI scaffold was not in the area where Messier found it. Brooks saw, photographed and inquired about the Safway scaffold upon his inspection, and not the HSI scaffold found by Messier. The record does not support a finding that Brooks saw the HSI scaffold or employees working on the HSI scaffold during his inspection. Messier’s reliance on Brooks’ statement that he must have “overlooked” the scaffold is simply not enough to convince this Board that HDCC failed to exercise reasonable diligence.

From the record of the hearing the Board also concludes that the citing of HDCC for the violation of HSI was more a result of HIOSH’s practice of also citing the general contractor whenever a subcontractor is cited for a serious violation. The emphasis of the investigation only on the subcontractor without investigation on HDCC’s knowledge or use of reasonable diligence leads to this conclusion. The Director contends HDCC violated the “general contractor responsibility clause” based on five factors: the hazard; the recognition of the hazard, the correctability of a hazard, the exposure to the hazard, and the responsibility for corrections. On appeal, it is the Director’s burden to prove each element to support its citation. The Board concludes that the Director has failed to prove HDCC

violated the general responsibility clause by concluding that HDCC failed to use reasonable diligence given the uncontested citation to HSI for deficiencies in its scaffold which Messier found in open view.

Having concluded that HDCC had neither actual or constructive knowledge of the violative conditions alleged in the HSI violations, the Board hereby vacates the citation.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant contest pursuant to HRS §§ 396-3 (Supp. 2002) and 396-11.
2. In enforcing the Standards, the Director has the burden of proof.
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. The Director’s assumption of lack of reasonable diligence on the part of HDCC based on the characterization of HSI’s violation of the scaffold standards as “serious” was erroneous and the issuance of the instant Citation was improper.
5. The record establishes that HDCC had neither actual or constructive knowledge of the violative conditions alleged in the HSI citations and therefore did not violate the standard as alleged in the instant Citation.
6. The Director failed to prove that HDCC violated Hawaii Administrative Rules § 12-110-2(f)(1)(A).

ORDER

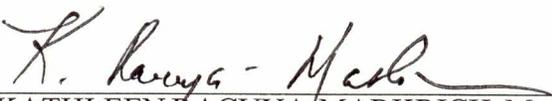
Citation 1, Item 1 for violation of HAR § 12-110-2(f)(1)(A) is vacated. The characterization of "serious" and proposed \$700.00 penalty are also vacated.

DATED: Honolulu, Hawaii, May 18, 2004.

HAWAII LABOR RELATIONS BOARD


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CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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