LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

DIRECTOR, DEPT. OF LABOR AND INDUSTRIAL RELATIONS, Complainant - Appellee, vs MONARCH MASONRY, Respondent - Appellant.	)	CASE NO. OSAB 75-5 (9-76)

DECISION AND ORDER

This occupational safety and health case came before the Labor and Industrial Relations Appeals Board on appeal by Monarch Masonry, respondent, from a citation and proposed penalty issued by the Director of the Department of Labor and Industrial Relations, dated August 12, 1975.

The sole issue before the Board is whether the violation was an isolated occurrence that exempted the respondent from liability.

FINDINGS OF FACT

1. By written stipulation, dated February 26, 1976, the following facts were stipulated:

a. On July 9, 1975, one of Respondent's employees was observed setting tiles on the unguarded and exposed edge of the 20th floor of the building under construction. The drop from the 20th floor to the ground was approximately 160 feet.

b. After laying a few feet of tile on the floor, the employee walked away from the edge of the building. He returned to the edge of the building and continued to lay more tile. He then stopped and stood at the edge looking down toward the ground with his left hand holding on to a reinforcing steel rod. The period of time during which the employee was near the edge of the building was approximately ten minutes.

c. At no time was the employee using a life line.

d. There was substantial probability that death or serious bodily injury could result to the employee from the hazard of working on the edge of the building 160 feet above the ground without a life line.

e. The hazard was a violation of §205.8[1/] of the Hawaii Occupational Safety and Health Standards, Rules and Regulations.

f. The violation was a serious violation.

2. On August 12, 1975, the Director issued a citation and a proposed penalty of $650.00.

3. At a hearing held on February 26, 1976, the Respondent testified that he had instructed his employees to wear life lines. Respondent also introduced various exhibits consisting of written documents. Most of the

---

1/ Section 205.8 GLOVES AND OTHER PROTECTIVE APPAREL.

Other personal safety equipment or clothing, such as rubber gloves, rubber boots, leggings, aprons, safety shoes, gloves, hand pads, safety belts, life lines, buoyant vests, shall be worn by employees who are exposed to hazards where such devices may be expected to prevent injury. Employees shall not wear torn or loose clothing while working around moving machinery.

documents post date the subject incident. Two documents dated April 23, 1973 and December 6, 1974 issued before the incident were addressed to the employers on two separate projects. These documents purport to summarize the safety program of Respondent at the apparent request of the employer. Neither document specifically required the use of safety belts and life lines by employees.

4. The only document addressed to employees which mentions the use of life lines is dated August 25, 1975, after the date of the incident.

5. No sanctions for failure to follow the safety instructions are set forth in the documents.

6. The inspector who issued the citation testified at the hearing that he had inspected the job on July 8, 1975, the day before the incident. At that time the inspector notified several contractors, including the Respondent through its foreman, to require all employees to wear safety belts after observing employees, including the employee subsequently involved in the July 9, 1975 incident, working near the edge of a building at the worksite without safety belts. It was determined that no regularly scheduled safety program was being carried on by the Respondent. No specific written safety instruction had been issued for the job.

The inspector further testified that on July 9, 1975, he returned to the construction site and noted the subject violation.

CONCLUSIONS OF LAW

The isolated occurrence exception to the employer's liability for a violation of a standard has been formulated as follows:

> "An employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all the Secretary's standards at all times. An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation ... by the employer." Standard Glass Co., Inc., 1 OSHC 1045 (1972) (Emphasis added).

The elements of proof for an "isolated occurrence" defense are that the incident which is alleged as the basis of the violation is a (1) deviation, (2) from a company work rule or instructions, (3) which are enforced, and (4) that the deviation was unknown to the employer. Murphy Pacific Marine Salvage Co., 2 OSHC 1464, 1465 (1975) (Concurring Opinion).

The defense is an affirmative defense and the employer bears the burden of proving each element. Murphy, supra.

The reasons for placing the burden on the employer are twofold:

> "The first is that the facts necessary to prove an isolation occurence will usually be peculiarly within the knowledge of an employer. He is in the best position to know, and to marshall the evidence to prove what safety policies and practices exist at the worksite and how they are enforced. Complainant, whose knowledge of respondent's operations is ordinarily limited to conditions prevailing at the time of inspection, would have much greater difficulty proving the routine practices at the site. The second reason is that when an infraction is observed, it is more probable that it represents the general practice at a site, rather than a departure from the usual practice. If it is contended that it does not represent the usual practice, it is more reasonable to place the burden of proving that assertion upon the party who advances it." Murphy, supra, 2 OSHC at 1465. (Concurring Opinion)

This was not a brief isolated incident. As noted by the testimony of the inspector the failure to use life lines and safety belts was observed on two consecutive days.

Although there may have been general work rules issued, there were no work rules issued for this particular job, and no specific instructions for the use of life lines, except in a document postdating this incident.

In addition, there was no evidence of enforcement of Respondent's safety program. The employer must have an enforcement program and follow through to ensure compliance. J. L. Manta, Inc., 1 OSHC 3017 (1972); Morrison-Knudsen Co. & Associates, 1 OSHC 3034 (1972).

There was no evidence of any sanction imposed or publicized by Respondent to enforce its safety programs. Even if the employer could not have detected the isolated incident the employer is still liable if the violation might have been prevented through precautions concerning the hiring, training and sanctioning of employees:

> "We note, first, that if an employee is negligent or creates a violation of a safety standard, that does not necessarily prevent the employer from being held responsible for the violation. See, e.g., REA Express, Inc. v. Brennan, 495 F.2d 822, 825 [1 OSHC 1651] (2d Cir. 1974); National Realty & Constr. Co. v. OSAHRC, 489 F.2d 1257, 1260 n.6, 1266 n.36 [1 OSHC 1422] (D.C. Cir. 1973). True, an employer is not an insurer under the Act. But an employer is responsible if it knew or, with the exercise of reasonable diligence, should have known of the existence of a serious violation. A particular instance 'of hazardous employee conduct may be considered preventable even if no employer could have detected the conduct, or its hazardous nature, at the moment of its occurrence, ... [where] such conduct might have been precluded through feasible precautions concerning the hiring, training, and sanctioning of employees.' National Realty, supra, 489 F.2d at 1266-67 n.37 (Emphasis Added)."

* * * * * * *

"An employer must take reasonable precationary steps to protect its employees from reasonably foreseeable recognized dangers that are causing or are likely to cause death or serious physical injury. And precautionary steps, of course, include the employer's providing an adequate safety and training program." (Emphasis added) [Citations omitted.]

Brennan v. Butler Lime and Cement Company and OSAHRC, 520 F.2d 1011, 1017 [3 OSHC 1461, 1465] (7th Cir. 1975).

The Board finds that the Respondent has not carried its burden of proving the affirmative defense of an isolated occurrence.

ORDER

The citation and penalty of the Director are hereby affirmed, and the Respondent is directed to pay the penalty forthwith.

Dated: Honolulu, Hawaii, June 28, 1976.

NADAO YOSHINAGA, Chairman

I CONCUR:

EDNA T. TAUFAASAU, Member

YUKIO TAKEMOTO, Member

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