

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of ) CASE NO. OASB 87-9  
)  
DIRECTOR, DEPARTMENT OF LABOR )  
AND INDUSTRIAL RELATIONS, )  
)  
Complainant, )  
)  
vs. )  
)  
THOMAS HALE, )  
)  
Respondent. )

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LIB APPEALS BOARD  
STATE OF HAWAII

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DECISION AND ORDER

This occupational safety and health case is before the Board on a written contest by Respondent, THOMAS HALE, from an order of revocation of his certificate of fitness to use explosives, issued by the Administrator of the Division of Occupational Safety and Health ("DOSHS"), on behalf of the Director of Labor and Industrial Relations, on April 8, 1987. The order charges that misfired explosives were left in the trench at the Kuakini Highway Interceptor Sewer Project at the Royal Contracting Company jobsite, in violation of Chapter 396, H.R.S., and of the Division of Occupational Safety and Health, Occupational Safety and Health Standards ("DOSHS Standards"). On April 7, 1987, a citation and notification of penalty was issued charging Respondent with a violation of §12-125-7(c)(1) of the Standards. Respondent contested both the revocation of his certificate and the citation and notification of penalty.

At the pre-trial conference on this matter, the parties agreed that §396-9(a) and (g), H.R.S., and §§12-125-3(b); 12-125-7(c)(1), (c)(13), (d)(7); 12-125-3(o)(1)(E) and (J), DOSH Standards, were applicable to this proceeding.

The issue before the Board is whether the revocation of THOMAS HALE's certificate of fitness for the use of explosives in the State of Hawaii was appropriate under §396-9(a) and 396-9(g), H.R.S., and Division of Occupational Safety and Health, Occupational Safety and Health Standards, sections 12-125-3(b), 12-125-7(c)(1), (c)(13), (d)(7); 12-125-3(o)(1)(E) and (J).

Respondent's exhibits "A-N" and Complainant's exhibits "1 - 12" were admitted into evidence.

#### FINDINGS OF FACT

1. Respondent, THOMAS HALE, was a general field superintendant of Blasting Enterprises, Inc. From May 1, 1986 through February 1987, HALE was responsible for company field operations on the islands of Maui and Hawaii. Respondent held an active certificate of fitness for the use of class "A" explosives, issued on May 1, 1986.

2. Respondent supervised and trained company blasters, and was responsible for pre-blast planning on all of Blasting Enterprises' jobs.

3. On December 8, 1986, Respondent applied with DOSH for a permit to use explosives for a blasting contract at a

jobsite located along the Kuakini Highway. Blasting was necessary to prepare the ground for the general contractor, Royal Contracting, who was to excavate and install a sewer trench.

4. Between December 9 and December 15, 1986, the Kuakini Trench site was prepared for blasting. From December 15, 1986 through January 8, 1987, blasts were loaded and detonated under HALE's direct supervision. On January 8, 1987, HALE personally detonated the only shots fired on that day, numbered "6" and "7", at the Kuakini Trench.

5. On March 9, 1987, a hoe-ram operator, employed by Royal Contracting, was excavating the blasted area at the Kuakini trench when he hit a previously unexploded charge which had been left at the site. The blast sent rock flying in a 200° radius. The operator was hit in the chest and sustained serious injury. The blast also caused property damage to automobiles parked in the vicinity, as far as 98 feet from the blast.

6. On March 10, 1987 and March 11, 1987, an investigation was conducted by Investigator Taniyama of the Division of Occupational Safety and Health. Following the production of blast reports from shots #6 and #7, it was determined that the March 9, 1987 explosion had been caused by a misfire occurring on January 8, 1987. Investigator Taniyama telephoned Respondent on Maui after learning that he was the licensed powderman on the job, and instructed him to investigate

the situation. Respondent did not come over personally, but sent Joyner, an unlicensed powderman, to hand dig and search for traces with a shovel. Joyner could not conduct a search because he did not possess a certificate of fitness. In the meantime, the contractor refused to continue digging because no licensed powderman was available to check for loose explosives.

7. It was not until two weeks after the misfire, that Respondent arrived to search for additional unexploded charges.

8. As a result of Inspector Taniyama's investigation, a citation and notification of penalty was issued on April 7, 1987, charging that a violation of §12-125-7(c)(1) had occurred.

9. Michael Rawls, an employee of Blasting Enterprises, testified that on January 8, 1987, he was a laborer on the Kuakini Trench project, working on shots #6 and #7. In spite of company policy that the blaster on the job was responsible to make the pre-blast plans and the final blast report, Rawls was asked to prepare and sign the final report for those shots. In the absence of any written pre-blast plans for shot #6 and #7, Rawls testified that HALE had to be called on the telephone to obtain the information on placement of delays on the holes. Rawls further stated that he had to inventory the powder magazine to prepare the final blast reports, since no records were kept of the explosives used from day to day. We credit Rawls' testimony.

10. In violation of §12-125-7(c)(1), Respondent had not prepared a completed written preshot plan for the Kuakini Trench project prior to loading the blast holes.

11. In violation of §12-125-7(c)(13), Respondent failed to keep an accurate running inventory of the explosive materials used and stored for the Kuakini Trench operation.

12. In violation of §12-125-7(d)(7), Respondent, the only powderman who held a permit for the Kuakini Trench project, failed to handle the apparent misfire after the March 9, 1987 injury as required by DOSH Standards.

13. Respondent's conduct created a hazard and a risk to persons and property.

#### CONCLUSIONS OF LAW

Revocation of a certificate of fitness to use explosives is governed by §396-9(g), H.R.S., Hawaii Occupational Safety and Health Law, as follows:

§396-9 Explosives.

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(g) Revocation of permits and certificates. Any permit or certificate of fitness issued under this section may be revoked or suspended by the Director on any ground specified in the rules and regulations promulgated under this chapter, or for any violation of this section.

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The DOSH is charged with promulgation and enforcement of appropriate rules and regulations pertaining to certificates of fitness to use explosive materials. In the case of a revocation of a certificate of fitness, §12-125-3(o)(1), DOSH Standards, states in pertinent part:

- (1) A permit or certificate may be denied or revoked for any of these reasons:

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(E) Violation of any explosive law, standard or rule;

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(J) For any other reason which in the discretion of the director would create a hazard or risk to persons or property.

Under this regulatory scheme, the Director may revoke a certificate of fitness on a showing of a violation of an explosive standard, law or rule. He also has the discretion to revoke such certificate for any other reason which would create a hazard or risk to persons or property. Thus, a certificate to use explosives may be revoked by the Director under a violation of either or both provisions (E) or (J), above.

In this case, the Director had determined, based upon investigation of the March 9, 1987 explosion, that Respondent, the permit holder, was responsible for the consequences of the loading and firing at the Kuakini Trench on January 8, 1987. The Director issued an order of revocation, citation and

notification of penalty for the alleged violations. On the record before us, we conclude that the Director's revocation of Respondent's certificate should be upheld, for a violation of DOSH Standards 12-125-3(b), 12-125-7(c)(1), 12-125-7(c)(13) and 12-125-7(d)(7).

In addition to the Director's power to revoke an individual's certificate of fitness upon a finding of a violation of DOSH Standards, it is also within his discretion to revoke a certificate if he determines that the holder's activities constitute a hazard or risk to persons or property. In this case, a risk to persons and property was created by Respondent's conduct on the Kuakini Trench project. On March 9, 1987, a misfire occurred which seriously injured a construction worker, resulted in property damage, and in the weeks immediately following the incident, created a risk to pedestrians and vehicles traveling along the Kuakini Highway.

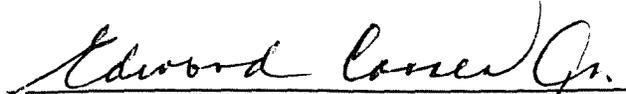
We are unable to find the Director erred in the exercise of his discretion to revoke Respondent THOMAS HALE's certificate of fitness, under either §12-125-3(o)(1)(E) or (J) and §396-9(g), H.R.S. Accordingly, we conclude that the revocation of Respondent, THOMAS HALE's, certificate of fitness for the use of explosives was appropriate.

#### ORDER

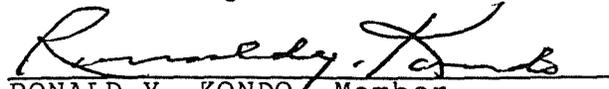
Based on the foregoing findings of fact and conclusions of law, and in accordance with Chapter 396, H.R.S, the citation

and notification of penalty issued on April 7, 1987, and the order of revocation of the certificate of fitness issued on April 8, 1987, is hereby affirmed in accordance with §396-9(g), H.R.S., and §12-125-3(o)(1)(E) and(J), State of Hawaii Occupational Safety and Health Standards.

Dated: Honolulu, Hawaii, MAR 22 1989.

  
EDWARD L. CORREA, JR., Chairman

  
CAROL K. YAMAMOTO, Member

  
RONALD Y. KONDO, Member

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

