

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)
 DIRECTOR, DEPARTMENT OF LABOR)
 AND INDUSTRIAL RELATIONS,)
 Complainant,)
)
 vs.)
)
 PAN-PACIFIC CONSTRUCTION, INC.,)
 dba PPC TOKYU JOINT VENTURE,)
 Respondent.)

CASE NO. OSAB 93-013
 (OSHCO No. C8955)
 (Report No. 103855581)

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 STATE OF HAWAII

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DECISION AND ORDER

This occupational safety and health case is before the Board on appeal by Respondent, PAN PACIFIC CONSTRUCTION, INC., dba PPC TOKYU JOINT VENTURE, from the Citation and Notification of Penalty issued by the Administrator of the Division of Occupational Safety and Health, Department of Labor and Industrial Relations on October 20, 1992.

The sole issue on appeal is:

Whether Respondent was properly cited for the condition described in Standard Section 12-141-4(c)(4)(A). [Subsumed in this issue is whether Complainant can change the alleged violation from Section 12-141-4(a) to Section 12-141-4(c)(4)(A)].

- a. If so, whether the characterization of the violation as "serious" is appropriate.
- b. If so, whether the imposition and the amount of the penalty is appropriate.

FINDINGS OF FACT

1. On July 22, 1992, the Department of Labor and Industrial Relations, Division of Occupational Safety and Health ("DOSH") conducted a planned inspection of Respondent's Kakaako



Waterfront Park jobsite. DOSH's compliance officer was escorted by Respondent's representative and project site superintendent, Nestor Felipe.

2. On August 5, 1992, DOSH issued a Citation and Notification of Penalty against Respondent for an alleged repeat violation of Section 12-141-4(a) ("Citation #1") of the Hawaii Occupational Safety and Health Standards ("HIOSHS"), relating to an employer's responsibility to use either ground-fault circuit interrupters ("GFCI") or have in place an assured equipment-grounding program ("AEGP"). DOSH proposed a penalty of \$200.00 against Respondent.

3. By letter dated August 11, 1992, Respondent timely contested the citation and requested an informal conference. The informal conference was held, and Respondent presented evidence to establish that Respondent had an AEGP in place. DOSH accepted this information and rescinded the violation, as the basis for the issuance of Citation #1 no longer existed.

4. During the course of the informal conference, one of DOSH's safety branch managers expanded his scope of questions to Mr. Felipe beyond the scope of Citation #1. Mr. Felipe, for whom English is a second language, and whose facility with English is at the trade level as opposed to a managerial level, became uncomfortable with the manager's adversarial questioning.

5. When asked if he knew about continuity testing, Mr. Felipe was confused and said he did not understand what continuity meant. From that remark, DOSH inferred that

Mr. Felipe did not know how to implement the AEGP, and issued an amended Citation citing Respondent for allegedly violating another standard, Section 12-141-4(c)(4)(A).

6. Section 12-141-4(c)(4)(A) calls for the performance of certain tests. Section 12-141-4(c)(5) identifies when testing can be performed and the manner in which the requirements of the preceding section can be satisfied.

7. Respondent's Safety Manager, Clifford Maeda, made periodic visits to Respondent's different construction sites, and to ensure that the Standards were being observed and performed, he conducted random tests including the continuity test required by Section 12-141-4(c)(4)(A).

8. Because of the minimal number of electrical equipment where continuity testing was critical at the Kakaako Waterfront Park jobsite, during the course of a three (3) month cycle Mr. Maeda would check each and every electrical equipment. On such occasions, he found every electrical appliance requiring continuity to have the necessary electrical continuity, or where equipment was determined to be faulty, caused such equipment to be repaired.

9. Mr. Maeda carried testing equipment, which included the circuit tester to test the presence of continuity, to the various sites. Entries into Respondent's Monthly Equipment Service indicate all testing to be negative.

10. Given a less stressful atmosphere, Mr. Felipe could have responded in a fashion which would not have given rise to the charge which emanated during the informal conference.

CONCLUSIONS OF LAW

We conclude that Respondent was not properly cited for the condition described in Standard 12-141-4(c)(4)(A), even assuming the Director may amend a citation, by modifying the characterization of the alleged violation or by alleging a violation of a different standard, based upon additional information obtained during the course of an informal conference.

Respondent was initially cited for an alleged repeat violation of Standard 12-141-4(a), relating to an employer's responsibility to use either ground-fault circuit interrupters ("GFCI") or have in place an assured equipment-grounding program ("AEGP"). At the informal conference, Respondent presented evidence, which DOSH accepted, to establish that Respondent had an AEGP in place.

After concluding that no acts existed to justify the issuance of Citation #1, the questioning continued. DOSH's safety branch manager questioned Mr. Felipe, and expanded his scope of questions beyond the scope of Citation #1. Mr. Felipe, for whom English is a second language and whose facility therewith is at the trade level, became uncomfortable and nervous. Therefore, when asked if he knew about continuity

testing, Mr. Felipe was confused and said he did not understand what continuity meant.

Relying solely upon one statement which Mr. Felipe made in a state of nervousness and confusion, DOSH inferred that Mr. Felipe did not know how to implement the AEGP. Based upon that one statement, DOSH proceeded to amend the citation, by charging Respondent for allegedly violating Standard 12-141-4(c)(4)(A). No field inspection was performed, and no closing conference was held relative to this alleged violation.

Standard 12-141-4(c)(4)(A) calls for the performance of certain tests, stating that all equipment grounding conductors shall be tested for continuity and shall be electrically continuous. Immediately following is Section 12-141-4(c)(5), which prescribes the manner in which the preceding section's requirements can be satisfied. Section 12-141-4(c)(5)(D) states in pertinent part that all required tests shall be performed at intervals not to exceed three (3) months.

Respondent's Safety Manager made periodic visits to Respondent's different construction sites and conducted random testing including the continuity test as required by Standard 12-141-4(c)(4)(A). Every three months, Respondent's Safety Manager tested each and every item of electrical equipment at the Kakaako Waterfront Park jobsite. On these occasions, every electrical appliance requiring continuity had the necessary electrical continuity, and every electrical appliance determined to be faulty was repaired.

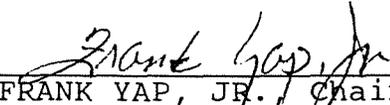
Complainant has not presented any evidence to support its contention that Respondent violated Standard 12-141-4(c)(4)(A). Complainant relied upon Mr. Felipe's statement that he did not know what continuity testing was, to infer that Respondent violated said section. Respondent, however, has presented evidence to establish that it did not violate said Standard, but rather, acted in conformity therewith.

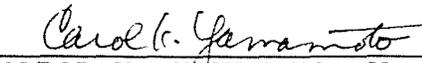
Based upon the foregoing findings of fact, we conclude that Respondent was not properly cited for the condition described in Standard Section 12-141-4(c)(4)(A). Accordingly, we do not reach the sub-issues regarding the characterization of the violation and the imposition and the amount of the penalty.

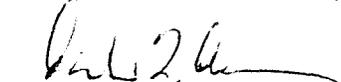
ORDER

The Citation and Notification of Penalty issued on October 20, 1992, is hereby dismissed, in accordance with the foregoing findings of fact and conclusions of law.

Dated: Honolulu, Hawaii, MAR 30 1995.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


CHARLES T. AKAMA, Member

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

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.