

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

|                                |   |                        |
|--------------------------------|---|------------------------|
| In the Matter of               | ) | CASE NO. OSAB 93-068   |
| DIRECTOR, DEPARTMENT OF LABOR  | ) | (OSHCO No. MO685)      |
| AND INDUSTRIAL RELATIONS,      | ) | (Report No. 120657119) |
| Complainant                    | ) |                        |
|                                | ) |                        |
| vs.                            | ) |                        |
|                                | ) |                        |
| PAN PACIFIC CONSTRUCTION, INC. | ) |                        |
| dba PPC-TOKYU JOINT VENTURE,   | ) |                        |
| Respondent.                    | ) |                        |

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FILED  
LABOR APPEALS BOARD  
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 March 24, 1993.

The sole issue on appeal is:

Whether Respondent violated Standards Section 12-130-3(a)(12) and Section 12-130-3(a)(8).

- a. If so, whether the characterization of the violation as "repeat serious" is appropriate.
- b. If so, whether the imposition and amount of the proposed \$17,500.00 penalty is appropriate.

FINDINGS OF FACT

1. On February 2, 1993, a compliance officer for the Division of Occupational Safety and Health (DOSHS), conducted an inspection of Respondent's Pearl City jobsite.

2. On March 24, 1993, DOSH issued a Citation and Notification of Penalty (Citation) against Respondent. The Citation alleged a violation of Section 12-130-3(a)(12), Hawaii Occupational Safety and Health (HIOSH) Standard, for an overhang over the end supports at the south wall form, and a violation of Section 12-130-3(a)(8) for use of improper wood for scaffold planks at the north wall form and south wall form. DOSH proposed a penalty of \$17,500.00.

3. Respondent's assistant safety officer, Gail Livoti, and carpenter foreman, Raymond Botelho, had escorted the compliance officer through the inspection.

4. A close-up examination of the scaffold planks used was not conducted. The dimensions were estimated and the planks photographed from a 30-foot distance.

5. At the closing conference, the compliance officer discussed the overlapping of planks, but not the overhanging of planks.

6. By memorandum dated February 23, 1993, Ms. Livoti indicated to Respondent's safety manager, Clifford Maeda, that the three items discussed during the closing conference related to an employee's descent from a column form without using a ladder, scaffold planks measuring 1 1/2 feet by 11 1/2 feet instead of 2 feet by 12 feet that were stacked on the ground, and wall form scaffold planks overlapping in the center. There was no mention of any overhang violation in Ms. Livoti's memorandum.

7. At the time of the inspection, the scaffold planks of the north wall form and south wall form were in place for removal and were not to be used by anyone.

8. The inspector did not observe any workers on the subject scaffolding at the time of his inspection.

9. An informal conference was held sometime after the closing conference. At the informal conference, Mr. Maeda sought clarification of the variance between the violations alleged in the Citation and the facts developed during the inspection. The compliance officer clarified the alleged violation by drawing a diagram showing the overlapping of planks.

10. Stewart Williams, a structural engineer, testified that the lumber used for the north wall form and south wall form scaffold planks was Douglas Fir #2. He opined that, considering the size of the lumber, the height of the scaffolding, the span between supports, the weight to be borne, and the assumptions being factored into the calculations, the lumber used met the standards set forth in Section 12-130-3(v)(1) and (2). We credit Mr. Williams' opinion.

#### CONCLUSIONS OF LAW

We conclude that Employer did not violate Standards Section 12-130-3(a)(12) and Section 12-130-3(a)(8).

a. Standard Section 12-130-3(a)(12) reads as follows:

(12) Scaffold planks shall extend over their end support not less than 6 inches nor more than 12 inches.

A general duty citation must involve exposure of a hazard to employees. In the instant case, no hazard existed, because the subject scaffold planks were being removed and were not being used by anyone. Further, the compliance officer gathered facts supportive of an overlap situation; he did not present facts to substantiate a situation of overhang, which was the basis for Respondent's alleged violation.

Moreover, the plain language of Section 12-130-3(a)(12) refers to a measurement taken from the end support of a scaffold and pertains to an overhang -- not an overlap, involving one plank over the other. The photograph taken of the overhang 16 feet above the ground and from a distance of 30 feet is without probative value in determining whether the overhang deviated from the standard. Even if Respondent was cited for an overhang violation, no actual measurements were taken to determine whether, in fact, Respondent violated the standard.

b. Standard Section 12-130-3(a)(8) reads as follows:

(8) All planking shall be scaffold grade, or equivalent, as recognized by grading rules for the species of wood used. The maximum permissible spans for 2 x 10-inch or wider planks shall be as shown in table 130-3.

Section 12-130-3(a)(8) states that planking shall be scaffold grade or equivalent, and thereby allows the contractor to use other materials which provide the necessary structural integrity to shield employees from injuries. Section 12-130-3(v)(2) uses the term "or equivalent" to refer to the use of other materials which provide a safety factor as shall equal

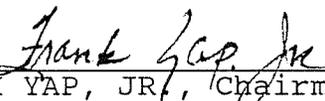
"...scaffold grade, as recognized by approved grading rules for the species used...". We credit Mr. Williams' opinion that the lumber used for scaffold planking met the equivalency standards set forth in Section 12-130-3(v)(1) and (2).

For these reasons, we conclude that Respondent was not properly cited for the condition described in Standard Sections 12-130-3(a)(12) and 12-130-3(a)(8). Accordingly, we do not reach the sub-issues regarding the characterization of the violations and the imposition and the amount of the penalty.

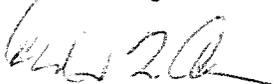
ORDER

The Citation and Notification of Penalty issued on March 24, 1993, is hereby dismissed, in accordance with the foregoing findings of fact and conclusions of law.

Dated: Honolulu, Hawaii, FEB - 2 1996.

  
FRANK YAP, JR., Chairman

  
CAROL K. YAMAMOTO, Member

  
CHARLES T. AKAMA, Member

Herbert Ikazaki  
for Complainant

Bruce Rudeen  
for Respondent

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

  
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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.