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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. KIEWIT PACIFIC COMPANY, Respondent.	)	CASE NO. OSAB 94-009 (OSHCO ID C6595) (Inspection #120658356)

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STATE OF HAWAII
'96 MAR -1 A9:21

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a notice of contest by KIEWIT PACIFIC COMPANY ("Respondent") from two Citations and Notifications of Penalty, issued on February 8, 1993.

The issues to be determined are:

(1) Whether Respondent violated Occupational Safety and Health Standard §12-132-4(a)(1); and

(a) If so, is the characterization of the violation as "serious" appropriate;

(b) If so, is the imposition and amount of the proposed $5,000.00 penalty appropriate;

(2) Whether Respondent violated Occupational Safety and Health Standard §12-136-2(x)(7); and

(a) If so, is the characterization of the violation as "repeat general" appropriate;

(b) If so, is the imposition and amount of the proposed $200.00 penalty appropriate.

For the reasons stated below, we reverse and vacate the Director's Citation and Notification of Penalty for §12-132(4)(a)(1) and affirm the Citation and Notification of Penalty for §12-136-2(x)(7).

FINDINGS OF FACT

1. On January 5, 1993, Complainant's compliance officer, David Ching, inspected Respondent's work site at the Kailua Wastewater Treatment Plant.

2. During the inspection, Ching saw one of Respondent's employees, Reggie Gawiran, working in an unprotected and/or unshored excavation.

3. The excavation was nine feet deep.

4. The soil in the excavation was "type B" soil. Excavations of type B soil requires protection from cave-ins.

5. At the time of the incident, Respondent had in effect a comprehensive safety program that included specific rules prohibiting its employees from working in unprotected excavations more than five feet in depth.

6. The subject excavation was shored on the day before the excavation. On that day, Gawiran, a pipefitter apprentice, broke a pipe that was in the excavation.

7. When Gawiran returned to work the next day, i.e., the day of the inspection, he told his foreman about the broken pipe. The foreman told him to fix it. Gawiran's conversation

with the foreman took place on another portion of the project site, away from the location of the excavation.

8. Gawairan was not scheduled to work in the excavation on the day of the inspection, but he felt responsible for the broken pipe and was anxious to return to the excavation to fix it.

9. The shoring in the excavation was removed on the day of the inspection to allow for a scheduled backfill. There was no evidence that Gawiran's foreman knew about the removal of the shoring when he told Gawiran to fix the broken pipe.

10. Gawiran was in the unprotected excavation for a few minutes before Ching came upon him. When Ching saw Gawiran in the unprotected excavation, he photographed him. By then, Gawiran's foreman had arrived on the scene and ordered Gawiran out of the excavation.

11. Ching could not remember if he interviewed the foreman about whether the foreman knew of the unshored excavation condition when he told Gawiran to fix the pipe.

12. Gawiran knew about Respondent's safety program and its rule against entering an unprotected excavation more than five feet deep. However, he ignored the rule for that moment because he wanted to fix the broken pipe.

13. Respondent provided regular training to its employees regarding safety. In particular, Respondent reminded its employees on a regular basis not to enter unprotected

excavations more than five feet deep. Respondent repeatedly warned its employees that they could be terminated for ignoring safety rules.

14. According to Respondent's personnel records, only one employee has been discharged in the past for violation of safety rules.

15. It was Respondent's policy to consider the circumstances of the violation and the work history of the violating employee in determining the appropriate disciplinary action. Respondent indicated that while discharge for a first offense could occur, it might not take that action if the other factors weighed in the employee's favor.

16. According to Respondent, Gawiran was a model employee and this was his first infraction.

17. After the citation, Gawiran, his foreman, and his superintendent were counseled by Respondent for the infraction.

18. There was no evidence presented of prior incidents of employee noncompliance with §12-132-4(a)(1) and no evidence that Respondent had any knowledge about prior noncomplying conduct by employees with respect to this standard.

19. Assuming that a violation occurred, Respondent asserted the affirmative defense of "unpreventable employee misconduct" to excuse its violation of §12-132-4(a)(1).

20. Based on the foregoing, we find that Respondent has established work rules designed to prevent violations of the

subject safety rule; that it has adequately communicated these rules to its employees; that it had no knowledge of prior noncompliance with the subject standard; and that it had effectively enforced the rules when the violation was discovered.

21. Respondent does not dispute that it violated §12-136-2(x)(7) on January 5, 1993, when the safety latch on the hoist of a crane did not close the entire throat of the hook or the load was not moused in place.

22. Respondent does not dispute that it had previously violated §12-136-2(x)(7), the same standard, in February of 1991, in which a final order was issued. The February 1, 1991 violation involved a truck, instead of a crane, in which its hoisting gear was not equipped with a safety latch hook. No penalty was assessed for Respondent's first violation of this standard.

23. Ching testified at trial before the Board that the danger involved in not using a safety latch hook on the hoisting gear of a crane is that the load could be dislodged from the sling or hook.

24. There is no dispute over the characterization of Respondent's prior and present violations of §12-136-2(x)(7) as "general"[1] violations.

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[1] A serious violation is defined in Hawaii Revised Statutes (HRS) §396-3 as a "violation that carries with it a substantial probability that death or serious physical harm could result from a condition . . . in a place of employment, unless the employer

25. Respondent provided no evidence that a penalty of $200.00 is inappropriate if its second violation of §12-136-2(x)(7) is construed to be a repeat general[2] violation.

CONCLUSIONS OF LAW

1. The Hawaii Occupational Safety and Health Law is patterned after the federal Occupational Safety and Health Act of 1970. Where applicable, we will look to the decisions of the Occupational Safety and Health Review Commission[3] and the

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did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation." According to HIOSH, a general violation is a nonserious violation of the Hawaii Occupational Safety and Health Law. Although our statute does not define a nonserious violation, it has been defined in caselaw as a one in which there is a direct and immediate relationship between the violative condition and the health and safety of employees, but not one in which the violative condition could result in death or serious physical injury. Cresent Wharf & Warehouse Co., 1 OSHC 1219, 1971-73 OSHD ¶ 15,687 (1973).

[2] Under HRS §396-10(f), any employer who wilfully or repeatedly violates a standard, rule, citations, or order issued under the authority of chapter 396, shall be assessed a civil penalty of no less than $5,000 nor more than $70,000 for each violation. However, if an employer repeatedly violates a non-serious or general violation that otherwise would have no initial penalty, it has been HIOSH's policy to assess a penalty of $200 for the first repeated general violation.

[3] The Occupational Safety and Health Review Commission adjudicates contested matters resulting from the United States Secretary of Labor's issuance of citations and proposed penalties for violations of the federal Occupational Safety and Health Act and its related rules and standards. Commission members are appointed by the President of the United States with the advice and consent of the Senate. Contested cases initially are heard by an administrative law judge (ALJ), who is appointed by the Commission. Decisions of the ALJ may be reviewed by the Commission, either upon a Petition for Discretionary Review by a party, or upon the Commission's own motion. If an ALJ decision is not reviewed by the Commission within thirty days of its

appellate circuits for guidance in reviewing occupational safety and health cases before the Board.

Our first inquiry in this case is whether Respondent violated Occupational Safety and Health Standard §12-132-4(a)(1). This standard applies only to the construction industry and requires protective systems in excavations more than five feet deep to prevent injury to employees from potential cave-ins. Protective systems are not required when the excavation is made entirely of stable rock or is less than five feet deep with no potential for cave-in.

We conclude that Respondent violated §12-132-4(a)(1) when its employee entered an unprotected excavation that was more than five feet deep and that required a protective system to prevent cave-ins.

We further conclude, however, that Respondent is excused from the violation of §12-132-4(a)(1) based on the affirmative defense of "unpreventable employee misconduct."

"Unpreventable employee misconduct", sometimes known as "isolated event", "isolated misconduct", or "isolated incident" is an affirmative defense that an employer may assert to defend

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issuance, then the ALJ decision becomes a final order or decision of the Commission. Unreviewed ALJ decisions, according to the Commission, have no precedential value. See Leone Construction Co., 3 OSHC 1979, 1975-76 OSHD ¶ 20,387 (1976). Final orders or decisions of the Commission are reviewable by the court of appeals in the judicial circuit in which the alleged violation occurred, where the employer has its principal place of business, or in the Court of Appeals for the District of Columbia Circuit.

against a citation for noncompliance with safety standards. The employer bears the burden of proving this defense. Murphy Pacific Marine Salvage Co., 2 OSHC 1464, 1974-75 OSHD ¶ 19,205 (1975).

Under Jensen Construction Co., 7 OSHC 1477, 1979 OSHD ¶ 23,664 (1979), the unpreventable employee misconduct defense can be sustained by establishing the following: (1) the employer has established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to detect and correct violations, especially if there were incidents of prior noncompliance; and (4) it has effectively enforced the rules when violations have been discovered.

On this record, we conclude that Respondent has successfully established the defense of unpreventable employee misconduct. Accordingly, the citation for violation of §12-132-4(a)(1) shall be vacated.

Having concluded that Respondent's violation of §12-132-4(a)(1) is excused, we do not reach the issues of whether the violation was "serious" or whether the assessed penalty was appropriate.

2. Our next inquiry concerns whether Respondent repeatedly violated §12-136-2(x)(7). This standard also applies to the construction industry and requires safety latch hooks to

be used on all hoisting gear or the load to be seated in the saddle of the hook and moused in place.

Respondent contends that the characterization of its second violation of §12-136-2(x)(7) as "repeat" is wrong, even if it had previously violated the exact same standard, because the circumstances under which the first violation occurred were not substantially similar to the circumstances that arose under the second violation. According to Respondent, the prior citation is dissimilar from the second, because the first involved the absence of a safety latch hook on a truck; whereas, the second involved a broken or defective safety latch hook on a crane. Therefore, in Respondent's view, the hazards generated by each violation were not the same, because different machines were involved. Respondent did not, however, identify the hazards or how they may be different.

The Occupational Safety and Health Review Commission announced its authoritative guidelines for determining what constitutes a "repeat" violation in the case of Potlatch Corporation, 7 OSHC 1061, 1979 OSHD ¶ 23,294 (1979).

In Potlatch, a violation is repeated if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation.

According to the Commission, substantial similarity may be established in several ways. The Commission recognized that occupational safety and health standards range from those that

designate specific means of preventing a hazard or hazards to those that are more generally stated and do not specify the means of preventing a hazard or apply to a variety of circumstances. Accordingly, the Commission concluded that if the prior and present violations concern the same specific standard, and the earlier order had become final prior to the date of the alleged repeated violation, then a prima facie showing of substantial similarity has been made. In cases involving violations of the same general standard, the Commission held that the Secretary of Labor may need to introduce additional evidence of similarity, other than the fact that the same standard was violated, to meet its burden of proof. This other evidence may include similarity of conditions or hazards generated by the prior and present violations of the same standard. If the prior and present violations concern non-compliance with different standards, a repeated violation may also be established if there is evidence that the violations involve similar hazards. In all of these cases, the Commission required the Secretary to make a prima facie showing of substantial similarity. Once that is done, the burden then shifts to the employer to rebut the Secretary's prima facie case.

We find Potlatch instructive in determining whether Respondent's second violation of §12-136-2(x)(7) was a repeat violation.

Applying Potlatch to the instant case, we find that §12-136-2(x)(7) is a specific standard, because it designates a specific means to prevent a hazard. Accordingly, Respondent's prior and second violations concern the same specific standard. The first violation, as we have found, resulted in a final order prior to the date of the alleged repeated violation. Under Potlatch, these findings sufficiently establish Complainant's prima facie showing of substantial similarity.

Since Respondent contends that the two violations were not substantially similar, we next determine whether Respondent has successfuly rebutted the Complainant's prima facie case with evidence of dissimilarity.

We conclude that Respondent has failed to rebut Complainant's evidence of substantial similarity. Respondent provided no evidence of the hazards involved or how they may be different depending on whether it involves a truck or a crane. In our view, the hazard of not using a safety latch hook on hoisting gear, be it a crane or truck, is the same. The load that is being hoisted could come off. Furthermore, §12-136-2(x)(7) applies to all cranes and derricks. Cranes, as defined in §12-136-1, means any machine, including a truck, that is used for lifting and lowering a load and is equipped with a hoisting mechanism as an integral part of the machine.

Accordingly, we conclude that the characterization of Respondent's second violation of §12-136-2(x)(7) as "repeat

general" was appropriate. There being no evidence that the proposed penalty of $200 is inappropriate for a first repeat general violation, we further conclude Respondent shall be assessed a penalty of $200.00 for its repeat violation of this standard.

ORDER

The Director's Citation and Notification of Penalty for a violation of §12-132-4(a)(1) is vacated. The Citation and Notification of Penalty for Respondent's second violation of §12-136-2(x)(7) is affirmed.

Dated: Honolulu, Hawaii, MAR - 1 1996.

FRANK YAP, JR., Chairman

CAROL K. YAMAMOTO, Member

CHARLES T. AKAMA, Member

Bruce Rudeen
for Complainant

Janice Teramae
for Respondent

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.

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