LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. CERTIFIED CONSTRUCTION, INC., Respondent.	CASE NO. OSAB 93-084 (OSHCO No. C8955)) (Report No. 103895496)

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a notice of contest from a Citation and Notification of Penalty, dated July 15, 1993, issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS ("Complainant") against CERTIFIED CONSTRUCTION, INC. ("Respondent").

On December 13, 1994, Respondent filed a motion to dismiss the Citation and Notification of Penalty ("Citation").

Since Respondent based its motion on matters outside its pleading, such as depositions and affidavits, the Board will treat Respondent's motion as a motion for summary judgment. See Haw. R. Civ. P. 12(b)(6) and 12(c).

For the reasons stated below, we grant Respondent's motion for summary judgment. The Citation against Respondent shall be vacated.

The following facts are undisputed:

FACTS

1. On or about June 23, 1993, Complainant's compliance officer, Clayton Chun, inspected Respondent's work site at Kaimuki High School.

2. According to Chun, he saw two of Respondent's employees performing built-up roofing work on a flat roof of a building that he estimated was about 100 feet wide and 300 feet long, with a ground-to-eave height greater than 16 feet, without proper fall protection. After witnessing the employees on the roof, Chun determined that a violation of the standards may have occurred. According to Chun, Respondent's employees should have been wearing safety lines or lanyards for fall protection.

3. After the inspection, Chun prepared an inspection report documenting his findings.

4. Based on the facts obtained from Chun's inspection, Complainant issued a Citation against Respondent for an alleged violation of §12-121-4(a) of the Hawaii Occupational Safety and Health Standards.

5. After the Citation was issued, Chun returned to Respondent's work site to measure the roof. He discovered that he had over-estimated the width of the roof. The width of the roof was actually under 50 feet, and not 100 feet.

6. At the time of his inspection, Chun did not inquire and did not know whether Respondent had a safety monitoring system in place.

7. After reviewing the text of §12-121-4(a) during a break in his deposition, Chun testified that if Respondent had a safety monitoring system in place at the time of his inspection, then Respondent would have been in compliance with the requirements of §12-121-4(a) and no citation would have been issued. Chun acknowledged that he did not know, at the time of his inspection, whether a safety monitoring system could have been used, instead of safety lines, to comply with the cited standard. All Chun knew was that the roof appeared to be 100 feet wide with a ground-to-eave height of more than 16 feet, and that safety lines would have been the appropriate form of fall protection under those circumstances.

8. In support of its motion for summary judgment, Respondent presented the deposition testimony of Respondent's foreman, Charles Pascal, and the affidavit of its president, Kevin Simpkins, to support its position that a safety monitoring system was in use and in effect at the Kaimuki High School site on the day of the inspection.

9. Complainant has presented no significant probative evidence to refute Respondent's evidence that a safety monitoring system was in place at the time of the inspection.

CONCLUSIONS OF LAW

Summary judgment is proper only when there is no genuine issue of material fact and the moving party clearly demonstrates that it should prevail as a matter of law. Crawford v. Crawford, 69 Haw. 410, 412 (1987). Inferences to be drawn from the record must be viewed in the light most favorable to the non-moving party, and "[a] fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Development Corp., 65 Haw. 58, 61 (1982), citing Lau v. Bautista, 61 Haw. 144 (1979) and Hunt v. Chang, 60 Haw. 608 (1979).

Respondent was cited for an alleged violation of §12-121-4(a).

Section 12-121-4(a) states as follows:

> During the performance of built-up roofing work on low-pitched roofs with a ground-to-eave height greater than 16 feet (4.9 meters), employees engaged in this work shall be protected from falling from all unprotected sides and edges of the roof by the use of a:
>
> (1) Motion-stopping safety system (MSS system); or.
>
> (2) Warning line system erected and maintained as specified in subsection (c) below and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system or, where mechanical equipment is not being used or

> stored, by the use of a safety monitoring system; or
>
> (3) Safety monitoring system on roofs 50 feet (15.25 meters) or less in width measured in accordance with appendix A where mechanical equipment is not being used or stored.

Since the roof, in this case, was actually less than 50 feet wide, and not 100 feet wide, as was estimated by Chun, under the standard, Respondent could have complied with §12-121-4(a) if it had a safety monitoring system.

According to §12-121-1, a safety monitoring system means a safety system in which a competent person monitors the safety of all employees in a roof crew, and warns them when it appears to the monitor that they are unaware of the hazard or are acting in an unsafe manner.

Complainant contends that summary judgment is improper because there is a genuine issue of material fact as to whether Respondent complied with §12-121-4(a). Specifically, Complainant disputes the fact that Respondent had a safety monitoring system in place at the time of the inspection. We disagree.

No genuine issue of fact precluding summary judgment exists if the party opposing summary judgment fails to offer evidence sufficient to establish the existence of an element essential to that party's case. Blue Ocean Preservation Soc. v. Watkins, 754 F. Supp. 1450 (D. Haw. 1991). The nonmoving party of a summary judgment motion must produce significant probative

evidence to show that a genuine issue of fact exists. Pleadings, legal memoranda, and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. Pagdilao v. Maui Intercontinental Hotel, 703 F. Supp. 863 (D. Haw. 1988).

In this case, Complainant has failed to adduce any significant probative evidence to show that Respondent did not have a safety monitoring system in place at the time of the inspection. According to the record, the Citation was based on Chun's observation that two of Respondent's employees were performing built-up roofing work on a roof that was, in his estimation, 100 feet wide, without safety lines or lanyards. Chun made no inquiry or fact determination, at the time of the inspection, as to whether Respondent had a safety monitoring system. Chun even admitted in his deposition that he had no idea, at the time of the inspection, that a safety monitoring system was a form of compliance for roofs less than 50 feet in width. Complainant, therefore, has no evidence to show that Respondent did not have a safety monitoring system in place at the time of his inspection. Without evidence to show support that fact, Complainant is unable to prove that Respondent did not comply with §12-121-4(a).

For these reasons, we conclude that summary judgment in favor of Respondent is appropriate in this case.

ORDER

The Citation and Notification of Penalty, dated July 15, 1993, is hereby vacated.

Dated: Honolulu, Hawaii, MAR 13 1996.

FRANK YAP, JR., Chairman

CAROL K. YAMAMOTO, Member

CHARLES T. AKAMA, Member

Herbert B.K. Lau
for Complainant

Stacy N. Hutchison-Miller
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.