

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 94-007
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO ID A4370)
AND INDUSTRIAL RELATIONS,)	(Inspection #120632567)
Complainant,)	
)	
vs.)	
)	
H.E. JOHNSON COMPANY, INC.,)	
Respondent.)	

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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 a notice of contest by Respondent, H.E. JOHNSON COMPANY, INC., from a Citation and Notification of Penalty issued by Complainant, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, on August 27, 1993.

The issues to be determined are:

- a. Whether Respondent violated Standard §12-132-3(e)(4).
 - (1) If so, is the characterization of the violation as "serious" appropriate.
 - (2) If so, is the imposition and amount of the proposed \$1,250.00 penalty appropriate.

For the reasons stated below, we vacate the Citation and Notification of Penalty issued against Respondent on August 27, 1993.

FINDINGS OF FACT

- 1. On June 8, 1993, Complainant's Compliance Officer inspected Respondent's work site adjacent to the Waikele Golf Club (golf course).

2. Respondent had excavated a trench approximately 200 feet long, 10 feet deep and 4 feet wide at the bottom, at the southwest end of its work site. The trench width at the top is disputed. Respondent's employees were working in the trench at the time of the inspection.

3. Two photographs of the trench, which were taken by the Compliance Officer on the day of the inspection, were enlarged and admitted into evidence at trial as Complainant's Exhibits E and F. Complainant's Exhibit F shows that one side of the trench abuts the golf course.

4. As a result of the inspection, Complainant issued a Citation and Notification of Penalty against Respondent on August 27, 1993, for an alleged serious violation of Standard §12-132-3(e)(4)¹ of the Hawaii Occupational Safety and Health Law. Respondent was assessed a proposed \$1,250.00 penalty.

5. Complainant alleges that Respondent violated Standard §12-132-3(e)(4), based on the Compliance Officer's testimony that he observed dirt, rocks, and concrete hollow tile blocks within two feet of the edge of the trench, as corroborated by its Exhibits E and F. Complainant contends that Exhibit E shows dirt and rocks within two feet of the edge of both sides of the trench while Exhibit F shows rocks and clumps of dirt within two feet of the edge of the trench on the side adjacent to the

¹Standard §12-132-3(e)(4) provides that "[i]n excavations which employees may be required to enter, excavated or other materials shall be effectively stored and retained at least 2 feet or more from the edge of the excavation." Excavations are defined to include trenches.

golf course and rocks and two concrete hollow tile blocks within two feet of the edge of the trench on the side opposite the golf course.

6. Hal Johnson, Respondent's president, testified that no excavated material (spoil) was stored on the golf course side of the trench. What appeared to be lighter colored material stockpiled at the edge of the golf course side of the trench was not spoil from the trench, but compacted fill from a previous grading operation that was now part of the trench itself. All spoil was stored on the opposite side of the trench, more than two feet away from the edge of the trench. The two concrete hollow tile blocks were for immediate use to support pipes that were being installed at the bottom of the trench. Complainant's Exhibit F shows a ladder leading from the floor of the trench to the two concrete hollow tile blocks. We have found no evidence to indicate that the two concrete hollow tile blocks had been there for a prolonged period of time. We credit Mr. Johnson's testimony.

7. The dirt and rocks Complainant alleges violated the Standard, because they were within two feet of the edge of the trench, was not spoil from the trench or other material that the Standard requires to be stored at least two feet or more from the edge of the trench.

CONCLUSIONS OF LAW

We conclude that Respondent did not violate Standard §12-132-3(e)(4). All excavated material was stored more than two

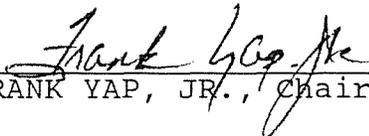
feet from the edge of the trench, in compliance with the Standard, on the side opposite the golf course. None was stored on the golf course side of the trench. The two concrete hollow tile blocks were to be used immediately in the trench. Because the Standard applies to excavated or other materials, and the dirt and rocks that were allegedly within two feet of the edge of the trench were not excavated or other materials, the presence of dirt and rocks did not constitute a violation of the Standard.

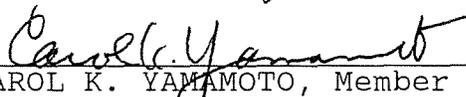
Having concluded that Respondent did not violate Standard §12-132-3(e)(4), we do not reach the other issues.

ORDER

The Citation and Notification of Penalty issued against Respondent on August 27, 1993, is hereby vacated.

Dated: Honolulu, Hawaii, MAR 21 1996.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


CHARLES T. AKAMA, Member

Steve Miyasaka
for Complainant

Hal Johnson
for Respondent

I do hereby certify that the foregoing
is a full, 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.