

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of the)
 DIRECTOR, DEPARTMENT OF LABOR)
 AND INDUSTRIAL RELATIONS,)
)
 Complainant,)
 vs.)
)
 MUTUAL WELDING COMPANY, LTD.,)
)
 Respondent.)

CASE NO. OSAB 93-032
 (OSHCO ID. B3269)
 (Report No. 103888848)

FILED
 DEPARTMENT OF LABOR
 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 filed by MUTUAL WELDING COMPANY, LTD. ("Respondent") from a Citation and Notification of Penalty issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, dated November 13, 1991.

Pursuant to a pre-trial order dated November 15, 1993, the issues to be determined are:

- (1) Whether the Citation and Notification of Penalty ("Citation") should be vacated because of untimely prosecution;
- (2) If not, whether Respondent violated §12-133-1(a) of the Hawaii Occupational Safety and Health Standards;
 - a. If so, is the characterization of the violation as "willful" appropriate.
 - b. If so, is the imposition and amount of the proposed \$5,000.00 modified penalty appropriate.

For the reasons stated below, we modify the Citation to find a serious violation of §12-133-1(a). We also modify the penalty to \$450.00.

FINDINGS OF FACT

1. Respondent is in the business of structural steel erection.

2. Respondent was contracted to erect a steel support platform for a project located at the Chevron Refinery's Fluid Catalytic Cracking facility in October of 1991.

3. On October 17, 1991, Complainant's compliance officer, Anthony Buswink, went to the Chevron project site to investigate a health-related complaint against a company named PetroChem concerning the encapsulation of asbestos.

4. While at the Chevron site, Buswink happened to see Respondent erecting an I-beam structure by using a crane to lower the I-beam structure onto existing I-beams. Two of Respondent's employees assisted by standing on two of the existing I-beams to guide the I-beam structure into place and to bolt it down. The two employees were wearing safety belts or life lines at the time, but the belts were unfastened or not "tied-off".

5. One of those employees, Richard Butcher, stood on a concrete beam that was measured by Buswink to be 13-1/2 feet above the concrete floor below. The other employee, Paul Johnson, stood on a steel beam that was measured to be even higher than 13-1/2 feet above the concrete floor.

6. The concrete floor was the nearest floor level from where Johnson and Butcher stood. Johnson and Butcher were, therefore, working more than ten feet above the nearest floor level without "tied-off" safety belts or life lines.

7. Because their belts were not "tied-off", Butcher and Johnson performed steel construction work without fall protection at a height of greater than 10 feet.

8. Tubes of pipes, some flushed against each other and some several inches apart, ran under the beams on which Johnson and Butcher stood, forming a "rack" between the beams and the concrete floor below. The pipe rack was about three to five feet below the steel beams on which Respondent's employees stood, but did not extend the entire length of the beams.

9. Based on Buswink's observations, Complainant issued a Citation against Respondent on November 13, 1991, for allegedly violating §12-133-1(a). Complainant characterized Respondent's alleged violation as "willful" and proposed a penalty of \$7,000.

10. Respondent filed a notice of contest on November 19, 1991, challenging the Citation.

11. After Respondent filed its notice of contest, Complainant issued an amended Citation, dated December 13, 1991, that reduced the proposed penalty to \$5,000.

12. On October 5, 1993, twenty-three months after the issuance of the original Citation, Complainant advised the Board of Respondent's notice of contest.

13. Respondent alleged that the twenty-three month delay prejudiced its defense of the Citation, but did not provide evidence to substantiate its allegation.

14. Respondent was familiar with Hawaii's Occupational Safety and Health Standards, including the standard for which it was cited in this case. Respondent also knew that its employees were performing work at a height of more than 10 feet from the ground without safety belts. However, because Butcher and Johnson were directing a load, Respondent felt that they needed to remain mobile so that they could move away in case the load fell or swayed in their direction. For this reason, Respondent directed its employees not to tie-off their safety belts while the load was being lowered. Respondent believed that its employees were safe because the pipe rack below them would have prevented a fall from the I-beams to the concrete floor below.

15. Although Respondent contended that the pipe rack would have protected its employees from a serious fall to the concrete floor below, upon questioning by the Board, it conceded that there was a possibility that an employee could still fall more than 10 feet to the ground floor if he bounced off the pipes.

16. There was also a possibility that the pipe rack would not have protected the employees from a 10 foot fall if one of them fell through the spaces between the pipes or through the gaps where the pipe rack did not extend.

17. Buswink provided trial testimony, based on his review of statistics and his experience in the field, that there was a substantial probability that a 10 foot fall to a concrete floor below could result in serious injury or death. We credit his testimony.

18. Buswink further testified that he would have recommended a penalty of \$450.00, based on the various factors identified in his worksheet, if it was determined that Respondent committed a serious violation of §12-133-1(a). Respondent did not challenge the amount of the penalty calculated by Buswink for a serious violation of this standard.

19. There was no evidence to show that Respondent acted with intentional disregard of or plain indifference to the cited standard or the Hawaii Occupational Safety and Health law.

CONCLUSIONS OF LAW

1. Under Hawaii Revised Statutes (HRS) §396-11, the Director is required to advise the Board of a notice of contest upon the receipt of such notice.¹ While our statute does not provide a time period in which this must be accomplished, we believe that it is in the interest of safety and timely resolution of disputes to have notices of contest be transmitted to the Board with reasonable promptness. In this case, the

¹ In comparison, 29 U.S.C. §659(c) of the federal Occupational Safety and Health Act requires the Secretary of Labor to immediately advise the Occupational Safety and Health Review Commission of an employer's notice of contest.

Director did not advise the Board of Respondent's notice of contest until twenty-three months after its filing.

Respondent contends that the Citation should be vacated because of the Director's unexcused and excessive delay in transmitting its notice of contest to the Board. We disagree.

A delay in the transmittal of a notice of contest is not a ground to vacate a citation unless the employer can demonstrate prejudice. Texas Masonry Inc., 11 OSHC 1835, 1983-84 OSHD ¶ 26,803 (1984). We have found no evidence to show that Respondent was, in fact, prejudiced by the delay. Accordingly, we will not vacate the Citation on this ground.

2. We next determine whether Respondent violated §12-133-1(a) of the Occupational Safety and Health standards. Chapter 133 of the standards applies to steel construction work.

Section 12-133-1(a) states as follows:

Personnel employed in steel erection shall wear hard hats at all times while on the job site. Safety shoes shall be worn and gloves, special protective clothing, respirators, etc., shall be worn as necessary. Safety belts and life lines shall be worn for all work 10 feet or more above the nearest floor level.

We find no merit with Respondent's contention that safety belts were not required because the pipe rack, and not the concrete floor, was the nearest floor level from Butcher and Johnson. Although the term "floor" is not defined in chapter 133, given the presence of spaces between the pipes, the gaps

where the pipe rack did not extend, and the references to planking and decking for flooring in steel construction in §12-133-2, we are unable to construe the pipe rack to be a floor within the meaning of §12-133-1(a).

Accordingly, we conclude that Respondent violated §12-133-1(a) when its employees performed work more than 10 feet above the nearest floor level without safety belts or life lines.

a. Having determined that Respondent violated the cited standard, our next inquiry is whether that violation was willful.

Under Hawaii Revised Statutes (HRS) §396-3, a "willful violation" means

a voluntary act or omission by the employer, as distinguished from an accidental act or omission, that is done with intentional disregard of, or plain indifference to, any standard, rule, citation, or order issued under the authority of this chapter. A willful violation does not require a showing of malicious intent or bad motive.

We conclude that Respondent's knowledge of the cited standard and its violation of the standard do not in themselves prove a willful violation. Since there was no evidence to show that Respondent's violation was committed with intentional disregard or plain indifference to the standard or our Occupational Safety and Health law, the violation was improperly characterized as willful.

However, although a willful violation has not been sustained in this case, the Board, under HRS §396-11,² has the authority to modify the characterization of the violation for which Respondent was cited, to either serious or general, if the modification is supported by the evidence.

Under HRS §396-3, a serious violation is one that

carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation.

Through the testimony of Buswink, Complainant presented evidence at trial that there was a substantial probability that death or serious physical harm could result if an employee fell more than 10 feet to the concrete floor below. There was also evidence to show that Respondent knew of the violative conditions for which it was cited.

On these bases, we conclude that Respondent committed a serious violation of §12-133-1(a).

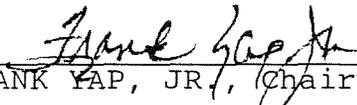
² Section 396-11(i) allows the Board to "affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary, or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate."

b. Having concluded that Respondent committed a serious, and not willful violation of §12-133-1(a), and there being no dispute over the amount of the penalty calculated by Buswink if a serious violation is found, we further conclude that Respondent shall be assessed a penalty of \$450.00 for its serious violation of §12-133-1(a).

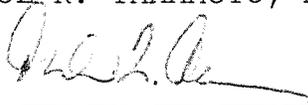
ORDER

The Citation and Notification of Penalty issued against Respondent is hereby modified in accordance with the foregoing findings and conclusions. Respondent is hereby ordered to pay a penalty of \$450.00 for its serious violation of §12-133-1(a).

Dated: Honolulu, Hawaii, MAR 21 1996.


FRANK YAP, JR., Chairman

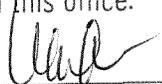
EXCUSED
CAROL K. YAMAMOTO, Member


CHARLES T. AKAMA, Member

Frances E.H. Lum and
Herbert B.K. Lau for
Complainant

Janice E.C. Teramae
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.