LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. ALCAL HAWAII ROOFING, Respondent.	CASE NO. OSAB 94-052 (OSCHO ID MO685) (Inspection #120644976)

DECISION AND ORDER

This occupational safety and health case is before the Board on a notice of contest by Respondent, ALCAL HAWAII ROOFING, from a Citation and Notification of Penalty issued by Complainant, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, on September 9, 1994.

The issues to be determined are:

a. Whether Respondent violated Standard §12-121-4(a).

(1) If so, is the characterization of the violation as "serious" appropriate. If not, what is the appropriate characterization, if any.

(2) If so, was the imposition and amount of the proposed $525.00 penalty appropriate.

For the reasons stated below, we affirm the Citation and Notification of Penalty issued against Respondent on September 9, 1994.

FINDINGS OF FACT

1. On August 11, 1994, Respondent was a subcontractor on a construction site at Kamaaha Avenue in Kapolei, Hawaii. JDH

Construction/Obayashi Joint Partnership (JDH/Obayashi), the general contractor of the project, was contracted to construct approximately 500 single and multi-family dwellings on the site. Respondent was subcontracted to perform roofing work. Respondent came onto the jobsite sometime in March or April 1994.

2. On August 11, 1994, Complainant's compliance officer, Hervie Messier, inspected the jobsite. Mr. Messier was accompanied during the inspection by JDH/Obayashi's safety officer, Anna Peterson.

3. Around 1:00 p.m., Mr. Messier observed two of Respondent's employees on the roof of a two-story structure on lot 328. The workers were observed for two to three minutes, laying roof shingles and nailing them with a pneumatic nail gun.

4. The ground-to-eave height of the structure the workers were working on was approximately 20 feet and the pitch of the roof was less than four (run) in twelve (rise). The ground below was composed of compacted earth.

5. The workers were performing built-up roofing work[1] on a low-pitched roof[2] with a ground-to-eave height greater than 16 feet. They were not inspecting, investigating, or estimating roof level conditions at the time.

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[1]Built-up roofing work is defined as "the hoisting, storage, application, and removal of built-up roofing materials and equipment, . . . but not including the construction of the roof deck." Section 12-121-1 of the Occupational Safety and Health Standards, Hawaii Administrative Rules.

[2]A low-pitched roof is defined as "a roof having a slope less than or equal to four in twelve." Section 12-121-1.

6. Mr. Messier did not observe any form of warning line system or safety monitoring system in place at the time.

7. Whether or not the workers were wearing safety belts for the time they were observed is disputed. Mr. Messier stated that the workers were not wearing their safety belts, but upon observing Ms. Peterson, they walked across the roof, picked up their safety belts which were already attached to a secured lanyard, and put their belts on. According to Ms. Peterson, the workers were wearing safety belts with no lanyard attached, but once they observed her, they walked across the roof and picked up a lanyard which they attached to their belts. Under either scenario, however, the workers initially were unprotected by any form of motion-stopping safety system (MSS system).

8. Mr. Messier indicated that there was a hazard of falling. Because the workers were nailing shingles on the roof with a pneumatic nail gun, they could have fallen while moving backwards. In his opinion, an employee would most likely have sustained a fracture to the arm or leg, if the employee fell from the roof. We credit Mr. Messier's opinion.

9. Based on Mr. Messier's inspection, Respondent was cited on September 9, 1994, for an alleged serious violation of §12-121-4(a) of the Occupational and Safety Health Standards, Hawaii Administrative Rules, and assessed a proposed $525.00 penalty.

10. Respondent does not dispute that the violation of the Standard occurred.

11. Although Respondent raised the affirmative defense of employee misconduct, it has not presented sufficient evidence to establish the affirmative defense.

12. If a worker fell from the roof, there was a substantial probability that serious physical harm could have resulted.

13. Complainant used the proper criteria and method to calculate the proposed $525.00 penalty.

CONCLUSIONS OF LAW

1. We conclude that Respondent violated Standard §12-121-4(a)[3]. Because Respondent's two workers were performing built-up roofing work on a low-pitched roof with a ground-to-eave height greater than 16 feet, Standard §12-121-4(a) required that the workers have fall protection. Respondent failed to comply with the Standard's fall protection requirement, however, because

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[3]Standard 12-121-4(a) provides:

(a) 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.

the workers were not protected from falling by any MSS system (of which safety belts, lifelines, and lanyards are a form), warning line system, or safety monitoring system.

Although the two workers were provided safety belts, the belts either were not properly tied-off or were not worn at all by the workers. Even if, however, the workers were wearing their safety belts, they still did not have any fall protection because the belts were not properly tied-off and would not have prevented the workers from falling. Furthermore, Respondent does not dispute that the violation occurred.

2. We conclude that the characterization of the violation as "serious" is appropriate. Under Hawaii Revised Statutes §396-3[4], a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative condition should an accident occur.

In this case, Complainant has established that the characterization of the violation is "serious", because there was a substantial probability that serious physical harm could result from a fall. Mr. Messier indicated that if a worker fell 20 feet from the roof onto the compacted ground below, serious harm in the form of a fracture to the arm or leg would likely result.

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[4]A serious violation is defined as "a violation 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." §396-3 (1993).

Although Respondent contended that the nature of the violation was "minor", the statute provides for a violation to be characterized as "serious" based upon the likelihood that serious physical harm could result if an accident occurred, rather than on the nature of the violation. Respondent does not dispute the substantial likelihood that an injury such as a limb fracture could result if an accident should occur.

3. We conclude that the imposition and amount of the proposed $525.00 penalty was appropriate, because the violation that occurred was a serious violation and Complainant properly calculated the proposed penalty. Respondent has not presented any evidence to show that the proposed penalty was inappropriate.

ORDER

The Citation and Notification of Penalty issued by the Director on September 9, 1994, is hereby affirmed.

Dated: Honolulu, Hawaii, APR 15 1996.

Frank Yap, Jr.
FRANK YAP, JR., Chairman

EXCUSED
CAROL K. YAMAMOTO, Member

CHARLES T. AKAMA, Member

Herbert Lau
Deputy Attorney General
for Complainant

Bernard Lander
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.