

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 94-003
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO No. C4756))
AND INDUSTRIAL RELATIONS,)	(Report No. 120636659)
Complainant,)	
)	
vs.)	
)	
KIEWIT PACIFIC COMPANY,)	
Respondent.)	
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FILED
LIR APPEALS BOARD
STATE OF HAWAII

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DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a written Notice of Contest, filed on January 5, 1994 by KIEWIT PACIFIC COMPANY ("Respondent"), to contest two Citations and Notifications of Penalty issued to it by the Director of Labor and Industrial Relations, via the Division of Occupational Safety and Health ("Complainant").

The issues on appeal are:

- (1) Whether Respondent violated Occupational Safety and Health Standard ("Standard") §12-130-3(d)(14);
 - a. If so, is the characterization of the violation as "serious" appropriate;
 - b. If so, is the imposition and amount of the proposed \$2,125.00 penalty appropriate;
- (2) Whether Respondent violated Standard §12-110-3(c);
 - a. If so, is the characterization of the violation as "repeat" appropriate;
 - b. If so, is the imposition and amount of the proposed \$1,000.00 penalty appropriate.



For the reasons stated below, we vacate the citations for violations of §12-130-3(d)(14) and §12-110-3(c) of the Standards.

FINDINGS OF FACT

1. On November 17, 1993, Complainant inspected Respondent's construction project site.
2. During the inspection, Complainant's inspector observed one of Respondent's employees walking on top of scaffolding. The scaffolds consisted of two scaffolding stages. There were no guardrails installed on the scaffolds.
3. The inspector asked Respondent's safety supervisor, who was present at the inspection, if he knew the height of each scaffolding stage. Respondent's safety supervisor stated that he was not sure but would estimate each scaffolding stage to be six feet in height.
4. Respondent's scaffolding stages came in various heights of three, four, five, and six feet. At trial, Respondent's safety officer testified that the subject scaffolding stages could have been either five or six feet in height and that the height estimate he gave to Complainant's inspector on the date of the inspection could have been inaccurate. We credit his testimony.
5. Complainant's inspector did not measure the height of the scaffolding, although he could have done so.
6. Based strictly on his observation of the scaffolding and the estimate from the safety officer,

Complainant's inspector determined that the height of the two scaffolding stages totaled more than ten feet above ground.

7. Also during the inspection, Complainant's inspector requested to see Respondent's written records of daily safety inspections. Respondent produced daily safety inspection records for three days prior to November 17, 1993.

8. On the day of the inspection, there were thirty-eight employees engaged by Respondent on the construction project being worked on. Since it had more than thirty employees working on its project site on November 17, 1993, Respondent does not dispute that it was required to perform a safety inspection on its project site on that day and generate by the end of the day a written record of the safety inspection.

9. Since Respondent produced inspection records for only three days prior to November 17, 1993, Complainant cited Respondent for its failure to keep written records of daily inspections on its project site, in violation of §12-110-3(c).

10. Complainant made no determination as to the number of employees Respondent had engaged for days other than November 17, 1993. Complainant made no determination as the number of days Respondent was at the project site.

11. Respondent did not have more than thirty employees on the project site every working day. There were days when there were no employees on the project site because of rain or holidays.

CONCLUSIONS OF LAW

1. Standard §12-130-3(d)(14) requires guardrails to be installed at all open sides and ends on all scaffolds more than ten feet above the ground or floor.

In this case, Complainant relied on the inspector's observation and estimate provided by Respondent's safety officer to show that the subject scaffolding was more than ten feet above the ground.

We find that the evidence presented by Complainant was not sufficient to prove that the scaffold was more than ten feet in height. Complainant did not measure the scaffold stages, which could have been either five or six feet each in height.

On the evidence presented, we conclude that Complainant failed to meet its burden to show that Respondent had violated Standard §12-130-3(d)(14).

Having concluded that Complainant failed to establish a violation of Standard §12-130-3(d)(14), we do not reach the issues of characterization and penalty.

2. Standard §12-110-3(c) requires written records of daily safety inspections to be kept on the project site for review by the Director. However, according to Standard §12-110-3(a) and (b), daily safety inspections are required only for projects employing more than thirty persons.

Since Complainant failed to determine whether Respondent had engaged more than thirty persons on the project for days other than November 17, 1993, we are unable to conclude

that Respondent was subject to Standard §12-110-3(c) for any days prior to November 17, 1993.

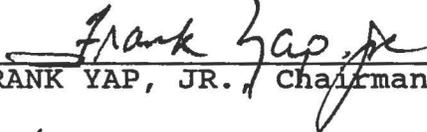
Accordingly, we conclude that Complainant has failed to meet its burden to prove that Respondent had violated Standard §12-110-3(c).

Having concluded that Complainant failed to establish a violation of Standard §12-110-3(c), we do not reach the issues of repeat violation and penalty.

ORDER

The Citations and Notifications of Penalty for violations of §12-130-3(d)-(14) and §12-110-3(c) are hereby, vacated, in accordance with the foregoing.

Dated: Honolulu, Hawaii, JUL 03 1997.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member

EXCUSED
VICENTE F. AQUINO, Member

Bruce W. Rudeen, Esq., for
Complainant

Janice E.C. Teramae, Esq., 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.