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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of,	CASE NO. OSAB 91-015
	(OSHCO No. C4756)
THE DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant,	(Report No. 103823787)
vs.	
CHARLES PANKOW BUILDERS, LTD., Respondent.	

DECISION AND ORDER

This occupational safety and health case is before the Board on written notice of contest of a Citation and Notification of Penalty issued by the Administrator of the Occupational Safety and Health Division of the Department of Labor and Industrial Relations on May 28, 1991.

The issues before us are:

(1) Whether Respondent's noncompliance with §12-122-6(g)(9)(c) of the Hawaii Occupational Safety and Health Standards (HOSHS) constitutes a serious or general violation; and

(2) If the violation is serious, what is the amount of penalty that should be assessed.

FINDINGS OF FACT

1. CHARLES PANKOW BUILDERS, LTD. (Respondent) is the general contractor for a construction project located in Waikiki. On May 14 and 15, 1991, a Department of Labor and Industrial

Relations, Occupational Safety and Health compliance officer inspected Respondent's work site.

2. On May 28, 1991, Respondent was issued a citation for violation of §12-122-6(g)(9)(c) of HOSHS. The violation was determined to be a serious violation under Hawaii Revised Statutes §396-10(k). Respondent was assessed a penalty of $350.00.

3. Respondent admits that it violated §12-122-6(g)(9)(c) of HOSHS, when it failed to remove from service a punctured synthetic web sling used to hoist and move lumber. The inner red gut of the sling was visible due to punctures and/or tears.

4. Respondent immediately removed the sling from service once the violation was noted by the Department's Occupational Safety and Health compliance officer.

5. Respondent testified that it was possible that the damaged sling could fail and cause the hoisted lumber to fall.

6. There was a substantial probability of death or serious physical injury if the sling failed. At the time of the violation, Respondent was using the sling to lift at least three hundred pounds of lumber nearly twenty feet above the ground. Respondent's employees were working directly below the hoisted lumber when the violation was observed.

7. Respondent, with reasonable diligence, could have known of the presence of the violation.

8. Tim Velleses, a manufacturer of the type of synthetic slings used by Respondent, testified that there is a possibility of sling failure whenever a sling is cut or punctured, and especially when the red gut is showing. We credit Mr. Velleses' testimony.

9. Respondent does not dispute the amount of penalty if the determination of "serious violation" is sustained.

CONCLUSIONS OF LAW

1. We conclude that Respondent's noncompliance with §12-122-6(g)(9)(c) of HOSHS constitutes a serious violation.

HRS §396-10(k) defines a serious violation as follows:

> [A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Respondent suggests that §396-10(k) requires the Director to prove a substantial probability that the sling could fail and that death or serious injury could result. Absent such a showing, Respondent contends that its violation should be deemed a general, and not a serious violation. We disagree.

HRS §396-10(k) is identical to §17(k) of the Federal Occupational Safety and Health Act of 1970, codified in 29 U.S.C. §666(k). Federal cases interpreting the corresponding federal

provision, hence, are highly instructive in construing the term "serious violation."

In California Stevedore & Ballast Co. v. Occupational Safety & Health Review Commission, 517 F.2d 986 (9th Cir. 1975), the Ninth Circuit Court of Appeals adopted the Secretary of Labor's interpretion of §17(k), and held that a "serious violation" is any violation of a regulation which renders an accident with a substantial probability of death or serious injury possible. See also, Titanium Metals Corp. of America v. Usery, 579 F.2d 536 (9th Cir. 1978). Because "Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey [a] regulation[,]" the court rejected the employer's argument that the probability requirement applied to both the likelihood of an accident, as well as the degree of harm. California Stevedore, 517 F.2d at 988. Accord, Bethlehem Steel v. Occupational Safety, etc., 607 F.2d 1069 (3rd Cir. 1979) ("The accident need only be possible, not probable."); Usery v. Hermitage Concrete Pipe Co., 584 F.2d 127 (6th Cir. 1978).

We find the reasoning in California Stevedore persuasive and adopt the Ninth Circuit Court of Appeal's construction of "serious violation."

On the record before us, we have found that an accident was possible under the condition for which Respondent was cited. Tim Velleses testified that once a sling has been cut or torn, it

could fail. Respondent itself admitted that there was a possibility of sling failure. We have also found that there was a substantial probability that death or serious injury could result if an accident occurred. If the sling failed, three hundred pounds of lumber could have fallen onto employees working below.

Accordingly, we conclude that Respondent's noncompliance with §12-122-6(g)(9)(c) of HOSHS was a serious violation.

2. As Respondent has represented that it would not dispute the amount of penalty if the determination of "serious violation" is sustained, we conclude that the penalty of $350.00 assessed by the Administrator was proper.

ORDER

The Citation and Notification of Penalty issued by the Administrator of the Occupational Safety and Health Division of the Department of Labor and Industrial Relations on May 28, 1991, is hereby affirmed.

Dated: Honolulu, Hawaii, JAN 28 1992.

FRANK YAP, JR., Chairman

CAROL K. YAMAMOTO, Member