STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. SWANSON STEEL COMPANY, INC., Respondent.	CASE NO. OSAB 2001-41 OSHCO ID C8955 Inspection No. 304213192 DECISION NO. 3 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This is a contested case that arises out of a Citation and Notification of Penalty that was issued by the Complainant, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), by and through the Hawaii Division of Occupational Safety and Health (HIOSH) on August 27, 2001 against Respondent SWANSON STEEL COMPANY, INC. (Respondent or SWANSON). By letter, dated September 4, 2001, Respondent contested the citation.

Jurisdiction over this contested case is conferred on the Hawaii Labor Relations Board (Board) pursuant to the Joint Order Re: Case Assignment dated July 10, 2002. The instant proceeding is de novo. Hawaii Revised Statutes (HRS) § 396-11. The Board conducted a hearing on August 15, 2002, where oral testimony was taken and documentary evidence was introduced for the Board's consideration.

FINDINGS OF FACT

1. SWANSON is in the structural steel erection industry. On August 14, 2001, HIOSH compliance officer Clayton Chun (Chun or inspector) initiated a programmed inspection of Respondent at its worksite located at 2100 Kalakaua Avenue, Honolulu, Hawaii 96815, in Waikiki. The programmed inspection was a part of the tier I inspection of high-hazard industries.

2. Respondent's worksite was a construction project where a three-story shopping complex was under construction. Hawaiian Dredging and Construction

Company was the general contractor and SWANSON was the subcontractor responsible to erect the structural steel frame of the building.

3. Chun entered the worksite at about 10:40 a.m., and began his inspection at approximately 10:55 a.m. He learned that on that particular day, Respondent's workers were performing the following activities: erecting a prefabricated stairway leading from the first to the second floor, "bolting up," and performing "decking" work. "Bolting up" refers to the procedure where two metal members are connected. "Decking" involves the connection of metal panels in a horizontal position to construct a floor or base.

4. Various tools and materials are used in the process of erecting and connecting the steel members. Chun observed a worker using a pry bar, similar to a carpenter's crow bar, and about as long as a person's arm and weighing approximately three pounds. The metal sheets used in decking were approximately three feet wide and twenty feet long, and weighed at least twenty pounds.

5. Chun was only able to observe a single ironworker install a prefabricated metal stairway. The other workers were "idle," probably as a result of Chun's presence. Chun saw seven of Respondent's employees; Respondent's foreman, however, stated that there were twelve employees on the site.

6. Chun was concerned about the ironworkers' use of personal protective equipment, specifically the use of a safety shoe as required by Hawaii Administrative Rules (HAR) § 12-133.1-1(a). Chun described the shoe as having a protective cap incorporated in the shoe and covering the front toe area of the shoe. A safety shoe is also known as a steel-toed shoe and safety-toe footwear.

7. The workers worked in an environment where heavy steel members were moved into place and heavy tools and equipment were used to connect the steel members. Chun was of the opinion that the movement of heavy steel beams and the use of heavy equipment in the erection and connection of the steel members exposed the workers to falling and dropping hazards on their feet. They were exposed to this hazard throughout their work day whenever they were engaged in steel erection activities.

8. Chun inspected the shoes of seven workers by physically depressing the toe area of each worker's shoe in order to detect the presence of a protective toe cap or covering. As a result of his inspection he found that seven of the men did not wear shoes with a protective toe cap as required by the standard. The

men were only wearing leather high-top shoes. The inspector determined that only one of the men wore shoes with a protective toe cap.

9. Chun was of the opinion that if a heavy steel member or piece of equipment fell onto the foot of a worker who was not wearing a shoe with a protective toe cap he would sustain a laceration, fracture or broken foot bone. This would require medical care, and likely, hospitalization. This constituted a "serious" injury.

10. Chun testified that leather shoes (without a protective toe cap) could constitute a safety shoe, depending upon the type of industry the worker is in. However, he was of the opinion that only a shoe with a protective toe cap could be considered a safety shoe for ironworkers. A leather high-top shoe or boot with traction protection and a heavy sole did not provide the full protection required considering the hazards inherent in the industry.

11. Chun was informed by one of the foremen that they are required to wear protective toe cap shoes on federal construction projects.

12. On August 27, 2001, HIOSH cited Respondent for a violation of HAR § 12-133.1-1(a) specifying that, "Personnel employed in steel erection were not wearing safety shoes on the job site" and fined Respondent $525.00.

13. Thus, Respondent was cited because in the judgment of the inspector, the shoes worn by Respondent's employees did not satisfy the "safety shoes" requirement of the standard because they did not have protective steel toes.

14. Respondent timely contested the citation.

15. Respondent does not contest the applicability of the standard but argues that the Director could not have found a violation because protective steel toes are not required by the standard.

16. The Director argues that the term "safety shoes" are required by the standard which should be construed to refer to shoes having a protective toe cap or covering in conformance with the definition of safety-toe footwear in HAR § 12-114.2-1, relating to personal protection equipment in the construction industry.[1] Further, the Director relies upon Chun's testimony that a safety shoe is also commonly known as safety toe footwear.

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[1]HAR § 12-114.2-1, incorporates 29 CFR 1926.96, relating to personal protective and life-saving equipment, and reads, "Safety-toe footwear for employees shall meet the requirements and specification in American National Standards for Men's Safety-Toe Footwear, Z41.1-1967."

CONCLUSIONS OF LAW

1. To establish a violation of a standard, the Director must prove: "(1) the standard applies, (2) there was a failure to comply with the cited standard, (3) an employee had access to the violative condition, and (4) the employer knew or should have known of the condition with the exercise of due diligence." Director v. Honolulu Shirt Shop, OSAB 93-073 at 8 (Jan. 31, 1996).

2. The cited standard provides as follows:

> § 12-13.1-1 General safety precautions. (a) 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. Personal fall arrest systems shall be used for all work 10 feet or more above the nearest floor level.

3. The Board is not convinced that either the definition in an admittedly inapplicable regulation (HAR § 12-114.2-1) or the inspector's opinion controls the instant interpretation. Rather the Board is bound to follow the cardinal rule of statutory construction, that "When construing a statute, [the court's] foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And [the court] must read statutory language in the context

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Section 4, General Requirements of the American National Standards for Men's Safety -Toe Footwear, Z41.1-1967, provides that safety footwear is "intended primarily to provide protection for the toes from impact and compression forces by the use of a protective toe box." The impact and compression requirements are specified in the standard. The standard identifies three (3) classifications: 30, 50 and 75. A 30 classification can withstand a load of up to 1,000 pounds of compression and 30 pounds of impact. A 50 classification can withstand a load of up to 1,750 and 50 pounds of impact. A 75 classification can withstand a load of up to 2,500 and 75 pounds of impact.

of the entire statute and construe it in a manner consistent with its purpose." Bank of Hawaii v. DeYoung, 92 Hawai`i 347, 351, 992 P.2d 42 (2000).

4. Legislative guidance is provided in HRS § 396-6(b) which identifies each employer's general duty with respect to safety devices:

> (b) Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe.

5. And, further clarification is given in the Legislature's definition of "safety device" found in HRS § 396-3 which provides:

> "Safety device" and "safeguard" shall be given a broad interpretation so as to include any practicable method of mitigating or preventing a specific danger.

6. Thus, it is the Board's conclusion that the Legislature's intent was to provide for broad interpretation of required safety devices so as to optimally mitigate specific danger.

7. This does not, of course, provide the Director with absolute license to manufacture standards from whole cloth. At the very least, due process considerations require that the standards provide some reasonable notice of the law's requirements. See, Diamond Roofing Co., v. OSHA, 528 F.2d 645, 649 (5th Cir. 1976) ("An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.")

8. In the instant proceeding, the Board adopts the uncontested representation by the Director that interpreting "safety shoes" to require steel-toed shoes would best conform to the Legislature's intent that required safety devices optimally mitigate specific danger. Adequate notice of the requirement was provided in that Respondent's foreman admitted to an understanding that steel-toed boots were required on federal jobs. There was thus an admitted understanding that reasonably ensuring employees' safety required the use of steel-toed shoes when doing steel work.

9. The Board thus concludes that Respondent violated the applicable standard by failing to require that employees engaged in steel work wear steel-toed safety shoes.

10. The Board also concludes that the Director's characterization of the violation as "serious" is appropriate because it is substantially probable that harm will be serious in the event an accident occurred. Pack River Lumber Co., 1974-75 OSHD § 19,323 (1975). The Board agrees with the Director that the requirement of safety shoes serves to eliminate the potential injuries due to the hazard of materials and objects falling onto the ironworkers' feet. Chun testified that if a heavy object fell onto a worker's foot, it is likely that the worker would sustain a laceration or broken foot requiring medical treatment or hospitalization, constituting serious physical harm.

11. The Board further concludes that the Director established the required prima facie case for employee exposure, employer knowledge, and the penalty. Respondent failed to present any evidence to contest these elements.

ORDER

The Board therefore affirms the instant citation and penalty.

DATED: Honolulu, Hawaii, November 6, 2002.

HAWAII LABOR RELATIONS BOARD

/s/BRIAN K. NAKAMURA
BRIAN K. NAKAMURA, Chair

/s/CHESTER C. KUNITAKE
CHESTER C. KUNITAKE, Member

/s/KATHLEEN RACUYA-MARKRICH
KATHLEEN RACUYA-MARKRICH, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Decision 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 order to a duly recognized representative of the employees.

Copies sent to:

Herbert B.K. Lau, Deputy Attorney General
Gary Swanson