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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

|                                 |   |                        |
|---------------------------------|---|------------------------|
| In the Matter of                | ) | CASE NO. OSAB 2001-023 |
| DIRECTOR, DEPARTMENT OF LABOR   | ) | Insp. No. 302958343    |
| AND INDUSTRIAL RELATIONS,       | ) | OSHC ID C4756          |
| Complainant,                    | ) |                        |
|                                 | ) |                        |
| vs.                             | ) |                        |
|                                 | ) |                        |
| PACIFIC TRADEWINDS ENTERPRISES, | ) |                        |
| Respondent.                     | ) |                        |
| _____                           | ) |                        |

FILED  
LIRAB  
STATE OF HAWAII  
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DECISION AND ORDER

This Occupational Safety and Health case came before the Hawaii Labor Relations Board (HLRB), acting as hearings officer for the Labor and Industrial Relations Appeals Board (LIRAB), on a written Notice of Contest filed by PACIFIC TRADEWINDS ENTERPRISES, through its President David B. Thielen (Respondent), from a Citation and Notification of Penalty issued April 9, 2001 (Citation) by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (DIRECTOR), State of Hawaii, via the Hawaii Occupational Safety and Health Division (HIOSH) (collectively Complainant).

The Citation reads as follows:

Citation 1, Item 1 Type of Violation: Other

29 CFR 1926.25(a) [Refer to Chapter 12-115.1 HAR] During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, were not kept cleared from work areas, passageways, and stairs, in and around buildings or other structures; i.e., two hallways and stairs used by employees to access their work areas were cluttered with nails, scrap lumber, and drywall remains.

Location: BB building  
Date By Which Violation corrected on  
Must be Abated: 12/18/2000  
Proposed Penalty: \$ 0.00

Citation 1 Item 2 Type of Violation: Other

29 CFR 1926.404(f)(6) [Refer to Chapter 12-141.1, HAR] The path to ground from circuits, equipment, and enclosures was not permanent and continuous; i.e., a 3-wire Black & Decker drill #863704 was missing the ground pin on the attachment plug.

Location: BB building  
Date By Which Violation  
Must be Abated: 04/16/2001  
Proposed Penalty: \$ 0.00

The issues to be determined were:

- (1) Whether Respondent violated standard 29 CFR 1926.25(a) as described in Citation 1, Item 1.
  - a. If so, is the characterization of the violation as "other" appropriate? If not, what is the appropriate characterization.
- (2) Whether Respondent violated standard 29 CFR 1926.404(f)(6) as described in Citation 1, Item 2.
  - a. If so, is the characterization of the violation as "other" appropriate? If not, what is the appropriate characterization.

HLRB heard this case, and on February 5, 2002, issued a Proposed Findings of Fact, Conclusions of Law, and Order (Proposed Decision and Order).

On February 19, 2002, Complainant filed exceptions to HLRB's Proposed Decision and Order, with LIRAB.

Having reviewed the record, we hereby issue this Decision and Order, modifying HLRB's Proposed Decision and Order to find that Respondent would not have used the deficient drill until it was repaired, and also to conclude that Respondent would not have used the deficient drill on the day of the inspection or in the future.

#### FINDINGS OF FACT

1. On December 18 and 19, 2000 HIOSH conducted an inspection at Alii Drive and Lunapule Road, Kailua-Kona, Hawaii (Construction Site) of a two-story multi-building residential condominium project under construction by general contractor, Metcalf Construction.

2. Respondent was a subcontractor at the Construction Site whose Big Island drywall crew was engaged in work on December 18, 2000.

3. HIOSH Safety Compliance Officer Charles Clark (Clark) conducted the inspection of the Construction Site on December 18 and 19, 2000, which began with an opening conference and included a walk around of the worksite, photographing what he saw to be safety hazards and employee exposure, and interviewed workers. Clark also looked for means of abatement, and then ended the inspection with a closing conference with the employer representatives at the Construction Site.

4. On December 18, 2000, during the inspection of Building BB, Clark ascended a ladder to the second floor. On the



outside of the building, in a hallway approximately 60 feet in length Clark saw and photographed two areas of the floor that were not swept clean. The first photo taken at approximately 2:00 p.m. shows scraps of wood against a wall, a person standing on a piece of wood. The bottom of the photo shows other scraps of debris, a box and plastic sheet. The second photo taken at approximately 2:15 p.m. shows some scraps of drywall and an empty plastic caulking tube. The photos taken were the worst examples of debris that Clark determined posed more of a tripping hazard to anybody walking in the area because the walkway was not level but included several steps. Clark noted seeing nails on the floor but they are not discernable in the photos, and there were no nails protruding from the scraps of lumber. Clark walked through the hallway and over the debris to take both photographs without tripping.

5. Clark saw one employee walk through the outside walkway. He deduced that workers were exposed to the tripping hazard because the walkway was the only way to access the work areas on the second floor. In speaking with Respondent's foreman Jimmy Sanchez, Clark verified that workers used the walkway to access the rooms. The exposure of one employee to the tripping hazard was not rebutted by Respondent. Hence, exposure is based on the compliance officer's unrebutted observation of one employee using the walkway and verification that the walkway was the only accessible route to other work areas.

6. Respondent has three trades within the drywall company-drywall hangers, tapers, and spray painters to texture the surface. Respondent's housekeeping practice is that after each trade completes the job "everybody cleans up after themselves."

7. On the day of Clark's inspection, Respondent's crew of two were hanging drywall in Building BB, while the tapers were taping in another building. Drywall hanging is a one-day job. The process of hanging drywall on the ceilings involves big sheets that create no mess other than a few pieces of scrap that are either saved or set aside for the dumpster. All of the big sheets of drywall are hung first, put on the wall and fastened using a screw gun.

8. Clark determined the area to constitute a tripping hazard based on the amount of debris that cluttered the walkway.

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The basis for Citation 1, Item 1 is articulated by Clark as follows:

- Q. What is your opinion that supports Citation 1, Item 1?
- A. The debris, amount of debris, loose debris on the stairway and walking surface, in my opinion, constituted and created a tripping hazard to anybody walking in the area, especially when you have workers that would be carrying tools other items in their hands that could obstruct their view of where they're stepping, so this is clearly, in my opinion, poor housekeeping by the employer working in the area and his employees were exposed to this situation.

Deposition of Charles B. Clark, Sept. 25, 2001, p. 29, Lines 13-23.

He estimated the amount of debris could fit into a 50 or 55 gallon drum. Respondent did not rebut Clark's estimate of the amount of debris that was swept clean, nor the tripping hazard which Clark found.

9. Clark determined that Respondent's crew hanging drywall in Building BB at the time of his inspection was responsible for the amount of debris in the walkway area that constituted a tripping hazard. Although at the time of inspection, Respondent's foreman denied responsibility for the debris, the area was swept clean as soon as Clark identified the hazard.

10. Based on the amount and extent of debris, Clark issued a citation to Respondent on April 9, 2001, for a housekeeping violation under standard 29 CFR 1929.25(a) and Chapter 12-115.1 Hawaii Administrative Rules (HAR). The characterization of the violation was determined to be other-than-serious, and no monetary penalty was assessed.

11. Respondent was also cited for violating standard 29 CFR 1926.404(f)(6) and HAR Chapter 12-141.1 based on Clark's inspection of a 3-wire Black & Decker drill #863704 that was missing a ground pin on the attachment plug. The characterization of the violation was determined to be other-than-serious, and no monetary penalty was assessed.

12. The drill inspected by Clark was not plugged into the wall. Clark found ground fault circuit interrupters (GFCI) in place provided by the general contractor for the entire site. The



purpose of a GFCI is to protect employees from electrical problems with tools by cutting the power off before an employee is exposed to electrical shock or electrocution. Clark did not observe any employees using the drill. Clark admitted that his written report indicating that the foreman was using a drill without a ground pin to mix drywall mud was not a correct observation.

13. We find that the representation of Respondent's foreman--Jimmy Sanchez--who allegedly told Clark the drill was his personal drill that he planned to use to mix drywall mud in the future, is not enough to establish that any employees were exposed to a hazard as a consequence of the missing ground pin on the attachment plug of the 3-wire Black & Decker drill. The only activity occurring in Building BB on the day of inspection was hanging drywall which is a one-day job. Tapers were not taping in Building BB on the date of inspection. The only use for the drill was to mix drywall mud which typically would be mixed in the morning as part of the taping process. According to the OSHA-1B dated March 28, 2001, Sanchez told Clark that he would have the drill taken out of service until he could repair it. In his deposition on September 17, 2001, Thielen confirmed that Sanchez told him that the drill had been set off to the side and was headed for the bin located at Respondent's baseyard that contained the tools that needed to be repaired. The drill was not used as part of the hanging drywall process on the day of Clark's inspection and would not have been used in the future.

### CONCLUSIONS OF LAW

1. The LIRAB has jurisdiction over this contested case pursuant to Hawaii Revised Statutes (HRS) § 396-11.

2. At all relevant times, Respondent was an employer as defined in HRS § 396-3, and employed employees, as defined in HRS § 396-3, and thus is subject to the requirements of HRS Chapter 396, the Hawaii Occupational Safety and Health Law.

3. Complainant has the burden of proving a violation by a preponderance of the evidence. A prima facie case is established by showing: 1) the cited standard applies; 2) Respondent failed to comply with the standard; 3) employees had access to the hazard; and 4) Respondent knew or should have known of the hazard with the exercise of reasonable diligence.

4. We conclude that Complainant met the burden of proving that Respondent violated the housekeeping standard as described in Citation 1, Item 1 cited as 29 CFR §1926.25(a).

5. The characterization as "other than serious" is appropriate for Citation 1, Item 1.

6. Complainant failed to prove by a preponderance of evidence Respondent violated the safety standard as described in Citation 1, Item 2 cited as 29 CFR § 1926.404(f)(6) because the drill with a missing ground pin on the attachment plug was not in use at any time on the day of inspection and would not have been used in the future. Accordingly, we need not address the characterization issue for Citation 1, Item 2.



ORDER

1. We affirm Citation 1, Item 1, and the characterization of that violation.

2. We vacate Citation 1, Item 2.

Dated: Honolulu, Hawaii, MAR 25 2002.

  
RANDALL Y. IWASE, Chairman

  
CAROL K. YAMAMOTO, Member


  
VICENTE F. AQUINO, Member

Frances Lum, Esq./Leo Young, Esq.  
for Complainant

Brian Choy, Esq.  
for Respondent

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.

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on MAR 25 2002 .

I do hereby certify that the foregoing  
is a full, true and correct copy of  
the original on file in this office.

  
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