

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of
DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,
Complainant,

vs.

STATE OF HAWAII,
DEPARTMENT OF HUMAN SERVICES,
ADMINISTRATIVE SERVICES OFFICE,
Respondent.

CASE NO. OSAB 97-014
(OSHCO No. Y4523)
(Inspection #301422457)

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a written notice of contest filed by the STATE OF HAWAII, DEPARTMENT OF HUMAN SERVICES, ADMINISTRATIVE SERVICES OFFICE, ("Respondent"), to contest a Citation and Notification of Penalty ("Citation") issued by the DIRECTOR of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, via the Division of Occupational Safety and Health ("Complainant").

At the June 3, 1998 hearing before the Board, Complainant orally amended Respondent's violation of HIOSH standard Section 12-71-2(j)(6), from a "serious" to an "other-than-serious" violation, with a corresponding penalty of \$1,800.00. Complainant also orally amended the penalty for Respondent's violation of HIOSH standard Section 12-71-2(r)(1), to \$1,800.00.

The issues before the Board are:

- (1) Regarding violation of standard Section 12-71-2(j)(6).

FILED
LIR APPEALS FOR
STATE OF HAWAII

99 JUN 10 A8:39

- a. Is the imposition and amount of the proposed \$1,800.00 penalty appropriate.
- (2) Regarding violation of standard Section 12-71-2(r) (1).
 - a. Is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization.
 - b. Is the imposition and amount of the proposed \$1,800.00 penalty appropriate.
- (3) Regarding violation of standard Section 12-89-5(f) (4).
 - a. Is the characterization of the violation as "serious" appropriate. If not, what is the appropriate characterization.
 - b. Is the imposition and amount of the proposed \$1,800.00 penalty appropriate.

For the reasons stated below, we modify Complainant's characterization of Respondent's violation of HIOSH standard Sections 12-71-2(r) (1) and 12-89-5(f) (4), and Complainant's imposition of the proposed penalties for Respondent's violation of HIOSH standard Sections 12-71-2(j) (6), 12-71-2(r) (1), and 12-89-5(f) (4).

FINDINGS OF FACT

- 1. In response to a complaint made to HIOSH, Ronald Yang, a HIOSH compliance officer, and Conroy Dang, a HIOSH trainee inspector, conducted an inspection of Respondent's workplace on March 25, 1997.
- 2. Respondent's workplace was located in the Liliuokalani Building, basement room #3 ("basement room").
- 3. Approximately 15 employees were working at the time of the inspection.

4. The inspectors observed that the doorway belonging to an office in the basement room measured 21 inches in width.

5. The inspectors further observed that a desk and adjacent furnishings were situated in the basement room. The spaces between the desk and furnishings measured approximately 14 inches on one side and 22 inches on the other side.

6. All of Respondent's employees regularly entered into and exited from the basement room through the same door ("doorway exit"). The doorway exit separated the basement room from a hallway.

7. During the inspection, the inspectors observed that the doorway exit was not marked by an exit sign.

8. All of Respondent's employees worked within 8 yards of the doorway exit.

9. All of Respondent's employees were familiar with the basement room's configuration.

10. All of Respondent's employees had knowledge of the doorway exit's location.

11 We do not find death or serious physical harm, resulting from the lack of an exit sign marking the doorway exit, to be a reasonable possibility under the circumstances in this case.

12. We find that the proper characterization of Respondent's violation of standard Section 12-71-2(r)(1) is "general" or "other than serious."

13. Using a Sears conduit tester, the inspectors tested the basement room's fixed electrical outlets for ground continuity, and found one of the 110 volt outlets to have an open ground.

14. Between 2 and 4 of Respondent's employees worked in the vicinity of the cited outlet.

15. The cited outlet was used to power portable electrical equipment such as typewriters, calculators, and desk lamps.

16. The environment of the basement room was dry.

17. We do not find death or serious physical harm, resulting from a 110 volt outlet having an open ground, to be a reasonable possibility under the circumstances in this case.

18. We find that the proper characterization of Respondent's violation of standard Section 12-89-5(f)(4) is "general" or "other than serious."

19. Employer promptly remedied every violation of the cited standards following issuance of the Citation.

CONCLUSIONS OF LAW

1. Standard Section 12-71-2(j)(6) provides in part that "[t]he minimum width of any way-of-exit access shall in no case be less than 28 inches."

Although not all of Respondent's way-of-exit accesses measured at least 28 inches in width, the record reflects that they were functional and safe for all of Respondent's employees working in the basement room. The record further reflects that all of

Respondent's employees were familiar with the basement room's configuration and had knowledge of the doorway exit's location.

As such, Complainant characterized Respondent's violation of standard Section 12-71-2(j)(6) as an "other-than-serious" violation. Accordingly, we conclude that no penalty shall be assessed.

2. Standard Section 12-71-2(r)(1) provides in part that "[e]xits shall be marked by a readily visible sign."

The record reflects that Respondent's employees, all of whom worked within 8 yards of the doorway exit, were familiar with its location and with the configuration of the area in which they worked.

Under Hawaii Revised Statutes ("H.R.S.") Section 396-1, a violation is "serious" if there is a substantial probability that death or serious physical harm could result from a hazardous condition at the work place.

In Director v. Charles Pankow Builders, Ltd., OSAB 91-015 (Jan. 28, 1992), we construed the term "serious violation" as any violation of a regulation which renders an accident with a substantial probability of death or serious injury possible. We concluded in Director v. Fritz's European Bakery, OSAB 96-025 (Oct. 6, 1998), that the possibility of the type of accident that could occur must at least be reasonably predictable in view of the type of work being done and the procedures, practices, and work patterns of the employer in performing that work.

Under the circumstances of this case, we did not find death or serious physical harm, resulting from the lack of an exit sign marking the doorway exit, to be a reasonable possibility.

Accordingly, based on our construction of the term "serious violation," as defined in H.R.S. Section 396-1, the relevant caselaw, and the requirement enunciated in Fritz's European Bakery that the alleged type of accident be a reasonable possibility, we conclude that Complainant has failed to establish all of the elements of a serious violation.

Respondent's violation shall, therefore, be characterized as a "general" or "other-than-serious" violation.

a. As Respondent's violation of standard Section 12-71-2(r)(1) has been characterized as "general" or "other than serious," we conclude that no penalty shall be assessed.

3. Standard Section 12-89-5(f)(4) provides that "[t]he path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

The record reflects that the environment of the basement room was dry, thereby reducing the risk of electrical shock.

Under the circumstances of this case, we did not find death or serious physical harm, resulting from a 110 volt outlet having an open ground, to be a reasonable possibility.

Accordingly, based on our construction of the term "serious violation" as defined in H.R.S. Section 396-1, the relevant caselaw, and the requirement enunciated in Fritz's European Bakery that the alleged type of accident be a reasonable

possibility, we conclude that Complainant has failed to establish all of the elements of a serious violation in this case.

Respondent's violation shall, therefore, be characterized as a "general" or "other-than-serious" violation.

a. As Respondent's violation of standard Section 12-89-5(f)(4) has been characterized as "general" or "other than serious," we conclude that no penalty shall be assessed.

ORDER

The Citation is hereby modified as to Respondent's violation of HIOSH standard Sections 12-71-2(r)(1) and 12-89-5(f)(4), and Complainant's imposition of the proposed penalties for Respondent's violation of HIOSH standard Sections 12-71-2(j)(6), 12-71-2(r)(1), and 12-89-5(f)(4).

Respondent shall not be liable for any penalties for its violation of the above identified standards.

Dated: Honolulu, Hawaii, JUN 10 1999.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Kris Nakagawa, Esq.
Attorney for Respondent

Herbert B.K. Lau, Esq.
Attorney for Complainant

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

