

LAB/JAS

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 96-027(H)
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO ID C6580)
AND INDUSTRIAL RELATIONS,)	(Inspection #120606314)
Complainant,)	
)	
vs.)	
)	
ARAKAKI MECHANICAL,)	
Respondent.)	
)	

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 by ARAKAKI MECHANICAL (Respondent), to contest the Citations and Notifications of Penalty issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via its Division of Occupational Safety and Health (Complainant), on April 23, 1996.

The Board's June 10, 1996 pretrial order identified five issues for determination, but because Complainant withdrew Citation 2 Item 1b at trial, the issue of whether Respondent violated Standard 29 CFR §1926.103(a)(1) will not be addressed.

The issues to be determined are:

- (1) Whether Respondent violated Standard §12-113-2(b).
 - (a) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?
- (2) Whether Respondent violated Standard 29 CFR §1926.59(e)(1).
 - (a) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?

(3) Whether Respondent violated Standard 29 CFR §1926.59(h)(3)(ii).

(a) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?

(4) Whether Respondent violated Standard §12-202-1(e).

We conclude that Respondent did not violate Standards §12-113-2(b), 29 CFR §1926.59(e)(1), 29 CFR §1926.59(h)(3)(ii), or §12-202-1(e). Accordingly, we vacate the April 23, 1996 Citations and Notifications of Penalty.

FINDINGS OF FACT

1. Coast Steel Fabricators, Ltd. (Coast Steel) was the general contractor of the Japan National Large Telescope (JNLT) project.

2. The JNLT project involved the construction of an observatory at the summit of Mauna Kea on the island of Hawaii.

3. To protect the telescope housed in the observatory from adverse weather conditions, a polyurethane foam was sprayed onto the observatory's interior surface, where, upon contact with the surface, it solidified into a rigid insulation.

4. The foam consisted of two components, an A-side and a B-side.

5. The A-side and B-side components were stored in 55-gallon drums at the worksite. The insulation was made on site by mixing the two components together.

6. Stene Spray Systems (Stene) was the subcontractor hired to spray the insulation. The spraying of the insulation had been ongoing since November 1995.

7. In November 1995, Coast Steel hired Respondent to perform clean up work on the JNLT project. Respondent performed welding and cutting, using acetylene torches that produce slag and sparks.

8. On January 16, 1996, Respondent was assigned by Coast Steel to remove a beam from an elevator shaft. While one of Respondent's employees was welding, slag ignited insulation behind the elevator shaft, causing a fire. Three workers died in the fire.

9. The insulation is flammable and its combustion produces toxic gases.

10. The A-side and B-side insulation components are health hazards.

11. Respondent did not bring the insulation to the worksite nor did it work with the insulation at the worksite.

12. On January 17, 1996, the day after the observatory fire, Complainant commenced an accident investigation, including an inspection of the JNLT worksite.

13. Following its investigation, Complainant determined that Respondent was an employer at the worksite and that it had failed to protect its employees from the hazards associated with the insulation. According to Complainant, Respondent's employees were exposed to a potential fire hazard and the release of toxic by-products by welding in close proximity to the insulation. The employees were also exposed to health hazards from the insulation during Stene's spraying operations. Respondent admits that it

did not provide training for its employees about the insulation nor did it monitor its employees' exposure to the insulation.

14. From the outset of the case, however, Respondent has always maintained that until the fire occurred, it was unaware of the dangers posed by the insulation and from what it observed at the worksite, it had no reason to suspect that the insulation was flammable or that its components were health hazards.

15. On April 23, 1996, Complainant issued Citations and Notifications of Penalty to Respondent. Respondent was cited for "serious" violations of Standards §12-113-2(b) [Citation 1 Item 1a]; 29 CFR §1926.59(e)(1) [Citation 1 Item 1b]; and 29 CFR §1926.59(h)(3)(ii) [Citation 1 Item 1c] and "other-than-serious" violations of Standards §12-202-1(e) [Citation 2 Item 1a]; and 29 CFR §1926.103(a)(1) [Citation 2 Item 1b].¹ Respondent was assessed proposed penalties of \$1,500.00 for the "serious" violations and \$300.00 for the "other-than-serious" violations.

16. Complainant has the burden of proof as to each of the alleged violations. To establish a prima facie violation of a standard, Complainant must prove by a preponderance of the evidence that the cited standard applies, there was a failure to comply with the cited standard, an employee had access to the violative condition, and the employer knew or could have known of the condition with the exercise of reasonable diligence.

¹Citation 1 Items 1a, 1b, and 1c were grouped. Citation 2 Items 1a and 1b were also grouped. As previously noted, Citation 2 Item 1b was withdrawn at trial.

Standard §12-113-2(b)

17. This standard falls under the chapter dealing with fire protection and prevention and requires that key personnel be instructed in the principles of fire, methods and equipment used in fire protection, fire prevention, and emergency evacuation procedures.

18. Complainant has asserted two bases to support its citation of Respondent for a violation of this standard.

The first basis is that Respondent failed to inform its employees about emergency evacuation procedures. Complainant presented testimony from the inspector who inspected the JNLT worksite to show that emergency evacuation procedures were not discussed.

The inspector testified that Respondent's employees had checked for escape routes in case of a fire, but the inspector determined that the employees were not sufficiently instructed in emergency evacuation procedures, because they attempted to fight the observatory fire themselves before finally escaping.

We find, however, that such evidence does not show that Respondent's key personnel lacked instruction about emergency evacuation procedures. There was no testimony by the inspector that Respondent's employees were not instructed in emergency evacuation procedures.

Because Complainant has not shown that Respondent failed to comply with the standard, we find that Complainant has not established a prima facie violation of the standard.

Assuming that Complainant has established a prima facie case on the basis of Respondent's alleged failure to inform its employees about emergency evacuation procedures, we find that Respondent has rebutted the prima facie case.

Respondent presented unrefuted evidence that all of its employees at the site were trained in fire protection and safety. Samuel David, Respondent's foreman, testified that Respondent's employees knew how to evacuate from the building in case of a fire.

19. The other basis is that Respondent failed to inform its employees about the flammable nature of the insulation and the toxic by-products of the insulation's combustion.

Complainant contends that Respondent knew that the insulation was flammable, because the mechanical foreman for Coast Steel, Charles Brown, informed Mr. David about the flammability of the insulation.

Complainant further contends that Respondent, being reasonably diligent, could have known of the flammability of the insulation. Complainant argues that Respondent, as welders, had the responsibility for determining the flammable or combustible material at the site. According to Complainant, Respondent could have taken steps to determine that the insulation was flammable, such as requesting from the general contractor the material data safety sheets (MSDS) for the insulation components or the product information sheet for the insulation. These documents would have revealed the insulation's flammable nature.

Contrary to Complainant's contentions, however, we find that Respondent neither knew nor had any reason to believe that the insulation was flammable.

Mr. Brown and Mr. David gave conflicting accounts on the issue of Respondent's knowledge. When interviewed by the inspector, Mr. Brown stated that he told Mr. David that the foam was flammable. Mr. David denied ever being told by Mr. Brown that the foam was flammable.

Mr. Brown did not testify before the Board. Mr. David did testify and reiterated that Mr. Brown never told him that the insulation was flammable. We find Mr. David to be credible and accept his account over the statements attributed to Mr. Brown by the inspector.

Respondent also presented unrefuted evidence that Coast Steel instructed Respondent to weld near the insulation on the day of the fire. Mr. David testified that no warning signs or "No Smoking" signs were ever posted. Stanley Iwashita, the foreman of Isemoto Contracting, Co., a subcontractor on the site, testified that he observed welding taking place in the vicinity of insulation and workers smoking in the building.

We further find that the standard's requirements are clear and that Respondent was not required under this standard to determine that the insulation was flammable. We agree with Respondent's assertion that this standard only imposes a general requirement that key personnel be trained in principles of fire protection and safety.

Regarding the second basis asserted by Complainant, we find that Complainant has not established a prima facie violation of the standard.

Standard 29 CFR §1926.59(h)(3)(ii)

20. This standard falls under the chapter dealing with hazard communication and requires an employer to provide its employees with training on the physical and health hazards of the chemicals in the work area.

21. Complainant asserts that Respondent violated this standard, because Respondent was required under this standard to train its employees about the health hazards of the insulation and that it failed to do so.

22. Complainant presented testimony from the inspector that Respondent failed to protect its workers who were directly exposed to the health hazards of the A-side component of the foam spray mixture. The A-side component of the insulation contains a hazardous chemical, 4,4-diphenylmethane diisocyanate (MDI), which is highly toxic when inhaled and a powerful irritant to the skin and eyes. Respondent's employees were not informed of the health hazards of MDI.

Complainant contends that Respondent, being reasonably diligent, could have known of the hazardous nature of the foam's ingredients, because there were three indications that the foam was a health hazard.

First, one of Respondent's employees fell ill on his first day on the jobsite due to breathing the spray. This should

have prompted Respondent to obtain from Coast Steel the MSDS of the A-side and B-side components of the insulation to determine whether there was any hazardous ingredients, but this was not done. A review of the MSDS would have revealed the hazardous nature of the insulation's ingredients.

Second, Respondent's workers were working near the sprayers who were wearing respirators. This should have caused Respondent to be concerned about the safety of the insulation and to ask Stene about the foam spray's ingredients.

Finally, the 55-gallon drums of the foam components carried a warning that the contents posed a health hazard. The drums had labels with large boxes that could be checked off if there was a health hazard. There was also a warning in small print. While the boxes identifying the contents as a health hazard were not marked, a close inspection of the labels would have disclosed to Respondent that the contents of the foam were hazardous and that protective measures should have been taken.

Contrary to Complainant's contentions, however, we find that Respondent had no reason to suspect that the insulation was a health hazard.

First, Mr. Arakaki confirmed that one of Respondent's employees left the Mauna Kea jobsite and attributed his leaving to illness from the insulation fumes. Mr. Arakaki also explained that the person was a new employee, worked one day, took two days off, worked a second day, and then never returned to work again. None of Respondent's other employees had similar complaints, but

Mr. Arakaki contacted Mr. Brown from Coast Steel to ask if there was a problem with the insulation and was assured there was none. We consider Mr. Arakaki's reliance on that representation to be reasonable, since Respondent's work on the jobsite was performed under the direction of Coast Steel.

Second, both Mr. Arakaki and Mr. Iwashita testified that the Stene workers did not use respirators, only paper dust masks. According to Respondent, the paper dust masks gave no indication to the other workers that the insulation was a health hazard.

Finally, Mr. Arakaki, who had gone on site prior to entering into the contract with Coast Steel, described seeing the insulation containers and recalled that they were not labeled as a health hazard. Mr. Arakaki explained that from his experience working at such jobsites, it is his regular practice to look at the labels and to scan them for hazard warnings.

We further find that Respondent was not required under this standard to provide its employees with training for health hazards of the insulation, when it did not know and had no reason to suspect that the insulation was hazardous. We agree with Respondent's assertion that because the JNLT project was a multi-employer worksite, the standard must be read in conjunction with provisions, such as §12-110-2(f), addressing the respective responsibilities of general contractors and sub-contractors on a project, and particularly, §1926(e)(1) and §1926.59(g), which require an employer to communicate information and have MSDS

available only for hazardous materials the employer knows about or uses. Respondent believes that reading §1926.59(h)(3)(ii) to require an employer to take the steps mandated by these sections, regardless of whether the employer knew or had any basis to conclude that a hazardous material was present at the worksite, would impose an impossible duty.

23. We find that Complainant has not established a prima facie violation of this standard.

Standard 29 CFR §1926.59(e)(1)

24. This standard, which is in the same chapter as the previously discussed standard, requires an employer to have a written hazard communication program that, at minimum, specifies how criteria regarding labels and other types of warning, MSDS, and employee information and training, about hazardous chemicals in the workplace, will be met.

25. Complainant asserts that Respondent violated this standard, because of the cited deficiency in the training aspect of its written hazard communication program, i.e., the violation of 29 CFR §1926.59(h)(3)(ii). Complainant's policy is to cite and group this general violation with the cited specific violation.

Since the basis for this violation is Respondent's alleged violation of 29 CFR §1926.59(h)(3)(ii) and because Complainant did not establish a prima facie violation of that standard, we find that Complainant has not established a prima facie violation of 29 CFR §1926.59(e)(1).

While Complainant has not established a prima facie case, we believe that Respondent's written hazard communication program, which included MSDS on site for each of the hazardous chemicals used by its employees or which its employees knew was present at the worksite, complied with the requirements of the standard.

Standard §12-202(1)(e)

26. This standard is part of the chapter dealing with toxic chemicals and harmful physical agents and requires all employers to measure, monitor, and record employee exposure to toxic materials or harmful physical agents. The standard goes into detail about the type of information that is needed to determine if any employee may be exposed to toxic materials or harmful physical agents.

27. Complainant asserts that Respondent violated this standard, because it failed to measure or monitor the worksite for employee exposure to hazardous chemicals from the insulation. Complainant relies upon the inspector's testimony regarding the absence of any measurement or monitoring by Respondent.

Complainant contends that Respondent, being reasonably diligent, could have known of the hazardous nature of the foam's ingredients, because there were indications that should have prompted Respondent to measure or monitor the worksite for any employee over-exposure to the insulation's components.

Complainant relies upon the same factual evidence that was presented to support the alleged violation of Standard 29

§1926.59(h)(3)(ii). i.e., the incident where one of Respondent's workers allegedly fell ill from breathing the spray, the wearing of respirators by the sprayers, and the warning on the insulation containers, all of which Complainant contends should have alerted Respondent to the hazardous nature of the insulation and to take protective measures.

As we have previously found, however, Respondent had no reason to suspect that the insulation was hazardous.

Furthermore, consistent with the findings we made in our discussion of Standard 29 CFR §1926.59(h)(3)(ii), we find that Respondent was not required under this standard to measure or monitor for employee exposure to any hazardous chemicals in the insulation.

28. We find that Complainant has not established a prima facie violation of the standard.

CONCLUSIONS OF LAW

We conclude that Respondent did not violate Standards §12-113-2(b), 29 CFR §1926.59(e)(1), 29 CFR §1926.59(h)(3)(ii), or §12-202(1)(e), because Complainant, who has the burden of proving that Respondent violated the cited standards, did not establish prima facie violations of any of the cited standards.

Complainant found Respondent to be in violation of the cited standards, because of hazards from the insulation sprayed by Stene. These hazards were unknown to Respondent, who did not bring the insulation to the worksite and did not work with the insulation at the jobsite.

Despite Respondent's assertion that it did not know or have any reason to suspect that the insulation was flammable and a health hazard, Complainant's position was that Respondent was required, nevertheless, to determine the flammable and hazardous nature of the insulation.


We are persuaded, however, that Respondent was unaware of the insulation's hazardous properties and had it known or had any reason to suspect that the insulation was flammable and a health hazard, it would have taken the necessary precautions and protective measures.


Having concluded that there were no violations of the cited standards, we do not address the characterization issues.

ORDER

The Citations and Notifications of Penalty [Citation 1 Items 1a, 1b, and 1c and Citation 2 Item 1a] dated April 23, 1996 are hereby vacated.

Dated: Honolulu, Hawaii, **MAY 22 2000**.

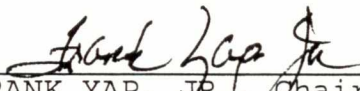

CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

I CONCUR:

I concur completely with the Findings of Fact and Conclusions of Law set forth in the Decision above. I further believe the agency's continued prosecution of the Citation, following the completion of discovery by the parties and in view of the two settlement conferences conducted by the undersigned, borders on over-zealous and unreasonable prosecution of this

sub-contractor, who was one of several cited by the agency for the tragic events of January 16, 1996.


FRANK YAP, JR., Chairman

Herbert Lau, Esq./Frances Lum, Esq.
for Complainant

Diana Van De Car, 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. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.

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

