

LMB/m

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 98-034
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO No. H0512)
AND INDUSTRIAL RELATIONS,)	(Report No. 301426755)
Complainant,)	
)	
vs.)	
)	
MCDONALD'S OF MOANALUA,)	
Respondent.)	
)	

FILED
LMB
AUG 29 1999

00 AUG 29 10:43

DECISION AND ORDER

This workers' compensation case is before the Board on a written notice of contest filed by MCDONALD'S OF MOANALUA, ("Respondent"), contesting a Citation and Notification of Penalty issued by the DIRECTOR of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, via the Division of Occupational Safety and Health ("Complainant").

The Board's October 26, 1998 Pretrial Order identified five issues.

At the September 1, 1999 hearing before the Board, Complainant withdrew Citation 1, Items 1 and 3, and Respondent withdrew its contest of Citation 1, Item 2. A written stipulation reflecting this agreement was filed with the Board on September 13, 1999.

Accordingly, the remaining issues for determination are:

- (1) Whether Respondent violated standard Section 29 CFR 1910.1200(e)(1) as described in Citation 1, Item 4a; and
- (2) Whether Respondent violated standard Section 29 CFR 1910.1200(h)(3)(ii) as described in Citation 1, Item 4b.



For the reasons stated below, we reverse and vacate the Citation for violations of HIOSH standard Sections 29 CFR 1910.1200(e)(1) and 29 CFR 1910.1200(h)(3)(ii).

FINDINGS OF FACT

1. Respondent is engaged in operating a fast food restaurant in Honolulu.

2. Respondent's employees use a degreaser known as "McD Heavy-Duty Degreaser" and a sanitizer known as "McD Sanitizer" to clean different parts of Respondent's establishment, including the grill, windows, counter-tops, tables, and apparatus in the playplace area.

3. Between August 3, 1998 and August 11, 1998, Yunlin Huang, a HIOSH compliance officer, inspected Respondent's worksite and reported that one of Respondent's eight employees whom he interviewed was unaware that the degreaser and sanitizer were capable of causing eye and skin irritation. The compliance officer further reported that Respondent had one visor and no goggles or eyewash available for use by its employees working with the degreaser and sanitizer. A determination was made that Respondent's hazard communication program was deficient because it failed to provide employee training in the physical and health hazards of the cleaning products used by the employees, i.e., the sanitizer and the degreaser.

4. On August 31, 1998, a Citation and Notification of Penalty was issued against Respondent alleging a violation of HIOSH

Section 29 CFR 1910.1200(e)(1) and Section 29 CFR 1910.1200(h)(3)(ii).

5. Section 29 CFR 1910.1200(h)(3)(ii) specifies that employers' HCPs shall provide employee training in the physical and health hazards of the chemicals in the work area.

6. Section 29 CFR 1910.1200(e)(1) requires employers to develop, implement, and maintain a written hazard communication program ("HCP"), for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) for labels and other forms of warning, material safety data sheets ("MSDS"), and employee information and training shall be met, and which also includes: a list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate MSDS; and the methods the employer will use to inform employees of the hazards of non-routine work.

7. Complainant alleges that Respondent failed to provide training on the physical and health hazards of the chemicals in the work area in violation of Section 29 CFR 1910.1200(h)(3)(ii).

8. Complainant further administratively imposed a violation of Section 29 CRF 1910.1200(e)(1), because of the violation of Section 29 CFR 1910.1200(h)(3)(ii).

9. At the time of the inspection, Respondent had a written HCP in effect, a part of which contained Respondent's Crew Orientation Hazard Communication Standard sheet ("Crew Orientation sheet").

10. The Crew Orientation sheet describes how the criteria specified in paragraphs (f), (g), and (h) of Section 29 CFR 1910.1200(e)(1) for labels and other forms of warning, MSDS, and employee information and training shall be met.

11. At the September 1, 1999 hearing before the Board, Jonathan B. Cachola, Respondent's restaurant manager, stated that he reads through the Crew Orientation sheet with each new employee during the employee's orientation, and informs each new employee that the degreaser and sanitizer are chemical irritants.

12. Mr. Cachola further indicated that a member of Respondent's management team instructs each new employee on the preparation and use of the degreaser and sanitizer, and reads those products' MSDS to the employee.

13. The MSDS for the degreaser and sanitizer contain sections entitled "Health Hazard Data," "Precautions for Safe Handling and Use," and "Special Protection Information," which address those products' physical and health hazards.

14. The MSDS for the degreaser and sanitizer do not require Respondent to have eyewash and protective clothing or equipment, including visors and goggles, available for use by its employees exposed to those products.

15. We find Respondent's HCP was not deficient.

CONCLUSIONS OF LAW

1. We first address whether Respondent violated standard Section 29 CFR 1910.1200(h)(3)(ii), described in Citation 1, Item 4b. Based on the foregoing and on our finding

that Respondent's HCP was not deficient, we conclude that Respondent did not violate standard Section 29 CFR 1910.1200(h)(3)(ii).

2. Because we have determined that Respondent did not violate Section 29 CFR 1910.1200(h)(3)(ii), we conclude that the violation of Section 29 CFR 1910.1200(e)(1), described in Citation 1, Item 4a, cannot be administratively imposed. Accordingly, we conclude that Respondent did not violate Section 29 CFR 1910.1200(e)(1).

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Citation issued by Complainant on August 31, 1998, is reversed and vacated.

AUG 29 2000

Dated: Honolulu, Hawaii, _____.

EXCUSED

RANDALL Y. IWASE, Chairman

Carol K. Yamamoto

CAROL K. YAMAMOTO, Member

Vicente F. Aquino

VICENTE F. AQUINO, Member

Herbert B.K. Lau, Esq.
for Complainant

Jeffrey S. Harris, Esq.
for Respondent

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

[Signature]

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.