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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 99-015 (WH)
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO No. Y0816)
AND INDUSTRIAL RELATIONS,)	(Report No. 120651138)
Complainant,)	
)	
vs.)	
)	
METCALF CONSTRUCTION CO., INC.,)	
Respondent.)	
_____)	

FILED
 LIR APPEALS BOARD
 STATE OF HAWAII
 01 MAY 30 P2:12

AMENDED PROPOSED DECISION AND ORDER
 and
ORDER ADOPTING AMENDED PROPOSED DECISION AND ORDER
AS FINAL DECISION AND ORDER

On May 11, 2001, the Board issued a Proposed Decision and Order in the above-captioned appeal. On May 22, 2001, the DIRECTOR of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS filed exceptions to the Proposed Decision and Order to correct certain typographical errors in the decision. METCALF CONSTRUCTION COMPANY, INC. ("Metcalf") did not file any exceptions to the Proposed Decision and Order.

Pursuant to the Board's Rules of Practice and Procedure §12-47-54, we hereby amend pages 1 and 9 of our May 11, 2001 Proposed Decision and Order to correct the standard number that Metcalf was cited for in Citation 1, Item 2. The reference to standard number §1926.1200(h)(1) on pages 1 and 9 shall be amended to §1910.1200(h)(1). All other provisions of the Proposed Decision and Order remain the same and are not affected by this amendment.



Having amended the Proposed Decision and Order to reflect the above-noted clerical errors, and there being no other exceptions to our decision, we hereby order the adoption of the Amended Proposed Decision and Order in toto as the final Decision and Order in this appeal.

Dated: Honolulu, Hawaii, MAY 30 2001.

EXCUSED
RANDALL Y. IWASE, Chairman

Carol K. Yamamoto
CAROL K. YAMAMOTO, Member

Vicente F. Aquino
VICENTE F. AQUINO, Member

Leo B. Young, Esq.
for Complainant

Brian G.S. Choy, Esq.
for Respondent

NOTICE TO EMPLOYER:

You are required to post a copy of this Amended Proposed Decision and Order and Order Adopting Amended Proposed Decision and Order as Final 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 MAY 30 2001.

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

Leo

For the reasons stated below, we affirm Citation 1, Items 1 and 2, and Citation 2, Items 1, 2, 3a, 3b, 3c, and 4. We modify the characterization of the violations for Citation 1, Items 1 and 2 from "repeat" to "other", and vacate the assessment of the \$200.000 penalty for each of these two violations. We affirm the characterization of the remaining violations as "other."

FINDINGS OF FACT

Citation 1, Item 1

1. Citation 1, Item 1 was issued against Metcalf for violation of 29 CFR §1910.1200(e)(1), which requires Metcalf to develop, implement, and maintain at each workplace a written hazard communication program that describes how the criteria specified in paragraphs (f) to (h) are to be met for labels and warnings for hazardous chemicals, material safety data sheets, and employee information and training.

2. Under the standards, hazardous chemical means any chemical which is a physical hazard or a health hazard. A health hazard means a chemical that causes acute or chronic health effects. Health hazard includes chemicals that are irritants and agents that damage the lungs, skin, eyes, or mucous membranes.

3. On March 15, 1999, the Director inspected Metcalf's residential construction jobsite at 1001 Kolapa Place, Kaunakakai, Hawaii. While at the jobsite, the Director's compliance officer observed latex paint being used. The paint

can labels listed various chemicals in the paint and warned that paint fumes could cause throat irritation and dermatitis.

4. At the inspection, the Director requested a copy of Metcalf's written hazard communication program. Metcalf was unable to produce a copy of the program.

Citation 1, Item 2

5. Citation 1, Item 2 was issued against Metcalf for violation of 29 CFR §1910.1200(h)(1). This Standard requires Metcalf to provide to its employees information and training about hazardous chemicals used in their work.

6. Metcalf employees who were observed using latex paint on the jobsite at the March 15, 1999 inspection did not receive any hazardous chemical information or training for the paint that they were using.

Repeat Violation

7. The violations of §1910.1200(e)(1) (no hazard communication program) and §1910.1200(h)(1) (no information and training on hazardous chemicals) were initially characterized by the Director's compliance officer as "other" violations, with no penalty.

Upon further research into its database, the Director subsequently amended the characterization of these two violations to "repeat", because the database showed that Metcalf was previously cited in 1998 for the exact same standards.

The Director assessed a \$200.00 penalty for each of these violations.

8. The Director stated in its post-trial position statement that the 1998 citation for these two violations was not contested and, thus, became a final order. The Director did not present any documentation, affidavit, deposition testimony, or trial testimony to support this statement. None of the Director's witnesses, Jimmy Yamada, David Ching, Anthony Buswink, and Walter Chun, provided testimony about whether the 1998 citation resulted in a final order. The file contains a one-page computer generated information summary (p. 00010 of Director's Response to First Request for Production of Documents) for the 1998 citation that noted that the Director had closed the 1998 case on November 23, 1998. There was no testimony from any of the Director's witnesses on what the information on this form means or what conclusions may be drawn from the information on the form. We find that the notation that the case had been closed on November 23, 1998 at the Director's level was not sufficient for us to find that the 1998 citation for violations of §1910.1200(e)(1) and §1910.1200(h)(1) resulted in a final order.

Citation 2, Items 1, 2, 3a, 3b, & 3c

9. Metcalf did not present any evidence to show that it did not violate Citation 2, Items 1, 2, 3a, 3b, and 3c. These items were for violations of Hawaii Administrative Rules ("HAR") §12-110-2(b)(1)(C) (no written safety and health program), 29 CFR §1926.250(c) (cluttered or blocked entry way), 29 CFR §1926.405(a)(2)(ii)(I) (unprotected extension cord), 29 CFR

§1926.405(g)(2)(iv) (pulled back outer covering of extension cord), and 29 CFR §1926.416(e)(1) (worn electric cord).

10. Metcalf's defense to Citation 2, Items 1, 2, 3a, 3b, and 3c was that its violations of these items were "de minimus", and for that reason, the Citation for these items should be vacated.

11. Metcalf did not cite to any legal authority under Hawaii law that allows the Board or the Director to classify violations as "de minimus" violations, and to vacate them because of this "de minimus" classification.

12. The Director had characterized the violations in Citation 2, Items 1, 2, 3a, 3b, and 3c as "other" violations for which no penalty was assessed. Metcalf presented no evidence to dispute the characterization of these violations as "other".

Citation 2, Item 4

13. Citation 2, Item 4 was issued against Metcalf for violation of 29 CFR §1910.1200(g)(1) that requires Metcalf to have a material safety data sheet in the workplace for each hazardous chemical that they use.

14. At the March 15, 1999 inspection, the Director's compliance officer asked to see the material safety data sheets ("MSDS") for the latex paint that was being used at the workplace.

15. Metcalf did not have the requested MSDS at the workplace.

16. The Director had characterized the violation in Citation 2, Item 4 as "other" violation for which no penalty was assessed.

Consumer Product Exception

17. Under §1910.1200(b)(6)(ix), the requirements under §1910.1200 do not apply to any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, where the employer can show that it is used in the workplace for the purpose intended by the chemical manufacturer or importer of the product, and the use results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers when used for the purpose intended.

18. Metcalf sought to apply the exception in §1910.1200(b)(6)(ix) as a defense to the violations of §1910.1200(e)(1) (no hazard communication program), §1910.1200(g)(1) (no MSDS), and §1910.1200(h)(1) (no information and training on hazardous chemicals).

19. According to the Director's compliance officer, at the March 15, 1999 inspection, he observed many 5-gallon cans of latex paints on the jobsite. The project was a 5-unit residential building that was large enough to house five families. Metcalf employees were toting 1-gallon cans of paint that were filled from the larger 5-gallon cans and using the

paint for touch-up work. The painting was all being done on the interior of the building.

20. Under the exception in §1910.1200(b)(6)(ix), Metcalf must show that the duration and frequency of the paint exposure on the March 15, 1999 inspection was less than the range of exposures that could reasonably be experienced by consumers. Metcalf failed to meet its burden to show that the consumer use exception applied in this case.

21. The Director presented evidence that there was no consumer use, because of the large quantity of paint that was present on the jobsite, and the nature and size of the project. According to the Director, these factors indicated that duration and frequency of exposure to paint exceeded average consumer usage.

22. Based on the foregoing findings and evidence presented at trial and in the record, we find that the Director has established the applicability of the cited standards, Metcalf's noncompliance with the terms of the cited standards, employee access to the violative conditions caused by Metcalf's noncompliance, and Metcalf's actual or constructive knowledge of the violative conditions.

CONCLUSIONS OF LAW

1. We conclude that Metcalf violated 29 CFR §1910.1200(e)(1), as described in Citation 1, Item 1 (no hazardous communication program at its workplace).

(a) We conclude that the characterization of the violation as "repeat" was not appropriate. A violation is a repeat violation if at the time of the alleged repeat violation, there was a final order against the same employer for a substantially similar violation. Director v. Kiewit Pacific Co., Case No. OSAB 94-009 (Mar. 1, 1996), citing Potlatch Corporation, 7 OSHC 1061, 1979 OSHD P 23,294 (Jan. 22, 1979). Without further evidence, the one-page computer summary of the 1998 citation was not sufficient to establish a final order. See Lanzo Constr. Co., Inc., 18 OSHC (BNA) 1856, 1999 OSHD (CCH) P 31,855 (May 10, 1999) (Without further evidence, computer printout of summary of prior citation was held to be insufficient to establish final order). We conclude that the violation should be characterized as an "other" violation.

(b) We conclude that the assessment of a \$200.00 penalty was not appropriate. No penalty shall be assessed for this "other" violation.

2. We conclude that Metcalf violated 29 CFR §1926.1200(h)(1), as described in Citation 1, Item 2 (no information and training about hazardous chemicals).

(a) For the reasons stated above, we conclude that the characterization of the violation as "repeat" was not appropriate.

(b) We conclude that the assessment of a \$200.00 penalty was not appropriate. No penalty shall be assessed for this "other" violation.

3. We conclude that Metcalf violated Standard §12-110-2(b)(1)(c), as described in Citation 2, Item 2 (no written safety and health program).

(a) We conclude that the characterization of the violation as "other" was appropriate.

4. We conclude that Metcalf violated 29 CFR §1926.250(c), as described in Citation 2, Item 2 (cluttered and blocked entry way).

(a) We conclude that the characterization of the violation as "other" was appropriate.

5. We conclude that Metcalf violated 29 CFR §1926.405(a)(2)(ii)(I), as described in Citation 2, Item 3a (unprotected extension cord).

(a) We conclude that the characterization of the violation as "other" was appropriate.

6. We conclude that Metcalf violated 29 CFR §1926.405(g)(2)(iv), as described in Citation 2, Item 3b (pulled back outer covering of extension cord).

(a) We conclude that the characterization of the violation as "other" was appropriate.

7. We conclude that Metcalf violated 29 CFR §1926.416(e)(1), as described in Citation 2, Item 3c (worn electric cord).

(a) We conclude that the characterization of the violation as "other" was appropriate.

8. We conclude that Metcalf violated 29 CFR §1910.1200(g)(1), as described in Citation 2, Item 4 (no MSDS).

(a) We conclude that the characterization of the violation as "other" was appropriate.

ORDER

We affirm Citation 1, Items 1 and 2, and Citation 2, Items 1, 2, 3a, 3b, 3c, and 4. We modify the characterization of the violations for Citation 1, Items 1 and 2 from "repeat" to "other", and vacate the assessment of the \$200.000 penalty for each of these two violations. The characterization of the remaining violations as "other" is affirmed.

Dated: Honolulu, Hawaii, _____

MAY 11 2001

EXCUSED

RANDALL Y. IWASE, Chairman

Carol K. Yamamoto
CAROL K. YAMAMOTO, Member

Vicente F. Aquino
VICENTE F. AQUINO, Member

Leo B. Young, Esq.
for Complainant

Brian G.S. Choy, Esq.
for Respondent

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A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on MAY 11 2001

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

[Signature]

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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 99-015 (WH)
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO No. Y0816)
INDUSTRIAL RELATIONS,)	(Report No. 120651138)
Complainant,)	
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vs.)	
)	
METCALF CONSTRUCTION CO., INC.,)	
Respondent.)	
_____)	

FILED
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 STATE OF HAWAII
 MAY 11 AM 1:47

PROPOSED DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a written notice of contest filed by METCALF CONSTRUCTION COMPANY, INC. ("Metcalf") to contest a Citation and Notification of Penalty issued by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, via the Division of Occupational Safety and Health ("Director").

The issues to be determined are:

(1) Whether Metcalf violated 29 CFR §1910.1200(e)(1), as described in Citation 1, Item 1;

(a) If so, whether the characterization of the violation as "repeat" was appropriate;

(b) If so, whether the assessment of a \$200.00 penalty was appropriate;

(2) Whether Metcalf violated 29 CFR §1926.1200(h)(1), as described in Citation 1, Item 2;

(a) If so, whether the characterization of the violation as "repeat" was appropriate;

(b) If so, whether the assessment of a \$200.00 penalty was appropriate;

(3) Whether Metcalf violated Standard §12-110-2(b)(1)(c), as described in Citation 2, Item 2;

(a) If so, whether the characterization of the violation as "other" was appropriate;

(4) Whether Metcalf violated 29 CFR §1926.250(c), as described in Citation 2, Item 2;

(a) If so, whether the characterization of the violation as "other" was appropriate;

(5) Whether Metcalf violated 29 CFR §1926.405(a)(2)(ii)(I), as described in Citation 2, Item 3a;

(a) If so, whether the characterization of the violation as "other" was appropriate;

(6) Whether Metcalf violated 29 CFR §1926.405(g)(2)(iv), as described in Citation 2, Item 3b;

(a) If so, whether the characterization of the violation as "other" was appropriate;

(7) Whether Metcalf violated 29 CFR §1926.416(e)(1), as described in Citation 2, Item 3c.

(a) If so, whether the characterization of the violation as "other" was appropriate; and

(8) Whether Metcalf violated 29 CFR §1910.1200(g)(1), as described in Citation 2, Item 4;

(a) If so, whether the characterization of the violation as "other" was appropriate.