

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of	)	CASE NO. OSAB 96-025
DIRECTOR, DEPARTMENT OF LABOR	)	(OSHCO No. Y5854)
AND INDUSTRIAL RELATIONS,	)	(Rep. No. 120611629)
Complainant,	)	
	)	
vs.	)	
	)	
FRITZ'S EUROPEAN BAKERY,	)	
Respondent.	)	
	)	

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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 FRITZ'S EUROPEAN BAKERY ("Respondent"), to contest 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 issues to be determined are:

(1) Whether Respondent violated Hawaii Occupational Safety and Health standard §12-88-5(a)(8);

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

b. If the characterization of the violation as "serious" was appropriate, was the imposition and the amount of the proposed \$750.00 penalty appropriate?

(2) Whether Respondent can be cited and penalized for the above-mentioned violation, when the equipment in question was acquired prior to the enactment of the regulation, without being

given prior notification of the requirements of the regulation;  
and

(3) Whether Complainant had a valid basis for  
conducting an inspection of Respondent's work site.

For the reasons stated below, we affirm the citation  
for violation of standard §12-88-5(a)(8), but reverse  
Complainant's characterization of the violation.

#### FINDINGS OF FACT

1. On March 29, 1996, Complainant conducted an  
inspection of Respondent's premises. Respondent was a bakery.

2. Respondent was randomly selected for inspection  
that day by Complainant's computer.

3. At the inspection, Complainant observed two mixers.  
One of the mixers was equipped with a bowl guard. The other  
mixer did not have a bowl guard. The mixer without a bowl guard  
was purchased in 1972. It was not equipped with a bowl guard at  
the time of purchase. A bowl guard was available for purchase at  
the time of the inspection for that particular mixer.

4. Respondent was cited for not equipping its mixer  
with a bowl guard.

5. At the time the subject mixer was purchased, the  
regulations or standards did not require a bowl guard. At the  
time of the inspection, Respondent's owner, Mr. Fritz Vincken,  
was not personally aware, nor was he personally notified by  
Complainant that the standards now required a bowl guard for the  
mixer.

6. The mixers were used for mixing dough.

7. Only two people operated the mixers, Mr. Vincken and his son-in-law, who also worked at the bakery. The other employees worked five feet away from the unguarded mixer.

8. When the unguarded mixer was on, Mr. Vincken and his son-in-law kept their hands away from the bowl. Neither had any reason to place their hands into the bowl while the machine was mixing. When subsequent ingredients needed to be added into the mixing bowl, the mixer was always turned off first, before the ingredients were added. This has been Respondent's practice when operating the mixer.

9. Complainant's compliance officer testified at trial about the scenarios in which different types of accidents could possibly occur when a mixer is not equipped with a bowl guard. According to the compliance officer, if the mixer was in operation without a protective guard, the following could possibly occur: (1) a worker's long hair could get caught in the mixer blades; (2) a worker's apron ties could get caught in the mixer blades; and (3) if a worker fell, his or her arms or hands could accidentally make contact with the mixer's blades and that if this happened, such an accident could lead to amputation or fracture of the arms or hands.

10. Complainant presented no evidence as to whether any of Respondent's employees had long hair at the time of the inspection. Complainant also presented no evidence as to whether



Respondent's employees wore aprons with ties at the time of the inspection.

11. Complainant presented no evidence as to what kinds of injuries could result from the types of accidents described in scenarios #1 and #2.

12. We find that Complainant has not met her burden of showing that the types of accidents under scenarios #1 and #2 were possible.

13. We find that, in the realm of all possibilities, there was a possibility of an accident occurring under scenario #3 and in the manner described by Complainant's witness; however, in view of the kind of work that was being done at Respondent's establishment, and the procedures that were being followed by Respondent when operating the subject mixer, that possibility was not a reasonable one under the circumstances.

#### CONCLUSIONS OF LAW

1. We conclude that Respondent violated Standard §12-88-5(a)(8). This Standard requires every mixer to be equipped with a full enclosure over the bowl, which shall be closed at all times while the agitator is in motion. Minor openings in this enclosure, such as ingredient doors, flour inlets, etc., each representing 1-1/2 square feet, may be opened while the mixer is in operation.

Complainant has presented sufficient evidence to show that Respondent's mixer was not equipped with a bowl guard, in violation of the cited Standard.

2. We next conclude that the Complainant's characterization of the violation as "serious" was not appropriate.

A "serious violation" under Hawaii Revised Statutes §396-1 is defined as follows:

a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation.

(emphasis added.)

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. In other words, we look to both (1) the possibility of an accident resulting from the conditions at work and (2) the substantial probability that death or serious physical harm could result if an accident did occur.

Our construction was consistent with the construction of the identically defined term under the federal standards by the Ninth Circuit Court of Appeals in California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1978).

To show that an accident with a substantial probability of death or serious injury was possible, Complainant presented testimony from its compliance officer that it was possible that a

worker could fall and accidentally thrust an arm or hand into the unguarded mixing bowl in the course of the fall, and sustain serious injury as a result.

We agree with Complainant that an accident in the manner described by her compliance officer was, in the realm of all possibilities, possible. But because anything is possible and because it has been generally recognized that the intent of the occupational safety and health standards is to require employers to eliminate all foreseeable and preventable hazards, see California Stevedore at 988, we conclude that, in determining whether a violation is serious under our standard, 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.

In this case, Complainant has not shown that the possibility that someone would fall into the mixing bowl was a reasonable possibility. There was no evidence on the size and height of the mixing bowl, the placement of the mixing bowl in the bakery, the proximity of the mixing bowl to foot traffic in the bakery, or any other facts that could be a factor in causing someone to fall into the mixing bowl. On the other hand, Respondent presented contrary evidence that an accident was not a reasonable possibility. According to Respondent, only two people operated the mixer, all other employees worked five feet away from the mixer, and it was their practice to turn the mixer off



whenever ingredients are added into the bowl and to keep their hands clear of the mixer when it was in operation.

Accordingly, based on our construction of the term "serious violation", as defined in HRS §396-1, and our requirement that the alleged type of accident be a reasonable possibility, we conclude that Complainant has failed to establish the first element of a serious violation in this case. Respondent's violation shall, therefore, be characterized as a general or other-than-serious violation. Respondent shall be assessed a penalty of \$0 for this violation.

3. Pursuant to Chapter 396 of the Hawaii Revised Statutes, and the accompanying regulations, we conclude that Respondent can still be cited and penalized for a violation of an occupational safety and health standard, even though the equipment in question was acquired prior to the enactment of the standard and Respondent was not provided personal notification of the change in the law.

4. Pursuant to Chapter 396 of the Hawaii Revised Statutes and the accompanying regulations, we conclude that Complainant had the authority to inspect Respondent's work site on March 29, 1996.

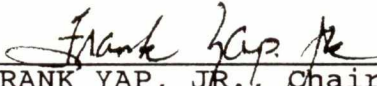
#### ORDER

Complainant's citation for violation of Standard §12-88-5(a)(8) is affirmed. The characterization of the violation shall be modified from "serious" to "general" or

"other-than-serious". The penalty to be imposed shall be modified from \$750.00 to \$0.00.

OCT 06 1998

Dated: Honolulu, Hawaii, \_\_\_\_\_.

  
FRANK YAP, JR., chairman

  
CAROL K. YAMAMOTO, Member

  
VICENTE F. AQUINO, Member

Leo B. Young, Esq.,  
for Complainant

Fritz Vincken  
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.

