STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. M. DYER & SONS, INC., Respondent.	CASE NO. OSAB 2002-19 OSHCO ID N2974 INSPECTION NO. 304217235 ORDER NO. 11 ORDER DENYING RESPONDENT'S MOTION TO DISMISS

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

On June 24, 2002, Respondent M. DYER and SONS (DYER or Respondent) filed a motion to dismiss a Citation and Notification of Penalty issued by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Hawaii Division of Occupational Safety and Health (HIOSH) on April 5, 2002 (Citation).

The Hawaii Labor Relations Board (Board) conducted a hearing on DYER's motion to dismiss on July 29, 2002. Both parties were represented by counsel and provided full and fair opportunity to be heard. Based upon the arguments and filings received,[1] the Board hereby makes the following findings of fact and conclusions of law.

[1]On August 15, 2002, Respondent filed a Motion to Strike Complainant Director, Department of Labor and Industrial Relations' "Memorandum of Law Regarding 'Recognized' Hazards" with the Board. Respondent contended that the Director's Memorandum was unresponsive to the Board's request for supplemental briefing and sought to relitigate an issue already decided by the Board. Also on August 15, 2002, the Director filed a memorandum in opposition to Respondent's motion to strike contending that its memorandum properly addressed the Board's request.

Based upon consideration of the arguments presented and a review of the record herein, the Board hereby finds the Director's memorandum to be sufficiently responsive and denies Respondent's motion to strike Complainant's memorandum.

FINDINGS OF FACT

1. On April 5, 2002, the Director issued Respondent a Citation and Notification of Penalty which Respondent received on April 8, 2002.

2. The Director cited Respondent for the following violations of the Hawaii Occupational Safety and Health Standards:

> Citation 1 Item 1 Type of Violation: Serious
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> 12-60-2(b)(A)(i). All existing or potential hazards within the workplace were not eliminated or controlled in a timely manner using engineering and work practice controls designed to control employee exposures to safety and health hazards by modifying the source to reduce exposure; i.e., engineering and work practice controls were not utilized to reduce employee exposure to lifting hazards of packing material, furniture, and/or packed-boxes weighing over 50 pounds.
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> * * *
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> Citation 1 Item 2 Type of Violation: Serious
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> 29 CFR 1910.23(c)(1) [Refer to Chapter 12-72.1, HAR]. Every open sided floor or platform 4 feet or more above the adjacent floor or ground level were not guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section), on all open sides; i.e., the loading docks, measured at 52 inches, were not guarded by standard railings.

3. The Director proposed a total of $875 in penalties for these violations. Respondent timely contested the Citation by letter dated April 25, 2002.

4. On June 24, 2002, Respondent filed a motion to dismiss the Citation. Grounds for dismissal were identified as:

> Citation 1, Item 1: HAR § 12-60-2(b)(A)(i) is invalid because it enlarges its implementing statute and is unconstitutionally vague and overbroad, and
> Citation 1, Item 2: 29 CFR § 1910.23(c)(1) does not apply where only forklifts operate on an elevated platform.[2]

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[2]At the hearing on the motion to dismiss, Respondent advised the Board that further discovery was appropriate prior to the disposition of his objections to Citation 1, Item 2. Respondent

DISCUSSION

With respect to Citation 1, Item 1, Respondent argues that the cited regulation is facially invalid because the imposed duty to eliminate or control "all existing and potential hazards" is constitutionally vague and overbroad, and that this same language enlarges the scope of the argued statutory charge of Hawaii Revised Statutes (HRS) § 396-6[3] to keep places of employment free from "recognized hazards," and the equivalent federal standard.

The Director argues that the regulation is not unconstitutional because the Director acted reasonably in applying the standard; that because the statute was promulgated pursuant to its general rulemaking powers, HRS § 396-4(a)(1);[4] the cited language does not exceed the scope of authorizing legislation; and Hawaii's standards may exceed those applied by the federal government.

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therefore withdrew, with the Board's approval, its motion to dismiss the Citation with respect to Citation 1, Item 2.

[3]HRS § 396-6, Employer responsibility: safe place of employment; safety devices and safeguards, provides, in part:

> (a) Every employer shall furnish to each of the employer's employees employment and a place of employment which are safe as well as free from recognized hazards. No employer shall require or direct or permit or suffer any employee to go or be in any employment or place of employment which is not free from recognized hazards that are causing or likely to cause death or serious physical harm to employees or which does not comply with occupational safety and health standards, rules, regulations, citations, or orders made pursuant to this chapter except for the specific purpose of abating said hazard.

[4]HRS § 396-4, Powers and duties of department, provides, in part:

> (a) Administration. The department shall be responsible for administering occupational safety and health standards throughout the State.
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> (1) The department shall prescribe and enforce rules under chapter 91 as may be necessary for carrying out the purposes and provisions of this chapter. The department shall make reports to the Secretary of Labor in the form and containing the information that the Secretary from time to time shall require pursuant to federal law; . . .

With regard to constitutionality, the Board, as an administrative body,[5] is simply without the power to pass on the constitutionality of the rule. "Although an administrative 'agency may always determine questions about its own jurisdiction [it] generally lacks power to pass upon constitutionality of statute. The law has long been clear that agencies may not nullify statutes. [citations omitted.]'" HOH Corp. v. Motor Vehicle Industry Licensing Board, 69 Haw. 135, 141, 736 P.2d 1271 (1987). Accordingly, the Board is without jurisdiction to address the issue of constitutionality and the issue must be reserved for the courts on appeal, if any.

With regard to the regulation's scope, Respondent correctly argues that if an administrative rule is not authorized by statute, the rule is void and cannot be enforced. Hyatt Corp. v. Honolulu Liquor Comm'n, 69 Haw. 238, 738 P.2d 1205 (1987). And the Board concurs that an interpretation or application of Hawaii Administrative Rules (HAR) § 12-60-2(b)(A)(i) which required employers to eliminate or control all "potential" hazards, (including those which are neither known, reasonably foreseeable nor recognized within the industry,) would be absurd and almost certainly outside of the permissible scope of the statute. See, Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Com'n., 528 F.2d 645, 649 (5th Cir. 1976) ("An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.")[6]

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[5]HRS § 396-11, Review, provides, in part:

> (g) Upon receipt, the director shall advise the appeals board of any notice of contest.
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> (h) The appeals board shall afford an opportunity for a de novo hearing on any notice of contest except where rules require a prior formal hearing at the department level, the proceedings of which are required to be transcribed, in which case review before the appeals board shall be confined to the record only.
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> (i) The appeals board may affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary, or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate.

[6]The Board concurs with the Director's argument that the scope of HAR § 12-60-2(b)(A)(i) is not limited to the language of HRS § 396-6. The regulation was adopted pursuant to the Director's authority to adopt rules "as may be necessary for carrying out the purposes and provisions of this chapter" as identified in HRS § 396-4(a)(1). However, it is the opinion of the Board that any rule which failed to provide an employer with effective notice of the law's

This is not to say however, that the possibility of such an excessively literal construction invalidates the regulation on its face. On the contrary, it is the prerogative of an administrative agency charged with implementing a pervasive statute to construe its laws and regulations subject to review by the courts. Hyatt Corp. v. Honolulu Liquor Comm'n, supra, at 242 (where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and will follow the same unless the construction is palpably erroneous.) The Board, as the administrative entity charged by statute with adjudicating the sufficiency of citations issued by the Director, will, if necessary construe the regulations pursuant to which such citations are issued.[7] Because, in this motion, the Respondent only challenges the regulation on its face, we are not called upon, and lack any factual foundation to, construe the regulation. Since the regulation has not been construed, the challenge based upon its scope is premature and therefore the motion in this regard must be denied.[8]

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant contest pursuant to HRS § 396-11.

2. The Board lacks jurisdiction to determine the constitutionality of HAR § 12-60-2(b)(A)(i).

3. In this motion, Respondent only challenges the regulation on its face, we are not called upon, and lack any factual foundation to, construe the regulation. Since the regulation has not been construed, the challenge based upon its scope is premature and therefore the motion to dismiss is denied.

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requirements, as would be the case if all possible hazards had to be cured, would exceed the "purposes and provisions" of Chapter 396.

[7]The Board is of the view that construction is likely to be required in that it is hardly free from ambiguity and the literal application of the regulation may lead to absurd results. See generally, HRS § 1-15(3) (construction which leads to absurdity shall be rejected.)

[8]The Board hesitates to attempt a definitive construction in the absence of a factual context. However, at a minimum, notice and due process considerations necessitate that an employer have either actual or constructive knowledge of any claimed existing or possible hazard. Constructive knowledge to be demonstrated by, inter alia, industry recognition. See, Bokat and Thompson, Occupational Safety and Health Law, 114-138 (1988) (discussion of general duty clause).

ORDER

The Board hereby denies Respondent's motion to dismiss the Citation.

Dated: Honolulu, Hawaii, September 11, 2002.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN R. ACUYA-MARKRICH, Member

Copies sent to:

Jeffrey S. Harris, Esq.
J. Gerard Lam, Deputy Attorney General