

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of
DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,
Complainant,

vs.

METAL-WELD SPECIALTIES, INC.,
Respondent.

CASE NO. OSAB 95-048
(OSHCO No. M2732)
(Report No. 103863429)

AMENDED DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest filed by METAL-WELD SPECIALTIES, INC. ("Respondent"), to contest a Citation and Notification of Penalty issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via its Division of Occupational Safety and Health ("Complainant"), on June 26, 1995.

The issues to be determined are:

- (1) Whether Respondent violated Standard §12-126-3(b)(4).
 - (a) If so, is the characterization of the violation as "serious" appropriate.
 - (b) If so, is the imposition and amount of the proposed \$1,000 penalty appropriate.

The Board issued its written Decision and Order dated February 20, 1998.

Complainant timely filed a motion for reconsideration of the Board's decision or for a new trial. Following a hearing on the motion and having considered this matter, we hereby grant

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Complainant's motion for reconsideration and amend our previous Decision and Order as provided herein.

The Citation and Notification of Penalty is affirmed as to the violation of Standard §12-126-3(b)(4), but modified as to the characterization of the violation and the imposition of the proposed penalty.

FINDINGS OF FACT

1. On May 31, 1995, Complainant inspected Respondent's jobsite in Lihue, Kauai.

2. As a result of this inspection, Complainant issued a Citation and Notification of Penalty (Citation) against Respondent on June 26, 1995, for an alleged serious violation of Standard §12-126-3(b)(4). This safety standard pertains to arc welding cables and connectors.¹ Respondent was assessed a proposed penalty of \$1,000.00.

3. At the time of the inspection, one of Respondent's workers was using an arc welding machine to weld metal columns of a building that was under construction. The worker was welding on the ground floor of the building. Because it had rained, the floor was wet.

4. The arc welding machine has a cord connected to the power source as well as welding cables. The welding cables

¹Standard §12-126-3(b)(4) provides that "[c]ables in need of repair shall not be used. When a cable, other than the cable lead referred to in section 12-126-3(b)(2) becomes worn to the extent of exposing bare conductors, the portion exposed shall be protected by means of rubber and friction tape or another equivalent insulation."

consist. of an electrode cable and a ground cable. One cable is connected to a positive terminal, and one cable is connected to a negative terminal on the machine.

At the end of the electrode cable is the electrode, which is used by the worker to weld. The electrode holder is insulated. Welders are trained and required to handle only an insulated electrode holder. Welders are also required to wear welding gloves which protect them from the heat and weld splatter and from coming into contact with the bare electrode.

The ground cable is attached to the steel framework of the building via a metal clamp at the end of the cable. If there is good metal-to-metal contact, then the equipment is properly grounded. Respondent's arc welding machine was grounded at the time of the inspection.

The electrode cable and the ground cable together form a circuit. When the worker strikes an arc on the grounded building, the building itself is part of the welding circuit. Once the circuit is completed, then the worker can weld.

5. At the time of the inspection, Complainant's compliance officer observed a welding cable that was frayed 20 feet from the end where the cable was connected to the welding machine, exposing the inner bare conductor.²

According to Complainant, the frayed cable was the positive cable, because the compliance officer traced it from the electrode back to the welding machine and believed that it was

²The power cord was not the frayed cable.

the positive cable, since it was connected to the positive input of the machine. Under that scenario, the positive cable was the electrode cable and the ground cable was the negative cable.

6. At trial, Complainant presented evidence to support characterizing the alleged violation as serious. The compliance officer described the types of accidents that could occur when a positive/electrode cable is frayed: 1) as the worker routes the frayed cable, the bare area on the cable could come into contact with the structure of the building, causing the building to be conductive, and 2) as the worker routes the frayed cable through the building structure, the worker could come into direct contact with the bare area on the cable. The compliance officer stated that if any of these accidents happened, the worker could receive an electrical shock. In the second situation, where the worker comes into direct contact with the bare area on the frayed cable, the worker could even be electrocuted.

7. The compliance officer also described the types of accidents that could occur when a negative/ground cable is frayed: 1) the worker, while welding, could come into contact with the bare area on the frayed cable, and, at the same time, touch the electrode; 2) the bare area on the frayed cable could be in a puddle of water and the worker, while welding, could walk into the same puddle of water; and 3) the bare area on the frayed ground cable comes in contact with the building and the worker, while welding, touches the bare area on the frayed cable. The

compliance officer noted that if any of these accidents happened, the worker could receive an electrical shock.

8. Respondent does not dispute that its arc welding machine had a frayed cable or that the frayed cable was the positive cable. Respondent, however, contends that Complainant misidentified the frayed positive cable as the electrode cable, when, in fact, the frayed positive cable on its welding machine was the ground cable.

9. Respondent's general foreman, John Davis, an experienced ironworker, explained why the frayed cable was the ground cable, or the cable connected to the building from the welding machine, and not the electrode cable.

Mr. Davis indicated that on the date of the inspection, Respondent's welding machine was running on direct current, rather than alternating current. Because the welding machine was running on direct current, the ground cable was actually the positive cable, whereas the electrode cable was the negative cable. Respondent's electrode cable was 500 feet long.

Mr. Davis stated that a ground cable normally comes in lengths of 50 feet, which is consistent with the compliance officer's testimony that the positive cable was approximately 30 feet long.

10. Complainant has not presented evidence to refute Respondent's testimony that the welding machine was running on direct current on the date of the inspection.

11. We find that at the time of the inspection, it was the ground cable of Respondent's welding machine that was frayed, and not the electrode cable.

12. The types of accidents that Complainant alleged could possibly occur in this case were based on the assumption that Respondent's arc welding machine had either a frayed positive/electrode cable or a frayed negative/ground cable at the time of the inspection. Complainant's assumption is incorrect, as Respondent's welding machine had a frayed positive/ground cable at the time of the inspection.

13. Complainant has not presented any evidence to show that an accident could occur if Respondent's arc welding machine had a frayed positive/ground cable.

14. Complainant has not met her burden of showing that an accident was possible if Respondent's arc welding machine had a frayed positive/ground cable.

15. Assuming, however, that Complainant had met her burden of showing that an accident was possible when the frayed cable on Respondent's welding machine was the positive/ground cable, we find that the possibility of an accident was not a reasonable one, because of the practices and work patterns Respondent followed when welding.

16. Respondent indicated that for electrical shock to occur when there is a frayed positive/ground cable, the welder would need to come into contact with the bare ground cable clamp or building and the bare electrode. The possibility of that

happening, however, was not reasonable, because welders do not normally handle a bare electrode. In addition, the ground cable on Respondent's arc welding machine was very seldom moved, because normally it would be positioned such that once it was attached to the steel framework of the building, it would not have to be moved nor would the workers have occasion to touch it.

If the bare area of the frayed ground cable was in a puddle of water, the water would become ground, similar to the building becoming ground after attachment of the ground cable. To receive an electrical shock under those circumstances, the worker would have to carry the bare electrode and wade into this same puddle of water. The possibility of that happening was not reasonable, because it would require the welder to mishandle the electrode holder.

A welder cannot receive an electrical shock when holding the insulated electrode holder and coming into contact with the ground cable clamp, the building, bare ground cable, or standing water in contact with the bare ground cable.

17. Respondent does not dispute that a violation of the standard occurred.

18. Complainant did not address whether a monetary penalty was still appropriate, if it was determined that the violation committed by Respondent was not a serious violation.

CONCLUSIONS OF LAW

1. We conclude that Respondent violated Standard

§12-126-3(b)(4), as Respondent has admitted that there was a violation of the standard.

a. We conclude that the characterization of the violation as serious is inappropriate.

The Hawaii Occupational Safety and Health Law defines a "serious violation" as:

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.

Hawaii Revised Statutes §396-3.

We have 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. See Director v. Charles Pankow Builders, Ltd., OSAB 91-015 (Jan. 28, 1992).

In determining whether a violation is serious, 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. Director v. Fritz's European Bakery, OSAB 96-025 (Oct. 6, 1998).

In Fritz, we determined that the alleged type of accident must be a reasonable possibility. Under Fritz, the possibility of the type of accident that could occur must 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.

Complainant has the burden of establishing both elements of a serious violation. Complainant, however, has not met her burden of showing that an accident was possible under the facts of this case. At the time of the inspection, Respondent's welding machine had a frayed positive/ground cable. Complainant presented evidence about the types of accidents that could occur if Respondent's welding machine had a frayed positive/electrode cable or, in the alternative, a frayed negative/ground cable, but did not present evidence about the type of accident that could occur if the welding machine had a frayed positive/ground cable.

Even if Complainant showed that an accident was possible when the positive/ground cable on Respondent's welding machine is frayed, we find that the possibility was not a reasonable one, given Respondent's practices and work patterns when engaging in welding activity. In this case, the electrode holder is insulated, the welder wears gloves while welding and does not normally handle a bare electrode, and the ground cable remains relatively fixed.

We conclude that Complainant has failed to establish the first element of a serious violation and, therefore, that the characterization of the violation as serious was inappropriate.

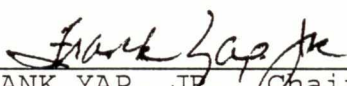
b. Because the characterization of the violation as serious is inappropriate and, in the absence of any evidence to


contrary, we conclude that the imposition of a monetary penalty is also inappropriate.

ORDER

The Citation and Notification of Penalty is hereby affirmed as to the violation of Standard §12-126-3(b)(4), but modified as to the characterization of the violation and the imposition of the proposed penalty.

Dated: Honolulu, Hawaii, NOV 05 1998.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Leo Young, Esq.
for Complainant

Donald Parks
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.

