

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSH 2003-17
DIRECTOR, DEPARTMENT OF LABOR)	DECISION NO. 11
AND INDUSTRIAL RELATIONS,)	FINDINGS OF FACT, CONCLUSIONS
Complainant,)	OF LAW, AND ORDER
vs.)	
SI-NOR, INC.,)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 26, 2003, the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (DIRECTOR), through the Hawaii Occupational Safety and Health (HIOSH) Division issued a Citation and Notification of Penalty (Citation) to Respondent SI-NOR, INC. (SI-NOR). The Citation resulted from Inspection No. 302956164 conducted on December 26, 2002 to January 6, 2003. Board Exhibit (Bd. Ex.) 1. The DIRECTOR found that SI-NOR committed a willful violation of HAR § 12-60-2(a)(3) and assessed a Penalty of \$49,500.00. The DIRECTOR also found that SI-NOR violated 29 CFR 1904.1(a)(2) recordkeeping requirements and assessed a penalty of \$900.00. On July 14, 2004, SI-NOR contested the Citation and on August 8, 2003, HIOSH transmitted the Notice of Contest to the Hawaii Labor Relations Board (Board) for its review.

The Board conducted an initial conference on September 2, 2003 and thereafter, a status conference on March 1, 2004. On April 5, 2004, the Board issued Order No. 95. Pretrial Order, designating the following issues to be determined in this contest:

- (a) Whether Respondent violated Hawaii Administrative Rules (HAR) § 12-60-2(a)(3) as described in Citation 1, Item 1, issued on June 26, 2003?
 - (i) Whether the characterization of the violation as “Willful” is appropriate? If not, what is the appropriate characterization?

- (ii) Whether the imposition and amount of the \$49,500.00 penalty is appropriate? If not, what is the appropriate penalty?
- (b) Whether Respondent violated 29 CFR 1904.1(a)(2) as described in Citation 2, Item 1, issued on June 26, 2003?
 - (i) Whether the characterization of the violation as “Other” is appropriate? If not, what is the appropriate characterization?
 - (ii) Whether the imposition and amount of the \$900.00 penalty is appropriate? If not, what is the appropriate penalty?

The Board conducted hearings on May 18, 19, 20, 24, 25, and 28, 2004. Thereafter, the parties filed closing briefs with the Board on August 13, 2004. Based on a thorough review of the entire record, the Board makes the following findings of fact, conclusions of law, and order affirming the DIRECTOR’s Citation.

FINDINGS OF FACT

1. SI-NOR is a company, incorporated in California, providing refuse and recycling pickup at various military bases on Oahu. SI-NOR’s administrative offices are located at 1345 Fitzgerald Avenue, Suite F, Rialto, California. SI-NOR’s baseyard in Hawaii is a large fenced-in lot located at 91-559 Nukuawa St., Lot 16, in Kapolei, Hawaii.
2. Anthony Uwakwe (Uwakwe) was, for all relevant times, the Vice President of Operations in charge of SI-NOR’s Hawaii operations.
3. Ryan Hamili (Hamili) was, for all relevant times, a Project Manager and SI-NOR’s top supervisory person in Hawaii. Previously, Hamili was a truck driver who was promoted to the Project Manager of the Hickam contract. Hamili later became the Project Manager for the Pearl Harbor and Marine contracts. Thereafter in 2002, Hamili became the Project Manager for the Coast Guard and Army contracts.
4. Lionel Deguzman (Deguzman) was, for all relevant times, a Quality Control Officer for SI-NOR . Deguzman was a mechanic and hired by SI-NOR in September of 2002 in a supervisory capacity to oversee the refuse collection services for the majority of military bases, except Hickam.

5. In the fall of 2002, Hamili became noticeably absent from the worksite during the work week and Deguzman began issuing disciplinary action forms to employees for infractions.
6. On September 30, 2002, there was an altercation between Deguzman and Refuse Truck Driver Charles Ke-a (Ke-a). Ke-a claimed Deguzman punched him in the face several times. Ke-a complained to Hamili, filed a police report, and reported the incident to Uwakwe.
7. On October 4, 2002, Ke-a filed a safety complaint of workplace violence (WV) with HIOSH which triggered an inspection commencing on October 9, 2002 by HIOSH Compliance Officer Hervie Messier.
8. Two days later, SI-NOR fired Ke-a. Ke-a filed a discrimination complaint against SI-NOR with HIOSH alleging he was terminated because he reported the safety violations.
9. During its safety investigation, HIOSH requested SI-NOR to produce its WV Policy and OSHA 200/300 logs. SI-NOR failed to produce the records even after HIOSH subpoenaed the records.
10. On November 15, 2002, HIOSH cited SI-NOR for failing to have and implement a WV Policy and failing to have the required OSHA 200/300 logs. SI-NOR contended that it could not produce its OSHA 200/300 logs because it allegedly kept them in an office trailer which was vandalized and repossessed. However, such events happened in 2000 more than two years before the investigations.
11. The Citation and Notification of Penalty to SI-NOR on November 15, 2002¹ stated, in part, as follows:

Citation 1 Item 1a Type of Violation: Serious

12-60-2(a)(3) The employer did not provide safe working places and practices by elimination or reduction of existing or

¹The Board takes administrative notice of its proceedings in Case No. OSH 2003-3, Director, Department of Labor and Industrial Relations, State of Hawaii v. SI-NOR, INC., where the Board affirmed the November 15, 2002 Citation and Notification of Penalty issued to SI-NOR in Decision No. 9, dated September 10, 2004. On appeal, in consolidated Civil Nos. 04-1-1844 and 04-1-1847, however, the First Circuit Court reversed the Board's decision finding that SI-NOR's notice of contest was untimely filed and the Board lacked jurisdiction over it. The matter is currently on appeal in S.C. No. 27304.

potential hazards. Elimination of existing or potential hazards by design, process substitution, or other appropriate methods is preferred because it eliminates the need for further employee protection. When elimination is not feasible, reduction of existing or potential hazards to acceptable levels using methods such as engineering or administrative controls, isolation, or guarding must be promptly used. When these methods are inadequate to reach acceptable levels, personal protective equipment must be provided and used; i.e., the employer did not provide a work place free from the potential hazard of personal violence by the institution of an administrative control in the form of a workplace violence prevention program.

Location: Establishment

Abatement certification documentation in the form of a copy of the company's workplace violence prevention program is required.

Date By Which Violation Must be Abated: 12/18/2002
Proposed Penalty: \$1,400.00

Citation 1 Item 1b Type of Violation: Serious

12-60-2(b)(1) The employer had not instituted and maintained an effective written safety and health program to identify, evaluate and control workplace hazards; i.e., the employer did not have a written safety and health program at the time of this inspection.

Location: Establishment

Abatement certification documentation in the form of a copy of the company's written safety and health program is required.

Date By Which Violation Must be Abated: 12/18/2002

Citation 2 Item 1 Type of Violation: Other

29 CFR 1904.2(b)(2) [Refer to chapter 12-52.1. HAR] A copy of the log and summary of occupational injuries and illnesses (OSHA Form No. 200, 300, or equivalent) was not available and current to within 45 calendar days at the

establishment; i.e., the OSHA 300 log for 2002, to date, and OSHA 200 logs for 2000 and 2001, were not available at the time of inspection.

Location: Establishment

Abatement certification documentation in the form of copies of the current OSHA 300 log and the OSHA 200 logs for 2000 and 2001 required.

Date By Which Violation Must be Abated:	12/18/2002
Proposed Penalty:	\$2,100.00

Complainant's (C's) Exhibit (Ex.) 1.

12. SI-NOR hired Private Investigator Mauro Edwards (Edwards) to investigate, inter alia, allegations of overtime abuse. On December 12, 2002, Edwards interviewed Deguzman who acknowledged hitting or slapping Ke-a in the September 30, 2002 incident and signed a written statement with the admission.
13. On December 14, 2002, SI-NOR's counsel Preston Gima (Gima) recommended that SI-NOR terminate Deguzman. Case No. OSH 2002-8, et seq., Tr. 8 (4/5/04), pp. 36-37.² Uwakwe confirmed he knew that Deguzman had violated SI-NOR's WV Policy but he did not fire Deguzman. Case No. OSH 2002-8, et seq., Tr. 5 (1/20/04), pp. 110-11. Uwakwe talked to Deguzman around December 16 and 17, 2002 but did not decide to fire Deguzman for hitting Ke-a and lying about it until December 19, 2002. Id., pp. 114-16.
14. On December 19, 2002, Deguzman saw Hickam Project Manager Chad Pasoquen (Pasoquen) and his crew drinking at the worksite while working overtime painting trash cans. Deguzman reported this to SI-NOR on a company Disciplinary Action Form.

²The Board takes notice of the record in Case Nos.: OSH 2002-8, et seq., Sheldon Keliinoi v. Si-Nor, Inc., et al.; Geno Akui v. Si-Nor, Inc., et al.; Leigh Westbrook v. Si-Nor, Inc., et al.; Russell Sanborn v. Si-Nor, Inc., et al.; Perry Sua v. Si-Nor, Inc., et al.; and Clifford Birgado v. Si-Nor, Inc., et al.

15. On the morning of December 20, 2002, there was a series of fights at the worksite. There were essentially two accounts of what occurred.³ It is

³The nonsupervisory employees uniformly testified that on December 20, 2002, Allan Paahana (Paahana) threw Myles Lyman (Lyman) into or against a rubbish dumpster because he thought Lyman had been “talking stink” about him the day before when the employees were drinking. Lyman denied it and asked Pasoquen what to do. Pasoquen said to file a police report; Lyman initially declined; and Pasoquen told him to forget it. Lyman went into his rubbish truck but called the police outside the job site.

Paahana then grabbed Paulie Espinda (P. Espinda) by the shirt and pulled him down from a truck. Paahana then hit P. Espinda in the back of the head. Espinda asked “what the hell” he was doing and Paahana said Espinda had been talking trash about him. The men were gesturing as if to fight. Pasoquen and Leigh Westbrook (Westbrook) went over to intervene. Deguzman allegedly said, “No, let them fight.” Then Paahana and Deguzman started arguing with P. Espinda and Deguzman hit P. Espinda in the jaw. Hanin Davalos (Davalos), Deguzman’s brother-in-law hit Shannon Espinda (S.Espinda) and Ruel Arzaga (Arzaga) in the face. Westbrook got into an argument with Deguzman and Deguzman went back to his car and got a pipe with Westbrook following him. Deguzman hit Westbrook on the head with the pipe and they wrestled for it, breaking the pipe. Westbrook took the pipe away and Deguzman rushed Westbrook (with the broken pipe). Westbrook then hit Deguzman once or twice in the face and knocked Deguzman down.

Pasoquen later called Uwakwe who said he needed the police report and statements.

SI-NOR offered the following scenario:

P. Espinda and Paahana were in the middle of the yard. Paahana did not strike P. Espinda but was hit in the mouth by P. Espinda. Deguzman tried to prevent the escalation of the argument and said, “Let them go; it’s their problem.” Then, Westbrook and Pasoquen intervened. Deguzman wanted to call the police but couldn’t find his cell phone and went to his car. His keys were missing and he was surrounded by the employees. P. Espinda had pulled out a baseball bat out of his car. Deguzman took a pipe out of his car to defend himself. He tried to hit Westbrook with the pipe and the pipe broke off at the handle. Sheldon Keliinoi picked up the pipe and beat Deguzman. Davalos called the police from the next yard. He also spoke with his sister - Lionel Deguzman’s wife, who urged him to return to help her husband.

Deguzman recalled being attacked by Arzaga, Gino Akui and Westbrook with their fists and Sheldon Keliinoi with the pipe. Davalos was hit by S. Espinda, Samuel Keliinoi, Lyman, and P. Espinda. Paahana was assaulted by Clifford Birgado and others.

Uwakwe received calls about the fight from Benarao, Pasoquen and Rene Mateo and he contacted Edwards to investigate the matter. After his investigation, Edwards reported that there was an apparent conspiracy by the employees to assault Deguzman as initially employee Michael Rodrigues (Rodrigues) corroborated Deguzman’s story, i.e., that DeGuzman was cornered and assaulted with a bat and metal pipe by six to eight workers. Rodrigues however, later recanted. Edwards found the employees’ version incredible given the nature and severity of Deguzman’s

immaterial to this case to resolve the disputed testimony as it is undisputed that there were multiple fights at the worksite which resulted in serious injuries to P. Espinda who sustained a broken jaw; Paahana was hit in the mouth and left eye; Westbrook was hit on the head with a pipe; Deguzman was beaten with a pipe and punched by several employees causing injuries to his eyes, face, head and forearms which required medical treatment. Consequently, Deguzman was also treated for a post traumatic stress mental condition.

16. On December 20, 2002, P. Espinda filed a police report stating that Paahana had punched him in the back of the head and that Deguzman punched him in the jaw area. C's Ex. 23. Westbrook also filed a police report stating that he was trying to stop the fighting and Deguzman grabbed a metal pipe from his car and struck him on the head. He then struck Deguzman with his fist. C's Ex. 24.
17. On December 24, 2002, Westbrook filed a safety complaint with HIOSH because of the workplace violence and he feared for his life. C's Ex. 33.
18. HIOSH Compliance Officer Mel Han (Han) conducted an inspection pursuant to the safety complaint from December 26, 2002 to January 6, 2003. Han interviewed various witnesses and reported that on December 20, 2002 at 6:30 a.m., a fight broke out between Paahana and P. Espinda at the baseyard in Campbell Industrial Park after Paahana grabbed P. Espinda's shirt and punched him in the back of his head. Pasoquen tried to intervene to break up the fight but Deguzman did not stop the fight but said, "Let them go, ... no stop them, ... let them fight." Some employees stepped in and broke up the fight. As one of the employees was walking away from Paahana, he asked Deguzman about why he let the fight go on. Deguzman became angry and chased the worker to the street outside of the lot and struck him.

Westbrook then asked Deguzman why he was taking things out on the people and Deguzman went to his car, retrieved a metal pipe and struck Westbrook on the head. Westbrook then fought back Deguzman in self defense.

Also during this time Hannin, Deguzman's brother-in-law, assaulted S. Espinda and Arzaga striking them in the face. Prior to Paahana assaulting P. Espinda, Paahana assaulted Lyman by grabbing his shirt and slamming him into a rubbish can. Lyman reported the incident to his supervisor, Deguzman, who told him not to worry about it.

wounds.

C's Ex. 4.

19. On December 30, 2002, SI-NOR, by its representative Private Investigator Edwards, terminated several employees, including Hamili, Westbrook, Arzaga, Geno Akui, Samuel Keliinoi, Ronald Benarao, and Sheldon Keliinoi. Pasoquen, Project Manager and supervisor, was demoted to driver. Westbrook, Geno Akui, Samuel Keliinoi and Sheldon Keliinoi filed Discrimination Complaints with HIOSH on December 31, 2002.
20. On December 31, 2002, HIOSH Compliance Officer Han asked Uwakwe to provide SI-NOR's written safety and health program, the workplace violence prevention program and the OSHA 200 and 300 logs.
21. On February 13, 2003, Rene Mateo (Mateo) who became the Project Manager after Ryan Hamili was terminated, produced an Employee Handbook, dated December 2001, to HIOSH. The Handbook did not contain a WV Policy. C's Ex. 15.
22. Thereafter, on March 20, 2003, HIOSH received another Employee Handbook, dated December 2001, which included a Work Place Violence Policy which states in part as follows:

Si-Nor, Incorporated can best perform its mission of refuse collection, disposal and recycling services when workers co-exist in a climate that supports the free exchange of ideas and utilizes constructive methods of conflict resolution. Si-Nor, Incorporated is committed to creating and maintaining a workplace environment that is free from intimidation, threats and violent acts. Nothing is more important to Si-Nor, Incorporated that the safety and security of its employees, customers, and visitors (sic)

Threats, intimidation and acts of violence will not be ignored, condoned or tolerated. The Company defines these behaviors as follows:

intimidation - an act towards another person, the purpose of which is to coerce, and the result of which could reasonably cause the other person to fear for his or her safety or the safety of others.

threat of violence - a communicated intent to inflict physical or other harm on any person or on property.

act of violence - exercise of physical force against another person or against property.

Any and all acts of intimidation, threats or acts of violence will be considered serious misconduct and will be the basis of disciplinary action, up to and including dismissal. These acts will be referred, when appropriate, to legal authorities.

Assurance of a safe working environment is important to everyone. It is the responsibility of all members of our work team to report any occurrence of intimidation, threat or violence to the Corporate Office. Threats, threatening behavior, or acts of violence against an employee, a customer, a visitor, or any other individual cannot and will not be tolerated. All reports of workplace violence will be taken seriously and will be investigated promptly and thoroughly. For the purpose of this policy, the workplace is considered to be anywhere an employee is engaged conducting business or providing service as a representative of Si-Nor, Inc.

Any form of violence or threat of violence - whether actual or perceived - involving an employee or occurring in the workplace must be reported to a supervisor, manager, or the Corporate Office. Such behavior must be reported whether it is committed by another employee, a contractor, a customer, or a member of the public. If management determines that an employee has engaged in workplace violence, appropriate action will be taken, which may include discipline up to and including discharge. Any violent behavior committed by an employee outside of the workplace, which arises out of a contact made at the workplace, may also result in disciplinary action up to and including discharge.

Where the violent behavior occurs at the workplace, whether it is committed by an employee or by an individual who is not an employee, Si-Nor, Incorporated will contact the appropriate law enforcement agency if necessary. Additionally in all cases where violent behavior or a credible threat of violent behavior is directed at an employee, Si-Nor, Incorporated will take appropriate legal action and/or other steps necessary to help protect the employee and/or the employee's family members.

An employee should also report the existence of any restraining order that covers the employee at the workplace or any potentially violent non-work related situation that could likely result in violence in the workplace. Under such circumstances, management will take appropriate precautions to help protect its employees in the workplace.

The types of behavior covered by this policy include, but are not limited to:

Violent physical action:

Direct or implied threats to do harm to another or to property (including intimidating use of one's body or physical objects);

Verbally abusing or intimidating language or gestures (sic)

Threatening, abusive, or harassing communication (e.g., telephone calls, letters, memoranda, faxes, e-mail;)

Unauthorized possession of a weapon at the workplace (including on Si-Nor, Inc. truck parking lots");

Destructive or sabotaging actions against Company or personal property;

Engaging in a pattern of unwanted or intrusive behavior against another (e.g., stalking, spying, following);

Violation of a restraining order.

So, that this policy will accomplish its objectives, the Vice President Corporate is directed to develop the procedures, guidelines, and training programs needed to prevent and appropriately respond to incidents of violence. Each Office, with the assistance of the Corporate Office shall communicate workplace violence prevention and violence management techniques to employees on a regular basis and insure that appropriate security measures are taken to minimize the likelihood of violence occurring.

Full cooperation by all employees is necessary if Si-Nor, Incorporated is to maximize the safety and security of its employees, customers, and visitors. Retaliation against any employee who reports workplace violence or a threat of violence will not be tolerated.

C's Ex. 14.

23. Also, on March 20, 2003, HIOSH received SI-NOR's Safety Policy Manual which provides, in part, as follows:

SI-NOR will maintain the following safety and health records in the main office under the following conditions:

1. Records of scheduled and periodic inspections, which identify unsafe conditions and work practices, and the actions taken to correct the identified unsafe conditions and work practices. The inspection records will be maintained for three years in the main office.
2. Documentation of safety and health training for each employee including the employee's name, training dates, types of training, and training instructors will be maintained for three years.

C's Ex. 13.

24. On June 26, 2003, the DIRECTOR issued the instant Citation and Notification of Penalty stating:

Citation 1, Item 1 Type of Violation: Willful

HAR § 12-60-2(a)(3) was violated because:

Employer intentionally disregarded, was plainly indifferent to, and/or did not respond in an objectively reasonable manner to employees' exposure to, and inadequate protection from, workplace violence by eliminating or reducing existing or potential workplace violence including, but not limited to, violent physical acts, direct or implied threats, intimidating language or gestures, and/or threatening, abusive, or harassing communications or actions, which resulted in serious injuries to its employees.

§ 12-60-2(a)(3) states “Every employer shall provide safe work places and practices by elimination or reduction of existing or potential hazards. Elimination of existing or potential hazards by design, process substitution, or other appropriate methods is preferred because it eliminates the need for further employee protection. When elimination is not feasible, reduction of existing or potential hazards to acceptable levels, using methods such as engineering or administrative controls, isolation, or guarding, shall be promptly used. When these methods are inadequate to reach acceptable levels, personal protective equipment shall be provided and used.”

Location: Establishment

Abatement certification documents in the form of a copy of the company’s workplace violence prevention program is required.

Date By Which Violation Must be Abated: 07/29/2003
Penalty: \$ 49,500.00

Citation 2, Item 1 Type of Violation: Other

29 CFR 1904.1(a)(2) [Refer to chapter 12-52.1, HAR] was violated because:

Recordkeeping of work-related fatalities, injuries, and illnesses was not maintained.

29 CFR 1904.1(a)(2) states “If your company had more than ten (10) employees at any time during the last calendar year, you must keep OSHA injury and illness records unless your establishment is classified as a partially exempt industry under § 1904.2.” § 1904.2 references the table in appendix A of subpart B of this chapter. Your establishment was not exempted under § 1904.2.

Location: Establishment

Abatement certification documentation in the form of copies of the current OSHA 300 and 200 logs for 2000, 2001, and 2002 are required.

Date By Which Violation Must be Abated: 07/29/2003

Penalty: \$ 900.00

C's Ex. 2.

25. According to Mateo, sometime in December 2002, Uwakwe said the Handbook would be reviewed and revised, if necessary, to cover SI-NOR legally. Tr. 3 (5/20/04), pp. 438-39.
26. HAR § 12-60-2(a)(3) provides every employer shall provide safe work places and practices by elimination or reduction of existing or potential hazards. Where elimination is not feasible, employers must promptly reduce existing or potential hazards using methods like engineering or administrative controls.
27. HAR § 12-60-2(a)(3) required SI-NOR to have a program to eliminate or reduce existing or potential hazards, including WV. As SI-NOR had more than 25 employees, the company was required to have a written safety and health program. HAR § 12-60-2(a).
28. The Board finds based on SI-NOR's submission of the varying versions of the December 2001 Handbook, with and without the WV program, the testimony of Mateo that the Handbook would be revised, if necessary, in December 2002, Hamili's statement that he was not trained in WV and did not conduct training on WV, the denial by employees that they received the Handbook or WV training, that SI-NOR did not have a written WV Policy at the time of the inspection.
29. Assuming arguendo, that SI-NOR did have a written WV policy as set forth in its Employee Handbook, the Board finds that SI-NOR did not fully enforce its alleged WV Policy.⁴ The evidence before the Board established that

⁴SI-NOR's WV Policy states, in pertinent part:

Threats, intimidation and acts of violence will not be ignored, condoned or tolerated.

* * *

Any and all acts of intimidation, threats or acts of violence will be considered serious misconduct and will be the basis of disciplinary action, up to and including dismissal. These acts will be referred, when appropriate, to legal authorities.

* * *

Threats, threatening behavior, or acts of violence against an employee, a customer, a visitor, or any other individual cannot and will not be tolerated. All reports of workplace violence will be taken seriously and will be investigated promptly and thoroughly.

SI-NOR did not communicate its WV policy to its employees through training and tolerated the reported WV incidents without thoroughly investigating the incidents or reporting it to the appropriate legal authorities.

30. Previously, employees reported WV incidents at SI-NOR. One involved SI-NOR's former Project Manager Myron Espinda who allegedly tried to run over another Project Manager Terry Clark (Clark). Tr.1 (5/18/04), p. 26. Clark reported the incident to Hamili and Uwakwe and Uwakwe allegedly laughed it off, not offering to call the police or help Clark file a report. Id., pp. 26-27. Thereafter, Myron Espinda allegedly swore at Clark and spit in his face at the H-Power Landfill. Id., p. 26 - 27. Clark reported the incident to Uwakwe who did not offer to call the police or file a report. Id., p. 63. On or about

* * *

Any form of violence or threat of violence - whether actual or perceived - involving an employee or occurring in the workplace must be reported to a supervisor, manager, or the Corporate Office. Such behavior must be reported whether it is committed by another employee, a contractor, a customer, or a member of the public. If management determines that an employee has engaged in workplace violence, appropriate action will be taken, which may include discipline up to and including discharge.

* * *

Where the violent behavior occurs at the workplace, whether it is committed by an employee or by an individual who is not an employee, Si-Nor, Incorporated will contact the appropriate law enforcement agency if necessary. Additionally in all cases where violent behavior or a credible threat of violent behavior is directed at an employee, Si-Nor, Incorporated will take appropriate legal action and/or other steps necessary to help protect the employee and/or the employee's family members.

* * *

So, that this policy will accomplish its objectives, the Vice President Corporate is directed to develop the procedures, guidelines, and training programs needed to prevent and appropriately respond to incidents of violence. Each Office, with the assistance of the Corporate Office shall communicate workplace violence prevention and violence management techniques to employees on a regular basis and insure that appropriate security measures are taken to minimize the likelihood of violence occurring.

* * *

Retaliation against any employee who reports workplace violence or a threat of violence will not be tolerated.

C's Ex. 14.

October 8, 2002, Deguzman filed a police report concerning WV threats from Jason Heisler and Jonathan Kahananui. C's Ex. 8. Deguzman reported the filing of the police report to Uwakwe who took no further action. Id.

31. SI-NOR's failure to address the reported threats and actual WV exposed its employees to further WV, a potential and existing hazard.
32. Uwakwe understood that HIOSH standards not only require the creation of a WV policy but also its implementation. Tr. 5 (5/25/04), pp. 721-22.
33. There is no evidence that SI-NOR maintained and/or distributed its Employee Handbook and Safety Policy Manual to all employees in a consistent manner and in accordance with its own procedures. SI-NOR failed to enforce its policy to sign two acknowledgment forms showing they received SI-NOR's Handbook - one to be kept in the Handbook and one to be sent to SI-NOR's Human Resources Department.
34. SI-NOR also failed to use reasonable efforts to reduce WV because it unreasonably relied on employees it believed had questionable supervisory skills to implement training and enforcement on WV.⁵ SI-NOR further failed to follow its internal training policies and its sporadic management presence negatively compounded the effect of its unreasonable reliance on employees with questionable supervisory ability to provide training and enforcement of the WV policy.
35. SI-NOR rarely, if ever followed its safety policies as SI-NOR claimed its Project Managers were responsible for conducting the monthly safety training. C's Ex. 13, Safety Policy Manual, p. 4. Its policies also required SI-NOR to be represented by at least one top management person. Id. There is no evidence that safety training was conducted for the refuse crews assigned to the Hickam contract by either Project Manager, Clark or Pasoquen. Hamili claimed to have provided safety training to his crews for Pearl Harbor and the Marine contracts as evidenced by Safety Training sign-in sheets. C's Ex. 16. Hamili conducted safety training on October 5, 2002 on SI-NOR Safety Policy/Driver/Helper Awareness. Id. No training records exist after October 5, 2002. Hamili, however, indicated to the HIOSH CO that he did not receive any WV training and did not conduct any WV training. C's Ex. 25.

⁵In September 2002, Uwakwe relied on Deguzman but the Ke-a incident occurred shortly after his hire. Uwakwe had doubts about Deguzman's leadership capability but did not replace him. By the first quarter of 2002, Uwakwe already had concerns about Hamili's performance of duties.

36. SI-NOR failed to follow its policies and did little to ensure all employees received its WV policy and training on it. There is no evidence that SI-NOR gave its employees adequate, if any, training on WV prevention.
37. Statements from employees indicate that there was no WV policy or program in effect at the time of the December 20, 2002 incidents. In addition, Deguzman was allowed to remain at work despite information and recommendations for termination by Hamili. C's Ex. 4. According to written statements of SI-NOR employees and supervisory witnesses, there was a lack of communication from higher management to employees about WV policies or training of employees on WV Policy and Program requirements and within this scope - repeated acts of violence and assaults on employees committed by a management representative resulting in serious injuries of several employees; the company's termination of eight of its employees who allegedly engaged in protected activity, one discrimination case of which resulted in a citation, and others under investigation; and plain indifference evidenced by the company's lack of prudent action to prevent WV incidents at any time before and after the September 30, 2002 WV incident especially in view of the issuance of a previous citation for workplace violence violations.
38. SI-NOR did not employ reasonable measures to reduce the risk of WV given Deguzman's admission that he hit Ke-a. SI-NOR's failure to have an effective WV policy or to fully implement its WV policy exposed employees to safety hazards on December 20, 2002, that resulted in serious injuries to its employees, including Deguzman. Given the past WV history, limited management presence, failure to provide appropriate employee training, and disregard of its own safety policies, including those governing the implementation of its WV Policy, its employees faced a higher risk of exposure to potential WV.
39. SI-NOR knew HIOSH's standards and rules required it to have and implement a WV program; SI-NOR knew this from as far back as December 2001 when it allegedly created its WV Policy. SI-NOR knew implementation under the standards meant all its employees had to receive and be trained on its WV Policy. SI-NOR received its First Citation on November 15, 2002 more than four weeks before the fights occurred on December 20, 2002. The First Citation cited SI-NOR for not having and implementing a WV program as numerous employees confirmed they were never given or trained on SI-NOR's alleged WV Policy although there was a history of WV. SI-NOR's training records also confirm it did not train all its employees. SI-NOR's failure to ensure all employees received training on its alleged WV Policy violated its own written policies. SI-NOR let the situation persist knowing it was required

to have and implement a WV program from the First Inspection and Citation. In addition, SI-NOR failed to discipline or fire Deguzman.⁶

40. Based on the record, the Board concludes that the employer did not implement an effective WV prevention program to reduce the risk of employee exposure to the potential hazard of WV. The Board finds SI-NOR did not respond in an objectively reasonable manner to the employees' exposure to, and inadequate protection from, WV by eliminating or reducing existing or potential WV which resulted in serious injuries to its employees.
41. The Board further concludes that SI-NOR's failure to provide an effective WV prevention program was evidenced by plain indifference to the HIOSH standards and its own internal policies and was therefore, willful.
42. HIOSH computed the penalty based on the severity of injuries that could occur and the likelihood of such injuries occurring. HIOSH properly considered the actual injuries that occurred, including P. Espinda's broken jaw, the possibility that Westbrook could have been killed from the blow to his head with a pipe, and Deguzman's need for emergency treatment. Due to the severity of the injuries and the likelihood of further injuries occurring if the situation remained uncorrected, HIOSH began with a \$70,000 penalty but reduced that amount by 10% or \$7,000 based on SI-NOR's size. The DIRECTOR also gave SI-NOR a discretionary reduction of \$13,500.00 which reduced its penalty to \$49,500.00.
43. Under 29 CFR 1904.1(a)(2), SI-NOR was required to keep OSHA 200/300 logs because it had over ten employees. SI-NOR had no OSHA 200/300 logs at the time of the inspection. The Board finds that SI-NOR never completed the OSHA 200/300 forms.
44. SI-NOR did not submit its OSHA 200/300 logs to HIOSH at the time of inspection or reasonably thereafter.
45. HIOSH properly characterized SI-NOR's failure to maintain OSHA 200/300 logs as "Other" which applies to record-keeping violations. This is SI-NOR's second citation for not having OSHA 200/300 logs. Respondent failed to present any compelling evidence or argument to modify this penalty.

⁶While it appears that Deguzman suffered serious physical injuries to his face, head and forearms and more seriously, mental injuries, the Board notes Deguzman hit Westbrook on the head with a pipe which fortunately did not require medical treatment. In addition, there is evidence that Deguzman hit P. Espinda in the jaw possibly causing P. Espinda's broken jaw.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contested case pursuant to HRS §§ 396-3 (Supp. 2002) and 396-11.
2. SI-NOR is an employer within the meaning of HRS § 396-3.
3. To establish a violation of a standard, the DIRECTOR must prove by a preponderance of evidence that: “(1) the standard applies, (2) there was a failure to comply with the cited standard, (3) an employee had access to the violative condition, and (4) the employer knew or should have known of the condition with the exercise of due diligence.” Director v. Honolulu Shirt Shop, OSAB 93-073 at 8. (Jan. 31, 1996).
4. HAR §12-60-2(a)(3)⁷ requires employers to “provide safe work places” by eliminating or reducing existing or potential hazards. Where elimination is not feasible, employers must promptly reduce existing or potential hazards to acceptable levels using methods such as engineering or administrative controls.
5. We conclude that the DIRECTOR proved by a preponderance of evidence that the general duty clause applies and SI-NOR violated the provisions of this standard by failing to provide a work place free from the potential hazard of violence by the institution of an administrative control in the form of a WV prevention program. SI-NOR did not have and/or failed to implement an effective WV prevention program by safety training as a means to reduce the risk of employee exposure to the hazard of WV.

⁷HAR § 12-60-2(a)(3) provides:

Every employer shall provide safe work places and practices by elimination or reduction of existing or potential hazards. Elimination of existing or potential hazards by design, process substitution, or other appropriate methods is preferred because it eliminates the need for further employee protection. When elimination is not feasible, reduction of existing or potential hazards to acceptable levels, using methods such as engineering or administrative controls, isolation, or guarding, shall be promptly used. When these methods are inadequate to reach acceptable levels, personal protective equipment shall be provided and used.” See also, HRS § 396-6(a).

6. Under HAR § 12-60-2(b),⁸ SI-NOR is required to institute and maintain an effective written safety and health program to identify, evaluate and control work place hazards. We conclude that the DIRECTOR proved by a preponderance of evidence that SI-NOR did not maintain an effective written safety and health program to identify, evaluate and control the hazard of WV at the time of the inspection.
7. A violation does not require proof that a given employee was actually endangered by an unsafe condition, but only that it was reasonably certain that some employee was or could be exposed to that danger. Mineral Industries & Heavy Construction Group v. Occupational Safety & Health Review Comm'n (Mineral Industries), 639 F.2d 1289, 1294 (5th Cir. 1981). Here, SI-NOR's approach to the implementation of its WV policy plus its failure to fire Deguzman made it reasonably certain its employees, including Deguzman, would face an increased risk of WV.
8. SI-NOR knew or should have known that its WV Policy was not fully implemented as its internal policies. Actual knowledge of a violative condition is not required to establish a violation. Knowledge is presumed where an employer knows or should have known of a violative condition with the exercise of reasonable diligence. Director v. Honolulu Shirt Shop, OSAB 97-073 at 8 (Jan. 31, 1996); Director v. Charles Pankow Builders, Ltd., OSAB 91-015 (Jan. 28, 1992) employer could have known of violative condition by exercising reasonable diligence. An employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative conditions. N & N Contractors, Inc. v. Occupational Safety & Health Review Comm'n, 255 F.3d 122, 126-27 (4th Cir. 2001). Factors relevant in the reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards, the duty to adequately supervise

⁸HAR § 12-60-2(b)(1) provides in part.

An employer subject to this standard shall meet the following requirements:

(1) Written safety and health program.

(A) The employer shall institute and maintain an effective safety and health program to identify, evaluate and control workplace hazards. . . . An exception to this requirement only applies to employers with "less than 25 employees." See, HAR § 12-60-2(a).

employees, and the duty to implement a proper training program and work rules. Id.

9. Wilful is defined as follows in HRS § 396-3 as:

“Wilful violation” means a voluntary act or omission by the employer, as distinguished from an accidental act or omission, that is done with intentional disregard of, or plain indifference to any standard, rule, citation, or order issued under the authority of this chapter. A wilful violation does not require a showing of malicious intent or bad motive.

10. Given SI-NOR’s lack of managerial presence in 2002, and its unreasonable reliance on employees with inadequate supervisory abilities and training, all of which contributed to the creation of an unruly workforce, we conclude that the DIRECTOR proved by a preponderance of evidence that it was reasonably certain that some employee was or could be exposed to the hazard of WV. The preponderance of evidence supports a conclusion that SI-NOR was plainly indifferent to HIOSH standards requiring the effective implementation of a written safety and health program addressing WV, thus constituting a wilful violation. Mineral Industries v. Occupational Safety & Health Review Comm’n, 639 F.2d 1289, 1294 (5th Cir. 1981).
11. Based upon the Board’s finding that SI-NOR failed to implement and maintain an effective safety and health program and did not respond in an objectively reasonable manner to employees’ exposure to WV by eliminating or reducing existing and potential WV hazards despite numerous complaints. SI-NOR evidenced an intentional disregard or plain indifference to the existing and potential WV hazards. The Board concludes SI-NOR’s actions constitute a wilful violation of the HIOSH standards, thus the DIRECTOR’s characterization of the violation as wilful is appropriate.
12. HRS § 396-10(f) provides that “[a]ny employer who wilfully ... violates this chapter, or any standard, rule, citation or order issued under the authority of this chapter, shall be assessed a civil penalty of not less than \$5,000 nor more than \$70,000 for each violation.”
13. The DIRECTOR’s assessment of \$49,500 as a penalty for SI-NOR’s wilful violation is appropriate.
14. Under 20 CFR 1904.2(b)(2), SI-NOR is required to have the OSHA 200 logs for 2000 and 2001, respectively, and the OSHA 300 log for 2002, that provide a summary of occupational injuries and illnesses incurred by its employees in

Hawaii, available at the time of inspection. Violations of record keeping standards require no proof that noncompliance also creates a safety hazard. See, Secretary of Labor v. Capitol Tunneling, Inc., 15 O.S.H. Cas. (BNA) 1304, 1307 (OSHRC Sept. 16, 1991). In such cases, it is presumed a hazard already exists. Id. We conclude that the DIRECTOR proved by a preponderance of evidence that SI-NOR did not make the OSHA 200 and 300 logs available at the time of inspection.

15. The Board concludes that HIOSH properly characterized the recording-keeping violation described in Citation 2, Item 1 as "Other," and the penalty imposed is appropriate.

ORDER

The Board therefore affirms the instant citation and penalty.

1. Citation 1, Item 1, for violation of HAR §§ 12-60-2(a)(3), the characterization, and penalty of \$49,500.00 are affirmed.
2. Citation 2, Item 1, for violation of 29 CFR 1904.2(a)(2), the characterization, and the penalty of \$900.00 are affirmed.

DATED: Honolulu, Hawaii, February 15, 2006.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



KATHLEEN RACUYA-MARKRICH, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Decision 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 order to a duly recognized representative of the employees.

Copies sent to:
J. Gerard Lam, Deputy Attorney General
Preston A. Gima, Esq.