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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 96-067
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO No. N1662)
AND INDUSTRIAL RELATIONS,)	(Report No. 301421368)
Complainant,)	
)	
vs.)	
)	
COSCO FIRE PROTECTION, INC.,)	
Respondent.)	
)	

FILED
 DEPARTMENT OF LABOR
 DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
 .99 JAN 20 A10:26

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a written notice of contest filed by COSCO FIRE PROTECTION, INC. ("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 Director found a serious violation of Hawaii Occupational Safety and Health ("HIOSH") standard, Section 12-127-2(b)(1). A penalty of \$525.00 for the violation was proposed.

Respondent does not contest the violation of HIOSH standard, Section 12-127-2(b)(1).

The issues before the Board are:

(1) Whether the characterization of the violation as "serious" is appropriate? If not, what is the appropriate characterization?

(2) If so, was the imposition and amount of the proposed \$525.00 penalty appropriate?

For the reasons stated below, we modify Complainant's characterization of the violation and imposition of the proposed penalty.

FINDINGS OF FACT

1. In October 1996, David Nelson, a HIOSH compliance officer, conducted a general inspection of a construction site known as the Maui Marketplace.

2. Respondent was a subcontractor working on the construction project at the time of Mr. Nelson's inspection.

3. Respondent was responsible for installing the fire sprinkler system.

4. Four of Respondent's employees were working on the site at the time of Mr. Nelson's inspection.

5. At the time of his inspection, Mr. Nelson observed a Ridgid pipe threader ("subject pipe threader"), a power-operated machine capable of cutting, reaming, and threading pipes, as well as performing other specialized functions.

6. The subject pipe threader was placed on Respondent's work area.

7. Respondent's employees were the only individuals who traversed on Respondent's work area.

8. The subject pipe threader was connected to a foot switch set on the floor.

9. The foot switch was capable of activating the subject pipe threader.

10. There was no guard over the foot switch.

11. The purpose of a guard is to prevent the operator of the pipe threader or any other person, from inadvertently stepping on the foot switch and activating the machine.

12. There was another pipe threader on Respondent's work area. This pipe threader was connected to a foot switch, over which there was a guard.

13. At the time of Mr. Nelson's inspection, the subject pipe threader had not been in use by Respondent's employees for three days.

14. The subject pipe threader was not the pipe threader Respondent's employees preferred to use.

15. At the January 20, 1998 hearing before the Board, Mr. Nelson testified that the subject pipe threader can only be activated by the foot switch.

16. A three-way selector switch is located on the body of the subject pipe threader.

17. The positions on the selector switch are "reverse," "off," and "forward."

18. The subject pipe threader will not operate when the selector switch is in the "off" position, even if the foot switch is depressed.

19. The subject pipe threader will operate only when the selector switch is in either the "reverse" or "forward" position and while the foot switch is depressed.

20. When activated, the subject pipe threader slowly turns with two to three hundred foot-pounds of force.¹

21. The subject pipe threader stops operating upon release of the foot switch.

22. Respondent's Safety Director, Frank Garrard, testified that employees were instructed to position the selector switch in the "neutral" or "off" position when not working with the subject pipe threader. We credit Mr. Garrard's statement.

23. Mr. Nelson testified that an individual could suffer lacerations, abrasions, and contusions if the subject pipe threader were inadvertently activated. We credit Mr. Nelson's statements.

24. We find there is no substantial probability that death or serious physical harm could result from inadvertent activation of the subject pipe threader.

CONCLUSIONS OF LAW

1. A "serious violation" under Hawaii Revised Statutes ("HRS"), Section 396-3, 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.

¹At the hearing before the Board, Mr. Nelson explained that two hundred foot pounds of force is the force generated when two hundred pounds, suspended one foot above the ground, are dropped.

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).

Complainant has the burden of establishing both elements of a serious violation. Complainant, however, has not met her burden of showing that there was a substantial probability that death or serious physical harm could result if an accident did occur.

The subject pipe threader operated only with specific positioning of the selector switch and depression of the foot switch, and only as long as the foot switch remained depressed. It did not operate at a high speed and would not continue to operate if the foot switch were not depressed. Hence, we find that inadvertent activation of the subject pipe threader could cause an individual to suffer lacerations, abrasions, and contusions only, as removal of the foot from the switch would stop the operation of the pipe threader. We are unable to conclude there was a substantial probability that death or serious physical harm could result if an accident occurred.

On the record before us, we conclude that characterization of Respondent's violation of HIOSH standard, Section 12-127-2(b)(1), as "serious" is inappropriate. Respondent's violation shall, accordingly, be characterized as general or other-than-serious.

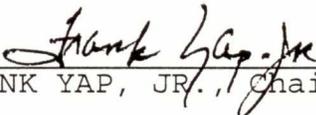
2. Because the characterization of the violation as "serious" was inappropriate, we conclude no penalty shall be assessed the Respondent.

ORDER

The Citation and Notification of Penalty is hereby modified as to the characterization of the violation and imposition of the proposed penalty.

JAN 20 1999

Dated: Honolulu, Hawaii, _____.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Frances E.H. Lum, Esq.,
for Complainant

Frank L. Garrard, Jr.
Representative for Respondent

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

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.