

- (ii) Whether the characterization of the violation as “Other” is appropriate? If not, what is the appropriate characterization?

An evidentiary hearing in this matter was held on April 10, 2007, and May 14, 2007. The parties filed Proposed Findings of Fact and Conclusions of Law on June 1, 2007. The Board issued its Proposed Findings of Fact, Conclusions of Law, and Order (Proposed Order) on June 26, 2007. The Director filed his Objections to the Board’s Proposed Order on July 16, 2007. On July 20, 2007, the Board held a hearing for the presentation of oral arguments on any exceptions filed regarding the Proposed Order.¹

Based on a thorough review of the entire record and the arguments presented by the parties, the Board makes the following findings of fact, conclusions of law, decision and order vacating the Director’s Citation.

FINDINGS OF FACT

1. Global Horizons was at all relevant times a company engaged in the business of supplying H-2A temporary agricultural workers to local farmers.² Global Horizons was required to provide their workers housing.³
2. On March 20, 2006, HIOSH initiated a planned comprehensive inspection of a temporary labor housing site located at 5288 Awawa Street, Hanapepe,

¹Pursuant to Hawaii Revised Statutes § 91-11, whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

Board Chair Nicholson was not present during the trial in this appeal; however, the Chair reviewed and considered the entire file in this proceeding, as well as the Objections filed by the Director, and heard and considered the arguments of the parties on July 20, 2007. See White v. Board of Education, 54 Haw. 10, 14-15, 501 P.2d 358, 362-63 (1972) (requirement that officials who are to render the decision personally consider the whole record or portions thereof cited by the parties is satisfied where the officials considered exceptions to the proposed decision and heard arguments thereon).

²Global Horizons filed the application under what is commonly known as the H-2A program, 8 U.S.C. §1101(a)(15)(H)(ii)(a).

³See 29 CFR 655.102(b)(1).

Kauai, Hawaii, 96716. The inspection was part of a “local emphasis program” focusing on temporary labor camps that housed H-2A workers.

3. The housing was a single-story, single-family home with three bedrooms. It was rented by Global Horizons from a private owner for approximately \$1,800 per month. Global Horizons’ on-site supervisor, John Boonkhai (Boonkhai), lived at the house with seven other workers. All of the workers worked at Pioneer Hi-Bred International, Inc., a research farm about three miles away. Boonkhai drove the workers to the farm daily. The workers had been living at the house for about 3-1/2 weeks.
4. Boonkhai was responsible for the maintenance of the house. He performed daily inspections and it was his responsibility to ensure the house was maintained in a sanitary condition.
5. The front or kitchen door and the back door of the house had wooden-framed screen doors that were not self-closing. Moreover, both doors were set in door frames that were too small for the doors. Hence, they did not close properly and remained ajar after closing. The screen doors did not have a spring or self-retracting mechanism which closed the doors shut when they were let go after opening. This failure to have a self-closing device prevented the doors from being effectively screened. The doors remained open about halfway after they were let go.
6. During the course of the inspection, Liese Barnes (Barnes), the HIOSH inspector noted that mosquitoes entered the house and bit her; however, the inspector also admitted that the house had adequate measures taken to prevent infestations and harborage of insects, rodents and pests. No employees ever complained about mosquito bites, and the inspector did not feel there was an infestation problem at the house.
7. During the course of Barnes’ examination, she testified about prior inspections⁴ and her conversations with the president and owner of Global Horizons and how the contracts between Global Horizons and all the growers

⁴Barnes explained that pre-housing inspections are performed upon request from the Workforce Development Division (WDD), Department of Labor and Industrial Relations, upon applications by Global Horizons to bring in H-2A workers to work on local farms in need of seasonal workers. Tr. pp. 34-35. Global Horizons would submit an application to bring in a set number of workers to be housed at a particular location for a certain period. *Id.* Her role was to assist the WDD in certifying that the particular house met the housing standard needed by the WDD. *Id.* If the house met the requirements of the standard, Global Horizons could proceed in the application process. *Id.*

were largely the same. Transcript of April 10, 2007 hearing (Tr.) pp. 29-30. Global Horizons brought the workers from foreign countries, provided benefits, e.g., workers' compensation, to the workers and supervised them. Tr. pp. 27, 30, and 37. Global Horizons had the power to hire and fire the workers. Tr. pp. 27-38 and 36-37. For example, if a grower was dissatisfied with a worker the grower would have to inform Global Horizons of the problem, and it was up to Global Horizons to discipline or remove the worker. Id. Significantly, Global Horizons considered the workers to be their own employees. Tr. p. 59.

8. Here, the doors were installed by the private landlord four weeks before the pre-occupancy inspection by the WDD that determined the house was suitable for H-2A housing. Global Horizons played no role in the installing or modifying the two doors in question.
9. The WDD approved the house for H-2A housing and did not inform Global Horizons that the doors violated any HIOSH laws. Since the time when the WDD approved the house for H-2A purposes, the doors were neither replaced nor modified.
10. Boonkhai received first-aid training in Thailand, although he was unable to present any certificate to the inspector to show that he was trained in first aid.
11. There is no specific certification necessary for first aid personnel.
12. There was a first aid kit in the kitchen of the house. There was a fire station three miles away from the house and a hospital ten miles away. Boonkhai lived with the employees at the house, and was available to drive the employees to the fire station and/or hospital, if necessary.
13. At the hearing on April 10, 2007, the characterization of Citation 1, Item 1, was changed from "repeat" to "other than serious" and the associated penalty of \$160.00 was withdrawn.
14. The Director issued the Citation for "5288 Awa Awa Street" although the proper address is "5288 Awawa Street." The Director did not amend the Citation to reflect the proper address even after the error was pointed out. Global Horizons did not have any employees at a "5288 Awa Awa Street" address.
15. There is no evidence that Global Horizons was prejudiced by the misspelling of the street name or was unable to identify the property that was the subject of the Citation. While conducting her inspection, the HIOSH inspector met

Boonkhai, Global Horizons' supervisor for the employees at the house, and accordingly Boonkhai was present during, and knew the correct address of, the site inspection. Additionally, Global Horizons timely contested the Citation. Thus, Global Horizons was provided adequate notice of the location of the house that was being cited.

16. The misspelling of the house's address was de minimis and there was no prejudice to Global Horizons.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contested case pursuant to Hawaii Revised Statutes (HRS) §§ 396-3 and 396-11.
2. Global Horizons is an employer within the meaning of HRS § 396-3, which provides in relevant part:

“Employer” means:

* * *

- (5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.
3. To establish a violation of a standard, the Director must prove by a preponderance of the evidence that: (1) the cited 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 could have known of the condition with the exercise of reasonable diligence. Director v. Maryl Pacific Constructors, Inc., OSAB 2001-18 (6/13/02).
 4. Citation 1, Item 1, alleges violation of 29 CFR 1910.142(b)(8), which governs temporary labor camps, and provides in relevant part:

All exterior openings shall be effectively screened with 16-mesh material. All screen doors shall be equipped with self-closing devices.
 5. Citation 2, Item 1, alleges violation 29 CFR 1910.142(k), which governs temporary labor camps, and provides in relevant part:

First aid.

1910.142(k)(1)

Adequate first aid facilities approved by a health authority shall be maintained and made available in every labor camp for emergency treatment of injured persons.

1910.142(k)(2)

Such facilities shall be in charge of a person trained to administer first aid and shall be readily accessible for use at all times.

6. Title 29, Code of Federal Regulations, Subpart J (which includes 29 CFR 1910.142), and its amendments, are incorporated in Title 12, Subtitle 8, Part 2, Chapter 67.2 of the Hawaii Administrative Rules (HAR), Department of Labor and Industrial Relations, Division of Occupational Safety and Health, General Industry Standards, General Environmental Controls (see HAR § 12-68.7-2).

7. Citation 1, Item 1, 29 CFR 1910.142(b)(8) [HAR Chapter 12-67.2].

It is undisputed that the doors were installed by the private landlord four weeks before the pre-occupancy inspection by the WDD that determined the house was suitable for H-2A housing. Global Horizons played no role in the installing or modifying the two doors in question. The WDD approved the house for H-2A housing and did not inform Global Horizons that the doors violated any HIOSH laws. Since the time when the WDD approved the house for H-2A purposes, the doors were neither replaced nor modified. Although the physical condition of the doors as they existed on the inspection date may have supported the Director's Proposed Conclusion of Law No. 4, the Board nevertheless rejects that proposed conclusion and accepts the affirmative defense of lack of fair notice.

8. Where applicable, the Board will look to decisions of the OSHA Commission and appellate courts for guidance in reviewing HIOSH cases. See Director v. Kiewit Pacific Co., OSAB 94-009 (1996).
9. The OSHA Commission recognized that an affirmative defense may apply when an employer relies on a compliance officer's prior statements that it was compliant with OSHA standards. See Miami Ind., Inc., 15 OSHC 1258 (1991); Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423, 430 (5th Cir. 2001) (where a company has been informed by an OSHA inspector that its

procedures or processes are safe and satisfactory, the company has a valid fair notice complaint if cited for the same procedures in a later inspection).

10. Here, Global Horizons reasonably relied upon the WDD's prior approval of the house, including the condition of the screen doors, to determine that the house and screen doors were compliant with HIOSH standards.
11. The Board does not, however, intend the affirmative defense of lack of fair notice to somehow create a waiver or defense from future citations. Global Horizons is now on fair notice and can be held responsible for future violations.
12. Accordingly, the Citation is vacated with respect to Citation 1, Item 1. However, the Board finds that Global Horizons is now on notice of the violation, and if employees are still living in the house at 5288 Awawa Street, the condition shall be fixed.
13. Citation 2, Item 1, 29 CFR 1910.142(k) [HAR Chapter 12-67.2].

Boonkhai received first-aid training in Thailand, although he was unable to present any certificate to the inspector to show that he was trained in first aid. There is no specific certification necessary for first aid personnel, and the Director was unable to demonstrate why Boonkhai's first aid training was insufficient for H-2A purposes. Furthermore, there was a first aid kit in the kitchen of the house. There was a fire station three miles away from the house and a hospital ten miles away. Boonkhai lived with the employees at the house, and was available to drive the employees to the fire station and/or hospital if necessary. The Board finds that the Director failed to prove that adequate first aid facilities were not available for emergency treatment of injured persons, or that there was not a person trained to administer first aid readily accessible at all times. The Board accordingly rejects the Director's Proposed Conclusion of Law No. 5.

14. The Citation is vacated with respect to Citation 2, Item 1.
15. There is no evidence that Global Horizons was prejudiced by the misspelling of the street name or was unable to identify the property that was the subject of the Citation. While conducting her inspection, the inspector met Boonkhai, who was Global Horizons' supervisor for the employees at the house, and accordingly Boonkhai was present during, and knew the correct address of, the site inspection. Additionally, Global Horizons was able to timely contest the Citation. Global Horizon was provided adequate notice of the location of the house that was being cited. Accordingly, the Board concludes that the

misspelling of the house's address was de minimis and resulted in no prejudice to Global Horizons.

ORDER

For the above-discussed reasons, the Board hereby vacates the instant Citation, Citation 1, Item 1 - 29 CFR 1910.142(b)(8), and Citation 2, Item 1 - 29 CFR 1910.142(k) are vacated.

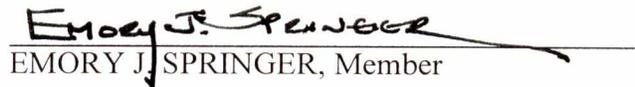
DATED: Honolulu, Hawaii, August 3, 2007.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON Chair



A handwritten signature in black ink, appearing to read 'Emory J. Springer', is written over a horizontal line.

EMORY J. SPRINGER, Member



A handwritten signature in black ink, appearing to read 'Sarah R. HiraKami', is written over a horizontal line.

SARAH R. HIRAKAMI, 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:

Herbert B.K. Lau, Deputy Attorney General
Ryan E. Sanada, Esq.