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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

v.

GLOBAL HORIZONS, INC.,

Respondent.

CASE NO. OSH 2006-12

DECISION NO. 19

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 23, 2006, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or Complainant), through the Hawaii Occupational Safety and Health Division (HIOSH) issued a Citation and Notification of Penalty (Citation) to Respondent GLOBAL HORIZONS, INC. (Global Horizons or Respondent). The Citation resulted from Inspection No. 309457760 conducted on March 23, 2006, and alleged two electrical standard and one temporary labor camp standard violations, and proposed a \$3,250.00 penalty. Global Horizons contested the Citation by letter, dated June 12, 2006.

Pursuant to the August 16, 2006, initial conference, the issues to be determined in this matter were:

- (a) Citation 2, Item 1 - 29 CFR 1910.254(d)(8):
 - (i) Whether Global Horizons violated 29 CFR 1910.254(d)(8) as described in Citation 2, Item 1, issued on May 23, 2006?
 - (ii) Whether the characterization of the violation as "Serious" is appropriate? If not, what is the appropriate characterization?
 - (iii) Whether the imposition and amount of the \$1,625.00 penalty is appropriate? If not, what is the appropriate penalty?
- (b) Citation 2, Item 2 - 29 CFR 1910.305(b)(1):

- (i) Whether Global Horizons violated 29 CFR 1910.305(b)(1) as described in Citation 2, Item 2, issued on May 23, 2006?
 - (ii) Whether the characterization of the violation as “Serious” is appropriate? If not, what is the appropriate characterization?
 - (iii) Whether the imposition and amount of the \$1,625.00 penalty is appropriate? If not, what is the appropriate penalty?
- (c) Citation 3, Item 1 - 29 CFR 1910.151(b):
- (i) Whether Global Horizons violated 29 CFR 1910.151(b) as described in Citation 3, Item 1, issued on May 23, 2006?
 - (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 11, 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 27, 2007. Global Horizons filed its 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 2, Item 1 (spliced cable) and its \$1,625.00 penalty;

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 Respondent, 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).

affirming the Director's Citation 2, Item 2 (exposed junction box) and its \$1,625.00 penalty; and vacating the Director's Citation 3, Item 1 (no first aid personnel).

FINDINGS OF FACT

1. Global Horizons is 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 203, 2006, a HIOSH Safety Compliance Officer inspected a temporary labor housing site for Global Horizons employees located at 75-390A Kailua Road, Kailua Kona, Hawaii, 96740.
3. The housing was owned by Kona Coffee & Tea Company (Kona Coffee), who rented the property to Global Horizons. Eighteen of Global Horizons' workers from Thailand lived there. Officially, Global Horizons did not expect the workers to do any work at the house, and the employees were expected to perform work at the farms only.
4. During the course of HIOSH Inspector Liese Barnes' (Barnes) examination in Case No. OSH 2006-11, 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 were largely the same. Transcript of hearing in OSH 2006-11 (Tr. OSH 2006-11), April 10, 2007, pp. 29-30. Global Horizons brought the workers from foreign countries, provided benefits, e.g., workers' compensation, to the workers and supervised them. Tr. OSH 2006-11, pp. 27, 30, and 37. Global Horizons had the power to hire and fire the workers. For example, if a grower was dissatisfied with a

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).

⁴In this regard, Barnes testified that she performed pre-housing inspections upon the 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. OSH 2006-11, pp. 34-35. She testified that 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.

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. Tr. OSH 2006-11, pp. 27-28 and 36-37. Significantly, Global Horizons considered the workers to be their own employees. Tr. OSH 2006-11, p. 59.

5. The workers in this case worked at the Kona Coffee farm, about a 15 to 20 minute drive away. The workers were under the control of Global Horizons while living at the housing, but under the control of Kona Coffee while in the field.
6. The HIOSH inspector inspected a washer-dryer room, which has also been described as a tool shed, that was next to the main house that housed the workers. Inside this room was an arc welder that had a splice in the cable. The metal clip on the lead cable was spliced with a different gauge cable. The splice was within ten feet of the electrode holder (based upon the estimate of the inspector and his photographs), and the inner conductors were exposed. The conductors of the arc welder carried a 220-volt current.
7. Danny Becker (Becker), a Field Manager for Kona Coffee, had directed one of the Global Horizons employees to splice and use the arc welder; Kona Coffee was also cited by the Director for the arc welder. The arc welder was used to weld a fertilizer shroud, which is related to the workers' farm activity. The splicing and welding was outside the scope of the worker's job, and was done under the direction and control of Becker, without the knowledge or permission of Global Horizons.
8. The arc welder was used on that one occasion to repair the fertilizer shroud, and was not used since; at the time of the inspection, the arc welder was not plugged in and was turned off. Although Global Horizons asserts that the arc welder did not pose an electrical hazard because it was not in use at the time of the inspection, that no employee was shocked by the arc welder, and that the employees were not supposed to go into the room or use the tools in there, there is evidence that at least one employee had gone into the room to use the tools, and had in fact used the arc welder in the past to repair the fertilizer shroud; additionally, employees would enter the room, which contained a washer and dryer, on a daily basis, and the room was occupied by workers approximately four hours per day. Accordingly, the Board rejects the proposed finding that the arc welder did not pose an electrical hazard.
9. Although the Director asserts that Global Horizons should have known about the condition of the arc welder if it had properly performed weekly inspections, such inspections may not have revealed the electrical hazard. Although the arc welder was in plain sight at the time of the inspection, the arc

welder was movable/portable, and may not have previously been stored in plain sight at the time of any inspection by Global Horizons. Additionally, it is not reasonable for Global Horizons to anticipate the employees using the arc welder at the housing location to do work outside of their job descriptions. The Director has not met his burden of proving that Global Horizons knew or should have known about the electrical hazard posed by the arc welder.

10. Inside the same washer-dryer/tool shed was an electrical junction box that had its cover hanging to the side, exposing the wires within. The wires inside the junction box were insulated and the ends were capped, with the exception of the ground wire, although the ground wire was not live and did not pose any safety hazard. The wires did not have a high voltage under HIOSH standards.
11. Upon being noticed during the inspection that the junction box was uncovered, it was immediately closed.
12. The junction box was located behind a water heater, but visible, and access to the box by a worker was still possible. The inspector opined that there was a greater than 90% chance that an employee would not get shocked, even if touching the wires with a metal rod, and that an employee “most likely” would not get shocked because the wires were insulated and capped. No Global Horizons employees were injured by the junction box.
13. Approximately one week before the inspection, Becker had the Global Horizons workers replace the washer and dryer in the room, and they failed to replace the cover. This work was outside the scope of the Global Horizons employees’ job duties.
14. Global Horizons was responsible for the maintenance of the washer-dryer/tool shed and the junction box. Jason Tanner (Tanner), Global Horizons’ manager for the housing site, was supposed to conduct periodic inspections at least once per week; however, Tanner seldom came to the house, primarily because he lived “down south, and it was a long drive.” As a supervisor whose job it was to inspect the housing site, Tanner’s knowledge gained from the period inspections, had they taken place, would be attributable to Global Horizons.
15. Unlike the arc welder, the junction box is a permanent fixture in the washer-dryer/tool shed. Had Global Horizons conducted inspections at least once per week, the condition of the junction box would have been known. Additionally, it is reasonable for Global Horizons to expect its workers to enter the room where a washer and dryer are located; in fact, the workers did enter the room on a daily basis. The Board rejects Global Horizons’ proposed finding that the employees were not supposed to go into the washer-dryer/tool shed.

16. The junction box cover was removed under the direction of Becker, and Kona Coffee was also cited for this hazard as an “employer.”
17. Under the facts of this case, the Board rejects Global Horizons’ proposed findings of fact that the house was not a place of employment, and that Global Horizons did not have management or control over the employees at the time of the splicing or replacement of washer-dryer. While the employees were under the control of Kona Coffee and Becker while in the field, they were under the control of Global Horizons while living at the housing, and the splicing and replacement of washer-dryer occurred at the housing. Although the work was outside the official scope of employment, and performed under the control of Becker, the housing manager failed to properly inspect the housing site as required, and such inspections may have revealed to Global Horizons that Becker was directing the work of the employees at their housing site - for example, inspection would have revealed the condition of the junction box, which in turn would have revealed the work performed under Becker’s direction. Also, the arc welder was used on a fertilizer shroud that was used in the scope of the employees’ work in the field. Additionally, the employees are reliant on Global Horizons for transportation and housing, and have no reasonable alternative to what Global Horizons provides for them.
19. Global Horizons controlled and provided the housing for the workers, and maintained the housing and provided transportation to/from the housing to ensure an adequate supply of labor was available, for the benefit of Global Horizons. The housing thus bore a direct relationship to the workers’ employment.
20. Under the facts of this case, the Board finds that the housing site was a condition of employment for purposes of 29 CFR 1910.254(d)(8) and 29 CFR 1910.305(b)(1).
21. At the time of the inspection, there was one Global Horizons worker assigned to work at Holualoa Farms located approximately 20 minutes away from the housing by car. There was no one certified to render first aid at the farm. The nearest medical facility to Holualoa Farms was Kona Community Hospital, which is approximately 30 minutes away by car.
22. There is no evidence that Global Horizons controlled the worker(s) at Holualoa Farm or otherwise acted as an “employer” with respect to any violation that occurred at that location.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contested case pursuant to sections 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 2, Item 1, alleges violation of 29 CFR 1910.254(d)(8), which governs arc welding and cutting, and provides in relevant part:

Electric shock. Cables with splices within 10 feet (3 m) of the holder shall not be used. The welder should not coil or loop welding electrode cable around parts of [the welder’s] body.
5. 29 CFR 1910.254(d)(8) is incorporated in Title 12, Subtitle 8, Part 2, Chapter 78.2 of the Hawaii Administrative Rules (HAR), Department of Labor and Industrial Relations, Division of Occupational Safety and Health, General Industry Standards, General Environmental Controls, by HAR § 2-78.2-1.
6. Citation 2, Item 2 alleges violation of 29 CFR 1910.305(b)(1), which governs wiring methods, components, and equipment for general use, and provides in relevant part:

Conductors entering boxes, cabinets, or fittings. Conductors entering boxes, cabinets, or fittings shall also be protected from abrasion, and openings through which conductors enter shall be

effectively closed. Unused openings in cabinets, boxes, and fittings shall be effectively closed.

7. 29 CFR 1910.305(b)(1) is incorporated into HAR Title 12, Subtitle 8, Part 2, Chapter 89.1, by HAR § 12-89.1-1.
8. Citation 3, Item 1 alleges violation of 29 CFR 1910.151(b), which governs medical services and first aid and provides in relevant part:

In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available.
9. 29 CFR 1910.151(b) is incorporated into HAR Title 12, Subtitle 8, Part 2, Chapter 62.1, by HAR § 12-62.1-1.
10. Citation 2, Item 1 - 29 CFR 1910.254(d)(8) [HAR Chapter 12-78.2].

The Board finds that the splice was within 10 feet, based upon the inspector's estimate following visual inspection and his photographs, and accordingly, the Board rejects Global Horizons' proposed Conclusion of Law No. 3. However, the Board finds that the cable was spliced under the control and direction of Becker, without the knowledge of Global Horizons. Additionally, weekly inspections may not have revealed the electrical hazard. Although the arc welder was in plain sight at the time of the inspection, the arc welder was movable/portable and may not have previously been stored in plain sight at the time of any inspection by Global Horizons. Additionally, it is not reasonable for Global Horizons to anticipate the employees using the arc welder at the housing location to do work outside of their job descriptions.

11. The Board concludes that the Director has failed to prove Global Horizons knew or could have known of the condition of the arc welder with the exercise of reasonable diligence, for the reasons discussed above, and accordingly, need not reach the remaining factors articulated in Director v. Maryl Pacific Constructors, Inc., OSAB 2001-18 (6/13/02) or conclusions proposed by the parties. Accordingly, the Board vacates Citation 2, Item 1.

12. Citation 2, Item 2 - 29 CFR 1910.305(b)(1) [HAR Chapter 12-89.1].

The Board concludes that the hazardous condition presented by the junction box's open cover was a permanent condition that would have been revealed had Global Horizons conducted adequate inspections, and therefore, Global Horizons knew or should have known of the condition with the exercise of reasonable diligence. While the employees were under the control of Kona Coffee and Becker while in the field, they were under the control of Global Horizons while living at the housing, and the splicing and replacement of washer-dryer occurred at the housing. Although the work was outside the official scope of employment, and performed under the control of Becker, the housing manager failed to properly inspect the housing site as required, and such inspections may have revealed to Global Horizons that Becker was directing the work of the employees at their housing site - for example, inspection would have revealed the condition of the junction box, which in turn would have revealed the work was performed under Becker's direction. Also, the arc welder was used on a fertilizer shroud that was used in the scope of the employees' work in the field. Additionally, the employees are reliant on Global Horizons for transportation and housing, and have no reasonable alternative to what Global Horizons provides for them. Under the facts of this case, the Board finds that the housing site was a place of employment for purposes of 29 CFR 1910.305(b)(1). The Board rejects Global Horizons' proposed conclusion that Global Horizons is not liable for the exposed junction box.

13. The evidence shows that employees have gone into the washer-dryer/tool shed to use the tools; an employee had used the arc welder located in the room to repair the fertilizer shroud; employees had replaced a washer and dryer in the room under Becker's direction; employees would enter the room, which contained a washer and dryer on a daily basis; and the room was occupied by workers approximately four hours per day. Under the facts of this case, the Board rejects Global Horizons' proposed conclusion that the junction box was not a hazard.
14. Accordingly, the standard 29 CFR 1910.305(b)(1) [HAR Chapter 12-89.1] applies. The junction box was not effectively closed because its cover was off, thereby exposing the live wires within. Although the wires were insulated, it was possible that a worker could come in direct or indirect contact with the wires within. The junction box was not effectively closed as required by 29 CFR 1910.305(b)(1), and therefore there was a failure to comply with the cited standard. The employees entered the shed, which contained a washer and

dryer, on a daily basis. Although the junction box was behind the water heater, it was accessible by the employees. Accordingly, employees had access to the violative condition. Finally, the junction box was a permanent fixture, and visible. Global Horizons knew or could have known of the condition with the exercise of reasonable diligence.

15. In Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325 (C.A. 11th Cir., 1983), the court of appeals reviewed the history of OSHA's enforcement of the industry and concluded that "as a matter of statutory construction, . . . the [Occupational Safety and Health] Act covers only housing that is a condition of employment." Hence, under this decision the housing must be a "condition of employment" before jurisdiction attaches and OSHA may regulate the housing. In C.R. Burnett and Sons, Inc., and Harllee Farms, 1980 OSHD (CCH) 24,964 (11/3/80), the Review Commission held that the conditions in a temporary labor camp are covered under the Act when it bears a "direct relationship to employment." The Secretary of Labor directed that two factors were necessary to meet the test: (1) the employer owns, controls, or provides the housing, and (2) the employer maintains the housing on its premises to ensure that an adequate supply of labor is available. Here, both tests are met. The Respondent rented the house for the purpose of housing their workers. The Respondent maintained and controlled the housing. The workers residing in the housing were required to work for the Respondent on demand. Although the Respondent is not in the business of farming it is clear that the ready and available supply of workers advanced their own business of supplying labor to local farmers.
16. Global Horizons controlled and provided the housing for the workers, and maintained the housing and provided transportation to/from the housing to ensure an adequate supply of labor was available, for the benefit of Global Horizons. The housing thus bore a direct relationship to the workers' employment.
17. Under the facts of this case, the Board concludes that the housing site was a condition of employment for purposes of 29 CFR 1910.254(d)(8) and 29 CFR 1910.305(b)(1).
18. The penalty was calculated using a predetermined formula. See pp. 34 and 40 of Exhibit 2. The possible injury resulting from the open junction box is 'high' in severity (if any worker came in contact with a live wire in the uncovered junction box he or she would suffer an electrical shock or electrocution) with

a 'lesser' probability rating (the live wires were insulated and capped), resulting in a gravity-based penalty of \$2,500.00. It was discounted by 35% due to Global Horizons' size (101-250 workers) and its good faith (safety program). This results in a penalty of \$1,625.00.

19. For the reasons discussed above, Citation 2, Item 2 and its \$1,625.00 penalty is affirmed.
20. Citation 3, Item 1 - 29 CFR 1910.151(b) [HAR Chapter 12-62.1]

There is no evidence to indicate that Global Horizons exerted control over the employee(s) who worked at Holualoa Farms, where there was no worker certified to render first aid. The Board cannot conclude that Global was the "employer" with respect to any violation that occurred at that location. Accordingly, the Board concludes that 29 CFR 1910.151(b) [HAR Chapter 12-62.1] does not apply in this instance, and Citation 3, Item 1 is vacated. The Director's conclusion of law no. 6 is rejected.

ORDER

For the above-discussed reasons, the Board hereby affirms Citation 2, Item 1 (spliced cable) and its \$1,625.00 penalty; affirms Citation 2, Item 2 (exposed junction box) and its \$1,625.00 penalty; and vacates Citation 3, Item 1 (no first aid personnel).

DATED: Honolulu, Hawaii, August 3, 2007.

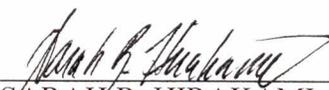
HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



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.

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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GLOBAL HORIZONS, INC.,

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NOTICE OF ERRATA TO DECISION
NO. 19, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
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NOTICE OF ERRATA TO DECISION NO. 19,
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Findings of Fact, Conclusions of Law, and Order issued by the Hawaii Labor Relations Board (Board) in Decision No. 19, dated August 3, 2007, contained an inadvertent error on page 11, in the first paragraph under the section entitled "Order." The incorrect language reads:

For the above-discussed reasons, the Board hereby affirms Citation 2, Item 1 (spliced cable) and its \$1,625.00 penalty; affirms Citation 2, Item 2 (exposed junction box) and its \$1,625.00 penalty; and vacates Citation 3, Item 1 (no first aid personnel). [Emphasis added].

The Board, however, intended to vacate Citation 2, Item 1 (spliced cable) and its \$1,625.00 penalty, as indicated on page 2 of the document as well as the Board's discussions in its findings of fact and conclusions of law.

Accordingly, the Board hereby clarifies that it vacates Citation 2, Item 1 (spliced cable) and its \$1,625.00 penalty; affirms Citation 2, Item 2 (exposed junction box) and its \$1,625.00 penalty; and vacates Citation 3, Item 1 (no first aid personnel).

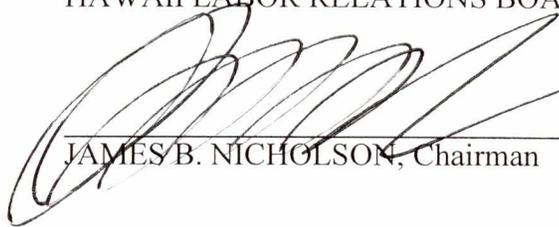
The Order on page 11 should read as follows:

ORDER

For the above-discussed reasons, the Board hereby vacates Citation 2, Item 1 (spliced cable) and its \$1,625.00 penalty; affirms Citation 2, Item 2 (exposed junction box) and its \$1,625.00 penalty; and vacates Citation 3, Item 1 (no first aid personnel).

DATED: Honolulu, Hawaii, August 9, 2007.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chairman



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Notice on 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.