

Dec.
NE ✓

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 2006-13

DECISION NO. 20

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 22, 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. 309457000 conducted on February 17, 2006, and alleged "serious" violations of the temporary labor camp standards and proposed a \$2,250.00 penalty. Global Horizons contested the Citation by letter dated June 12, 2006.

Pursuant to the August 16, 2006, initial conference and the Board's subsequent Order, the issues to be determined in this matter were:

- (a) Citation 1, Item 1 - 29 CFR 1910.142(b)(2):
 - (i) Whether Respondent violated 29 CFR 1910.142(b)(2) as described in Citation 1, Item 1, issued on May 22, 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 \$1,250.00 penalty is appropriate? If not, what is the appropriate penalty?

- (b) Citation 1, Item 2a - 29 CFR 1910.142(b)(4):
 - (i) Whether Respondent violated 29 CFR 1910.142(b)(4) as described in Citation 1, Item 2a, issued on May 22, 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 \$1,000.00 penalty is appropriate? If not, what is the appropriate penalty?
- (c) Citation 1, Item 2b - 29 CFR 1910.142(d)(9):
 - (i) Whether Respondent violated 29 CFR 1910.142(d)(9) as described in Citation 1, Item 2b, issued on May 22, 2006?
 - (ii) Whether the characterization of the violation as “Serious” is appropriate? If not, what is the appropriate characterization?
- (d) Citation 1, Item 2c - 29 CFR 1910.142(d)(10):
 - (i) Whether Respondent violated 29 CFR 1910.142(d)(10) as described in Citation 1, Item 2c, issued on May 22, 2006?
 - (ii) Whether the characterization of the violation as “Serious” is appropriate? If not, what is the appropriate characterization?
- (e) Citation 1, Item 2d - 29 CFR 1910.142(f)(3):
 - (i) Whether Respondent violated 29 CFR 1910.142(f)(3) as described in Citation 1, Item 2d, issued on May 22, 2006?
 - (ii) Whether the characterization of the violation as “Serious” 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 27, 2007. Global Horizons filed its Objections to the Board’s Proposed Order on July 16, 2007; the Director filed his objections to the 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, the Board makes the following findings of fact, conclusions of law, decision and order affirming Citation 1, Item 1, and its \$1,250.00 penalty; affirming the \$1,000.00 penalty and Citation 1, Item 2a, Citation 1, Item 2b, and Citation 1, Item 2c; and vacating Citation 1, Item 2d. Accordingly, the Board affirms the aggregate penalty of \$2,250.00.

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. During the course of HIOSH Inspector Liese Barnes' (Barnes) examination in Case No. OSH 2006-11, she testified about prior inspections⁴ and her

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 Global Horizons, 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).

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

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 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.

3. On February 17, 2006, pursuant to a complaint received, HIOSH performed an inspection of a temporary labor housing site located at 92-9102 Hula Lane, Ocean View, Hawaii. The site is a single-story residential home. It is owned by Global Horizons. The complaint had mentioned kitchen and bathroom facilities.
4. Twenty-one Thai workers lived at this temporary labor housing site.
5. Sam Wongsesanit (Wongsesanit), Global Horizons' field supervisor, lived in a detached unit near the house and supervised the workers. As part of his duties, Wongsesanit was required to make sure the housing remained clean and comfortable for the workers. He conducted regular weekly inspections of the residence. If there was a non-conforming condition at the house, Wongsesanit could fix the condition himself if he were able to do so, or he could call another person to do the work. He also had a Home Depot credit card provided by Global Horizons to purchase items. If the work was too complicated for Wongsesanit to handle himself, he was required to inform Bob Babanian (Babanian), the Housing and Development Manager for Global Horizons, who would then take care of it.
6. Wongsesanit was also required to send period written reports to Babanian regarding the condition of the site, including anything of significance such as non-conforming conditions that could not be fixed.
7. If Wongsesanit did not fix a non-conforming condition or report the condition to Babanian, he could be disciplined for not doing so. Depending on the

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.

severity of the problem, Global Horizons had internal procedures to discipline employees when they did not perform their jobs properly. Wongsesanit was provided with a personnel manual and training materials which informed employees that they will be disciplined if they did not do their jobs properly. The disciplinary procedures in the personnel manual applied to Wongsesanit. The training materials explained the H-2A and HIOSH requirements for the temporary labor housing.

8. In the past, Global Horizons issued several disciplinary actions against employees who did not maintain H-2A housing in proper condition, including oral and written warnings.
9. The workers at this housing site harvested nuts at the MacFarms, about a fifteen minute drive away. Wongsesanit drove the workers there every day in a van, and supervised the workers both in the field and in the housing. The workers did not have transportation to/from work or other locations such as shopping, other than what Global Horizons provided to them.
10. The housing site consisted on a single-story house. There were three bedrooms, a living room that was also used as a bedroom, and two bathrooms.
11. The first bedroom was 208 square feet, and contained six beds (three double-bunk beds). There was bedding material on the beds. The second bedroom was 130 square feet and contained four beds (two double-bunk beds). There was bedding material on these beds as well.
12. The inspector did not observe the workers sleeping in the beds, and did not speak with the Thai workers who slept there. From the photographs taken by the inspector, it appears that at least one of the beds did not have a blanket or sheet, and there were clothes, a backpack, a suitcase, and a bottle on the bed. However, Wongsesanit confirmed the number of workers sleeping in each bedroom (six and four, respectively), and also stated that the workers had been living in the house for approximately three weeks.
13. Although there were 21 workers living in the house at the time of the inspection, the house should only have held a maximum of five workers. At the time of the inspection, the workers had been there for three weeks because they were "in transition." Wongsesanit reported the fact that there were 21 workers at the house to Global Horizons, but he wasn't told when the workers would be flown to the mainland.
14. The Board rejects Global Horizons' proposed findings that there was no way for Global Horizons to control where the workers slept if they had their own

preferences, or that there was sufficient space in other parts of the house for other employees to sleep. The beds - double-bunk - were provided by Global Horizons. The fact that twenty-one workers were living in a single-story house that should have housed no more than five workers was entirely under the control of Global Horizons.

15. The inspector noticed that a three-foot area of the kitchen floor was damaged; specifically, two planks were warped and buckled.
16. The floor was in good condition and repair prior to the employees moving into the house, as the house was approved by the WDD for H-2A purposes. However, the initial H-2A inspection was performed on May 26, 2005, nearly nine months prior to the instant inspection.
17. There is no evidence to pinpoint the exact date the floor became damaged; however, Wongsesanit had stated that Global Horizons knew the floor was damaged for six months.
18. Not every imperfection in a floor constitutes a violation of the standard. Except for the damaged area, the floor appeared to be clean and there were no visible splinters, exposed nails, or holes in the floor.
19. The damaged area of the floor covered three square feet. Part of the floor board was raised one-half inch to one inch above the surface of the floor. A photo of the damaged area reveals nails and screws in those boards. The warped board posed a tripping hazard because it was located in the center of the kitchen near a table with knives and stove. All twenty one workers in the house had to cook their meals in this kitchen. A worker could trip on the board while carrying hot food, hot water, or knives.
20. Following the inspection, Global Horizons attempted to temporarily repair the floorboards by nailing down the warped pieces. The floorboards were scheduled to be repaired within one week. None of the employees complained that the floor was a hazard, and no employee was injured during the six months the floor was damaged.
21. The house had two bathrooms. At the time of the pre-occupancy inspection nearly nine months earlier on May 26, 2005, toilet paper was available in each bathroom, and the toilets and privies were certified to be in clean condition, well lighted, ventilated, and sanitary; additionally, the house had an adequate and convenient water supply for drinking, cooking, bathing, and laundry purposes.

22. However, at the time of the instant inspection on February 17, 2006, there was no toilet paper in one of the bathrooms. According to Wongsesanit, Global Horizons did not supply toilet paper for the workers. In this same bathroom, there was no flush handle on the toilet tank, and a cloth material was rigged to flush the toilet through the handle hole. A worker would have to reach into the tank to grab the cloth to flush the toilet. The cover of the tank had been removed, probably by one of the employees, and was placed on the side of the toilet. The inspector also observed fecal material in the bowl. The inspector, however, did not know how long the bathroom was missing toilet paper, and admitted the last person to use that bathroom may have used up the paper. The other bathroom did have toilet paper. The inspector also did not know how long the toilet was missing its handle.
23. The Board rejects Global Horizons' proposed finding that the first toilet room was not unsanitary. The missing toilet handle meant that the workers who lived there - 21 of them at the time of the inspection - would have to grasp a cloth material to attempt to flush the bowl. Fecal material in the bowl indicates the bowl did not flush properly, or was not being cleaned sufficiently. The lack of toilet paper is a particular problem for workers who do not have means of transportation, even to get to a store, other than what Global Horizons provides.
24. The hot water faucet for the sink in the second bathroom was not working. The bathtub in this same bathroom did have hot water. The standard requires hot water for bathing and laundry purposes; the house as a whole had an adequate supply of hot water for bathing and laundry purposes. There is no evidence presented that the sink in this bathroom was used for bathing or laundry purposes, and therefore the standard would not apply.
25. Since the time that the employees lived at the house, there have been no recordable injuries.
26. The Board rejects Global Horizons' proposed finding that it had a philosophy of providing the H-2A workers with the best possible living conditions, which in turn raises the efficiency, output and morale of the workers, and therefore, maintaining the site in a safe and livable condition was a serious part of Wongsesanit's job duties. Rather, Wongsesanit's admissions indicate that Global Horizons knew about the damaged kitchen floor for six months; that Global Horizons knew about the over-crowding conditions for three weeks; and did not adequately address the safety and sanitary needs of the workers, at least for the period of time preceding the instant inspection

27. The Board finds that Wongsesanit was a supervisor and agent of Global Horizons, such that Wongsesanit's discharge of his duties and failure to enforce the House Rules, and whether he knew or should have known of the presence of a violation, establishes action/inaction and knowledge attributable 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)(2), which governs temporary labor camps, and provides in relevant part:

Each room used for sleeping purposes shall contain at least 50 square feet of floor space for each occupant. At least a 7-foot ceiling shall be provided.
5. Citation 1, Item 2a alleges violation of 29 CFR 1910.142(b)(4), which governs temporary labor camps, and provides in relevant part:

The floors of each shelter shall be constructed of wood, asphalt, or concrete. Wooden floors shall be of smooth and tight construction. The floors shall be kept in good repair.

6. Citation 1, Item 2b alleges violation of 29 CFR 1910.142(d)(9) which governs temporary labor camps, and provides in relevant part:

An adequate supply of toilet paper shall be provided in each privy, water closet, or chemical toilet compartment.

7. Citation 1, Item 2c alleges violation of 29 CFR 1910.142(d)(10) which governs temporary labor camps, and provides in relevant part:

Privies and toilet rooms shall be kept in a sanitary condition. They shall be cleaned at least daily.

8. Citation 1, Item 2d alleges violation of 29 CFR 1910.142(f)(3) which governs temporary labor camps, and provides in relevant part:

An adequate supply of hot and cold running water shall be provided for bathing and laundry purposes. Facilities for heating water shall be provided.

9. 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).

10. Citation 1, Item 1 - 29 CFR 1910.142(b)(2) [HAR Chapter 12-67.2].

The standard applies here because the Respondent was required to provide temporary housing to the Thai migrant workers under the H-2A program. The migrant workers were the employees of the Respondent and they were required to live (and sleep) at the housing. Two of the bedrooms were violative of the cited standard. The first bedroom was 208 square feet. Under the standard, there should be only four occupants for sleeping, however, there were six beds with bedding material indicating that each had been slept in. The second bedroom was 130 square feet; only two occupants were permitted to sleep there. There were four beds with bedding material. The number of occupants for both rooms were verified by Wongsesanit. The Respondent was aware of the sleeping conditions in the house. Wongsesanit admitted that he had reported the overcrowding situation to the Respondent and that he was aware that only five occupants were permitted to live in the house.

11. The Board rejects Global Horizons' proposed conclusions nos. 1, 3, 4, and 5. Although the inspector did not observe the workers actually sleeping in the

bunk beds and did not talk to the Thai workers, he was able to observe that the beds had bedding material on them, and significantly, Wongsesanit confirmed to the inspector that six employees were sleeping in the first bedroom and four were sleeping in the second bedroom. Further, given that there were 21 occupants in this two-bedroom, single-story house, it is reasonable that the bedding material observed indicated that those bunk beds were indeed used for sleeping.

12. The violation was properly characterized as serious. In the event of a fire, safe egress from a crowded room is compromised, increasing the probability that an employee or employees would be injured in an attempt to exit during a fire, or be injured in the fire. Overcrowding can also increase stress on the employees and increase potential for violence.
13. The penalty was calculated using a predetermined formula. See pp. 53 and 59 of Exhibit 3. The possible injury resulting from the crowded condition is “high” in severity with a “lesser” probability rating; this arrived at a gravity-based penalty of \$2,500.00. It was discounted by 50% due to the size of the company (101 – 250 workers) and its history (no serious, willful or repeated violation in the past three years). This results in a penalty of \$1,250.00.
14. The Board affirms Citation 1, Item 1, and its \$1,250.00 penalty.
15. Citation 1, Item 2a - 29 CFR 1910.142(b)(4) [HAR Chapter 12-67.2].

All of the workers used the kitchen. 29 CFR 1910.142(b)(4) is applicable to this situation. A three-foot area of the kitchen floor was buckled and warped. The damaged area had been repaired by nailing nails or screws into the boards; the damaged portion represents a more recent episode of warping/buckling or represents a bad repair job. It cannot be disputed that the floor was not of a “smooth and tight construction” or that it was not kept in good repair. Wongsesanit stated that the Respondent was aware of the damaged floor for the past six months and they were in the process of having it repaired within the week.

16. The Board rejects Global Horizons’ proposed conclusions nos. 7-13. The warped board posed a tripping hazard because it was located in the center of the kitchen near a table with knives and stove. All 21 workers in the house had to cook their meals in this kitchen. A worker could trip on the board while carrying hot food, hot water, or knives. Wongsesanit had stated to the inspector that Global Horizons knew the floor was damaged for six months. The Board finds that Wongsesanit was a supervisor and agent of Global Horizons, such that Wongsesanit’s discharge of his duties and failure to

enforce the House Rules, and whether he knew or should have known of the presence of a violation, establishes action/inaction and knowledge attributable to Global Horizons. Furthermore, Wongsesanit's admission that Global Horizons knew about the condition of the floor for six months renders this condition more than a mere "isolated incident" or "isolated misconduct." The inspector opined, and the Board agrees, that the floor violation standing alone is a "serious" violation.

17. The Board affirms Citation 1, Item 2a.

18. Citation 1, Item 2b - 29 CFR 1910.142(d)(9) [HAR Chapter 12-67.2].

The workers used the bathroom of the house in the normal course of their occupancy of the house. 29 CFR 1910.142(d)(9) is applicable to this situation. There was no toilet paper in the dispenser in one of the bathrooms. The Respondent did not supply toilet paper and there was no more toilet paper for that bathroom. Wongsesanit was supposed to conduct weekly inspections of the house. The workers had been in the house for the past three weeks. Hence, it is clear that the Respondent should have known of the lack of toilet paper if proper inspections were conducted.

19. The Board rejects Global Horizons' proposed conclusion nos. 14 and 16. The standard requires that an adequate supply of toilet paper shall be provided in each privy, water closet, or chemical toilet compartment (emphasis added), and it is undisputed that the first bathroom did not have any toilet paper. This is particularly troubling where, as here, there are 21 workers living in a house with only two bathrooms, and they have no means of transportation to a store other than what Global Horizons provides.

20. The Board affirms Citation 1, Item 2b.

21. Citation 1, Item 2c - 29 CFR 1910.142(d)(10) [HAR Chapter 12-67.2].

29 CFR 1910.142(d)(10) also applies here. There was no flush handle on the tank and a cloth material was rigged to flush the toilet. A worker would have to reach into the tank to grab the cloth material and then pull it in order to flush the toilet. Moreover, there was still fecal material in the bowl. It is clear that the Respondent failed to keep the bathroom in a sanitary condition. Wongsesanit was supposed to inspect the house on a weekly basis. The unhygienic condition of the bathroom was in plain view. Based upon these facts it is concluded that the Respondent should have known of the unsanitary condition of the bathroom. The Board rejects Global Horizons' proposed conclusions nos. 18-21.

22. The Board affirms Citation 1, Item 2c.
23. Citation 1, Item 2d - 29 CFR 1910.142(f)(3) [HAR Chapter 12-67.2].

29 CFR 1910.142(f)(3) applies to the second bathroom, and requires that the bathroom have an “adequate” supply of hot and cold running water for bathing and laundry purposes. However, there is no evidence to indicate that the basin sink in the second bathroom was used for bathing or laundry purposes. Although the Director argues that employees may bath parts of their body (hands, face, etc.) in the basin sink, and thus use the sink for bathing purposes, there is no evidence that the bathtub faucet in that same bathroom did not have hot water. Accordingly, there is no evidence that the bathroom as a whole did not have an adequate supply of hot water, or that the house as a whole did not have an adequate supply of hot water for bathing and laundry purposes. Accordingly, the Board rejects the Director’s proposed conclusion no. 8.

24. The Board vacates Citation 1, Item 2d.
25. Citation 1, Items 2a – 2d were grouped together by the Director to form a serious violation. The Board vacates Item 2d, leaving Items 2a – 2c. The inspector opined, and the Board agrees, that the floor violation standing alone constitutes a serious violation. In addition, the combined unsanitary condition of Items 2b and 2c (the condition of the first bathroom – no toilet paper, missing flush handle replaced by cloth material, and fecal matter in the bowl), would result in illness or the spread of illness if a worker were to contract a disease. Accordingly, the Board affirms the characterization as “serious” and the \$1,000.00 penalty notwithstanding the Board’s vacating Item 2d.
26. The possible injury resulting from the damaged floor and unsanitary conditions is “medium” in severity with a “lesser” probability rating, resulting in a gravity-based penalty of \$2,000.00. It was discounted by 50% due to the Global Horizons’ size and history. This resulted in a penalty of \$1,000.00.

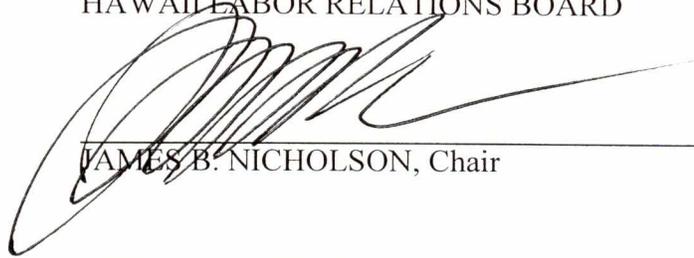
ORDER

For the above-discussed reasons, the Board hereby affirms Citation 1, Item 1, and its \$1,250.00 penalty; affirms the \$1,000.00 penalty and Citation 1, Item 2a, Citation 1, Item 2b, and Citation 1, Item 2c; and vacates Citation 1, Item 2d. Accordingly, the Board affirms the aggregate penalty of \$2,250.00.

DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS v. GLOBAL
HORIZONS, INC.
CASE NO. OSH 2006-13
DECISION NO. 20
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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.