



(b) Citation 2, Item 2 - 29 CFR 1910.142(b)(2):

- (i) Whether Respondent violated 29 CFR 1910.142(b)(2) 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 \$975.00 penalty is appropriate? If not, what is the appropriate penalty?

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.<sup>1</sup>

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 affirming Citation 2, Item 1 and its \$1,300.00 penalty, and affirming Citation 2, Item 2 and its \$975.00 penalty.

FINDINGS OF FACT

1. Global Horizons was at all relevant times a company engaged in the business

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<sup>1</sup>Pursuant to Hawaii Revised Statutes § 92-11, 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).

of supplying H-2A temporary agricultural workers to local farmers.<sup>2</sup> Global Horizons was required to provide their workers housing.<sup>3</sup>

2. During the course of HIOSH Inspector Liese Barnes' (Barnes) examination in Case No. OSH 2006-11, she testified about prior inspections<sup>4</sup> 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 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 March 20 and 21, 2006, HIOSH performed a general scheduled inspection of a temporary labor housing site located at 93-2073 South Point Road, Naalehu, Hawaii, 96772. The housing site is a cluster of eight cabins, set in pairs astride a walkway, with a two-story main house at the end. Workers lived in the small cabins and the second floor of the main house. Morton Bassan (Bassan), the owner of Kau Gold, owned the housing site and lived a couple of blocks away from the site. Global Horizons rented the site from Bassan.
4. Bassan and his wife were present during the inspection on March 21, 2006.
5. The workers worked at MacFarms and occasionally at Kau Gold with the prior

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

<sup>3</sup> See 29 CFR 655.102(b)(1).

<sup>4</sup> In 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.*

consent of Global Horizons. Global Horizons drove the workers daily to MacFarms.

6. Sam Wongsesanit (Wongsesanit) supervised the workers at the housing site, and supervised the workers while they worked at the farms. He also took care of housing and transportation issues for the employees at the housing site.
7. As part of his job, Wongsesanit was required to ensure that the site remained comfortable and clean for the workers, and was to inspect the housing site at least weekly.
8. If there was a non-conforming condition at the house, Wongsesanit could fix the condition himself if he was 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 Horizon, who would then take care of it.
9. Wongsesanit was also required to send periodic written reports to Babanian regarding the condition of the site, including anything of significance such as non-conforming conditions that could not be fixed.
10. 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 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.
11. 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.
12. In addition to the training materials, Babanian also trained the employees on the H-2A and HIOSH requirements himself.
13. While at the site, the inspector noticed that one of the windows on Cabin no. 3 was broken, apparently by one of the workers.

14. Cabin no. 3 was 11 feet, 5 inches square, and the broken window was located next to the entry door and faced the walkway. The window was approximately 4-foot square and consisted of two panes. One of the panes was broken; it measured 1-1/2 feet by 2 feet. The broken glass pane had jagged edges. The broken edges were near the top of the pane, but a worker's body could reach the lower portion of the broken glass, about five feet above the floor. There was no glass on the floor near the window.
15. The crack in the window was about six feet above the floor at the top portion of the break, and about five feet above the floor at the lower portion of the break. According to the inspector's estimate, the heads of the workers would probably reach the bottom of the cracked part of the glass.
16. Two workers lived in the Cabin no. 3, with the broken window.
17. No injuries were reported from the broken window, and the employees said there were no safety problems at the site. However, the workers expressed their concerns about the length of time – two months – that the window had been broken.
18. Prior to moving the employees into the site, the window was not broken.
19. Wongsesanit had noticed the broken window a few days prior; however, he did not report the broken window to Global Horizons, nor did he fix the broken window, get someone else to fix the window, or even place cardboard, wood, or other covering over the broken window to eliminate or lessen the hazard to the workers.
20. A worker could get severe lacerations if the worker were cut by the glass pane. There were many ways a worker could get cut by the broken glass, e.g., through horseplay, the slamming of the door, or even if someone leaned against the window. A worker could also get impaled if a strong wind blew hard enough against the glass.
21. The condition of the broken glass was obvious, and something that would be noticed right away by someone walking by.
22. When Bassan accompanied the inspector on the inspection, Bassan noticed the broken window, but was not going to fix it.
23. The inspector cited the general duty standard for this violation, because there is no specific temporary labor housing standard that applied.

24. Cabin no. 5 measured 8 feet and 4 inches by 8 feet and 2 inches, an area of 68 square feet. A double bunk bed was inside the cabin, which indicated two workers slept in there.
25. Based upon its size, Cabin no. 5 should have only housed one worker. The inspector confirmed through Wongsesanit that two workers lived in this cabin.
26. Cabin no. 8 measured 9 feet and 4 inches by 7 feet and 5 inches, an area of 64.6 square feet. A double bunk bed was in the cabin.
27. Based upon its size, only one worker should have been sleeping in Cabin no. 8. The inspector confirmed through Wongsesanit that two workers lived in this cabin.
28. The workers had been living in over-crowded Cabin nos. 5 and 8 for about two months.
29. The employees living in the cabins were Thai. Although Global Horizons also rented the two-story house on this site, and thus there was extra space for employees to sleep in this main house, the two-story house was occupied by Vietnamese workers. The Thai workers and Vietnamese workers were separated, according to Wongsesanit.
30. The inspector's notes indicate that Cabin no. 5 had only one worker sleeping there, and the inspector admitted that his memory at the time of the investigation was better than when he was testifying. However, the inspector confirmed with Wongsesanit not only the number of employees who were sleeping in Cabin nos. 5 and 8 (two employees each), but also the names of the employees, and the inspector further verified with the employees, through an interpreter, the number of employees sleeping in those cabins. Accordingly, the Board finds that there were two employees sleeping in each Cabin nos. 5 and 8, notwithstanding the inspector's notes.
31. The Board rejects Global Horizons' proposed finding nos. 4, 6, 22, 27, 28, and 29.
32. The employees were under the control of Global Horizons while living at the housing. 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.

33. Under the facts of this case, the Board finds that the housing site was a condition of employment.

### 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:

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- (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 HAR § 12-60-2(a)(3), which provides in relevant part:

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, person protective equipment shall be provided and used.
5. Citation 2, Item 2 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.

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 2, Item 1, [HAR § 12-60-2(a)(3)]

The temporary labor camp standards, HAR § 12-67.2, do not have a specific standard pertaining to broken windows. Instead, HIOSH cited the general duty provision, HAR § 12-60-2(a)(3). In order to establish a prima facie violation of the general duty clause, the Director must show: (1) the employer failed to render its workplace free of a hazard which was (2) recognized and (3) causing or likely to cause death or serious physical harm, and (4) specify the feasible measures that would have materially reduced the likelihood of the hazardous condition. National Realty and Construction Company, Inc. v. OSHRC, 489 F.2d 1257 (D.C. 1973). In determining whether a violation is “serious,” the Board must address (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 European Bakery, OSAB 9600025 (1998).

8. An initial issue is whether the term “work places” applies to housing where no work is performed, as in the present case. In Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325 (11<sup>th</sup> 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. Global Horizons rented the house for the purpose of housing their workers. Global Horizons maintained and controlled the housing. The workers residing in the housing were required to work for

Global Horizons on demand. Although Global Horizons is not in the business of farming, it is clear that the ready and available supply of workers advanced their Global Horizons' business of supplying labor to local farmers.

9. Global Horizons failed to render its workplace free of a hazard.

A hazardous condition existed in Cabin No. 3. The general duty clause only requires employers to discover and remove from the workplace feasibly preventable hazardous conditions. Getty Oil Co. v. OSHRC, 530 F.2d 1143 (5<sup>th</sup> Cir. 1976). The glass window in Cabin No. 3 posed a hazard to the two workers who lived in the cabin. The hazard existed for approximately two months.

10. The hazardous condition was recognized. A hazard is recognized if (1) it is common knowledge in the employer's industry, or (2) the employer had knowledge of the hazardous condition. M. Rothstein, Occupational Safety and Health Law, § 6:5 at 232 (2006 edition). Here, it is common knowledge that a broken glass pane with jagged edges in living quarters poses a dangerous condition. Wongsesanit observed the broken window a few days prior to the inspection. Global Horizons had actual knowledge of the condition and its hazardous nature.

11. The hazard was causing or likely to cause death or serious physical harm. In applying the "likely to cause" element of the general duty clause, it is improper to apply mathematical tests relating to the probability of a serious mishap occurring. National Realty & Construction Company, Inc. v. OSHRC, *supra*, n. 33 at p. 1265. Here, it was possible for an accident to occur, caused by the condition of the broken window. Two employees lived in this cabin with the broken window. There were many ways a worker could get cut by the broken glass, e.g., through horseplay, the slamming of the door, or even if someone leaned against the window. A worker could also get impaled if a strong wind blew hard enough against the glass. And in the event such an accident did occur, the recognized hazard of the broken glass pane presented the "substantial probability that death or serious physical harm could result" if a worker was cut by the broken glass. A worker would suffer a serious laceration if he was cut by the broken glass pane. Accordingly, the violation was properly characterized as "serious."

12. Feasible measures would have materially reduced the likelihood of the hazardous condition. "Feasible" means economically and technologically capable of being done. American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1981). The Respondent could have eliminated the hazard by installing a cardboard or wood panel over the broken glass.

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

The standard applies here because Global Horizons was required to provide temporary housing to the migrant workers under the H-2A program. The migrant workers were the employees of Global Horizons and they were required to live (and sleep) at the housing. Cabin no. 5 was 68 square feet. It should have been only one occupant, however, there were two beds in the cabin. Cabin no. 8 was 64.6 square feet; only one occupant was permitted to sleep there. Two beds were in the cabin. The number of occupants for both rooms were verified by Wongsesanit. Wongsesanit was responsible for weekly inspections of the property, and the workers had been living there for two months. Global Horizons should have been aware of the sleeping situation in the housing site because it was responsible for its maintenance and was required to ensure that the site was in accord with State and federal requirements.

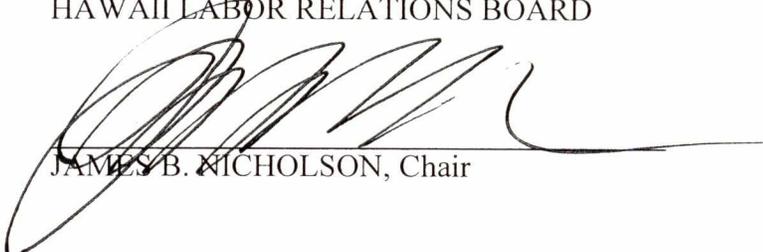
14. The overcrowding violation was properly characterized as serious. The safe egress from the crowded cabins would be impaired in the event of a fire, thereby resulting in serious injury or death.
15. The penalties were calculated using a predetermined formula. See p. 46 and 49 of Exhibit 3. The possible injury resulting from the broken glass is 'medium' in severity with a 'lesser' probability rating, providing a gravity-based penalty of \$2,000.00. It was discounted by 35% due to the size of the company (101 – 250 workers) and Global Horizons' good faith (safety program). This results in a penalty of \$1,300.00. The possible injury resulting from the crowded condition is 'low' in severity with a 'lesser' probability rating, resulting in a gravity-based penalty of \$1,500.00. It was discounted by 35% due to Global Horizons' size and good faith. This resulted in a penalty of \$975.00. Hence, the aggregate penalty is \$2,275.00. The Board concludes that the penalties are proper.
16. The Board rejects Global Horizons' affirmative defense of employee misconduct. The Board finds that Wongsesanit was a supervisor and agent of Global Horizons, such that Wongsesanit's discharge of his duties and failure to maintain the housing in safe and uncrowded conditions, and whether he knew or should have known of the presence of a violation, establishes action/inaction and knowledge attributable to Global Horizons itself. Additionally, it has not been established that Wongsesanit had control over where the workers slept, and accordingly, the defense of employee misconduct certainly cannot be applied to the overcrowding violation.
17. The Board rejects Global Horizons' proposed conclusions of law nos. 1-17.

ORDER

For the above-discussed reasons, the Board hereby affirms Citation 2, Item 1 and its \$1,300.00 penalty, and affirms Citation 2, Item 2 and its \$975.00 penalty.

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.