LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. THE STORAGE ROOM, INC., Respondent.	CASE NO. OSAB 97-044 (OSHCO ID M0685) (Inspection #120621719)

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ORDER ADOPTING LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD'S PROPOSED DECISION AND ORDER

On October 23, 2000, the Labor and Industrial Relations Appeals Board filed its Proposed Decision and Order. Certified copies of the Proposed Decision and Order were served on the parties the same day and received shortly thereafter. The parties were afforded ten (10) working days in which to file written exceptions to the Proposed Decision and Order. No exceptions were filed.

Having considered and reviewed the record, the Labor and Industrial Relations Appeals Board hereby adopts the Proposed Decision and Order in toto.

Dated: Honolulu, Hawaii, NOV 0 8 2000.

Excused

RANDALL Y. IWASE, Chairman

CAROL K. YAMAMOTO, Member

VICENTE F. AQUINO, Member

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on NOV 0 8 2000.

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

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. THE STORAGE ROOM, INC., Respondent.	)	CASE NO. OSAB 97-044 (OSHCO ID M0685) (Inspection #120621719)

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PROPOSED DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest filed by THE STORAGE ROOM, INC. (Respondent), to contest two Citations and Notifications of Penalty (Citations) issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via its Division of Occupational Safety and Health (Complainant), on October 20, 1997.

The Board denied Complainant's motion to limit issues and granted Complainant's motion to quash subpoena duces tecum.

Based on the issues identified in the Board's pretrial order of February 6, 1998, and Complainant's trial and post-trial modifications to the Citations, the issues to be determined are:

(1) Whether Respondent violated Standard 29 CFR §1910.132(d)(1), as described in Citation 1, Item 1.

    (a) If so, is the characterization of the violation as "other-than-serious" appropriate?

(2) Whether Respondent violated Standards §12-71-2(b)(5), as described in Citation 1, Item 2, and §12-71-2(r)(1), as described in Citation 1, Item 3.

(a) If so, is the characterization of the grouped violations as "serious" appropriate? If not, what is the appropriate characterization.

(b) If so, was the imposition and amount of the proposed grouped penalty of $375.00, appropriate.

(3) Whether Respondent violated Standard §12-71(3)(a)(1), as described in Citation 1, Item 4.

(a) If so, is the characterization of the violation as "other-than-serious" appropriate?

(4) Whether Respondent violated Standard §12-78.1-6(b)(4)(C), as described in Citation 1, Item 5.

(a) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization.

(b) If so, was the imposition and amount of the proposed $300.00 penalty appropriate.

(5) Whether Respondent violated Standard §12-80-4(h)(5), as described in Citation 1, Item 6.

(a) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization.

(b) If so, was the imposition and amount of the proposed $375.00 penalty appropriate.

(6) Whether Respondent violated Standards §12-80-5(a)(4), as described in Citation 1, Item 7, and §12-80-5(b)(10), as described in Citation 1, Item 8.

(a) If so, is the characterization of the grouped violations as "serious" appropriate? If not, what is the appropriate characterization.

(b) If so, was the imposition and amount of the proposed grouped penalty of $300.00, appropriate.

(7) Whether Respondent violated Standard §12-89-6(b)(2), as described in Citation 1, Item 9.

(a) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization.

(b) If so, was the imposition and amount of the proposed $300.00 penalty appropriate.

(8) Whether Respondent violated Standard §12-62-3, as described in Citation 2, Item 1.

(a) If so, is the characterization of the violation as "other-than-serious" appropriate?

We affirm Citation 1, Items 1 through 9 and Citation 2, Item 1, as to the cited violations, including grouped violations, the characterizations of such violations, and the imposition of total proposed penalties of $1,650.00.

FINDINGS OF FACT

1. Respondent operates a storage facility for the general public at 407 Coral Street, in Honolulu, Hawaii. The facility is approximately 300 feet wide and 150 feet deep. The storage lockers, which range in heights of four to six feet, are stacked one on top of each other in rows that are more than 15 feet in height. Forklifts are used to access the upper lockers.

2. The facility has several fire exit doors, including three fire exit doors located on the Auahi Street side of the facility.

3. At the rear of the facility is an open storage area. Pallets of particle board, steel uprights, and other equipment and tools for constructing storage lockers are kept in

this area. Power tools, such as saws and grinders, and welding equipment are also stored here. The power tools were not in use at the time of the inspection.

4. On October 3, 1997, Complainant's compliance officer conducted a comprehensive inspection of Respondent's facility. The compliance officer held an opening conference with, and was accompanied during the walkaround portion of the inspection by, Mr. Jon Grondolsky, Respondent's office and warehouse manager.

5. Respondent had at least nine employees (office and storage facility personnel) at the site at the time of the inspection. Because the facility was undergoing renovation, Respondent had hired additional employees to do the renovation work. No construction work was taking place at the time of the inspection.

6. Following the inspection, Complainant issued two Citations to Respondent on October 20, 1997, for the following alleged violations of the Hawaii occupational safety and health standards:

Citation 1 (serious):		
Item 1:	29 CFR §1910.132(d)(1)	$300.00
Item 2:	§12-71-2(b)(5)	$375.00
Item 3:	§12-71-2(r)(1)	$375.00
Item 4:	§12-71-3(a)(1)	$375.00
Item 5:	§12-78.1-6(b)(4)(C)	$300.00
Item 6:	§12-80-4(h)(5)	$375.00
Item 7:	§12-80-5(a)(4)	$300.00
Item 8:	§12-80-5(b)(10)	$300.00
Item 9:	§12-89-6(b)(2)	$300.00
Citation 2 (other-than-serious):		
Item 1:	§12-62-3	$0.00

Respondent was also assessed total proposed penalties of $3,000.00. Respondent contested the Citations to the Board.

7. At trial, Complainant stipulated on the record to the following: 1) re-characterizing Citation 1, Item 1, from an alleged "serious" to "other-than-serious" violation of Standard 29 CFR §1910.132(d)(1), and withdrawing the penalty of $300.00; 2) grouping Citation 1, Item 2, alleging a "serious" violation of Standard §12-71-2(b)(5), with Citation 1, Item 3, alleging a "serious" violation of Standard §12-71-2(r)(1), and proposing a grouped penalty of $375.00; and 3) grouping Citation 1, Item 7, alleging a "serious" violation of Standard §12-80-5(a)(4), with Citation 1, Item 8, alleging a "serious" violation of Standard §12-80-5(b)(10), and proposing a grouped penalty of $300.00.

In its position memorandum, Complainant requested that Citation 1, Item 4, alleging a "serious" violation of Standard §12-71-3(a)(1), be re-characterized to an "other-than-serious" violation and that the proposed penalty of $375.00, be deleted.

8. Complainant's position memorandum sets forth its burdens of proof to establish a violation of a specific standard and to characterize an alleged violation as serious in nature.

9. At trial, the compliance officer testified about the alleged safety and health standard violations for which Respondent was cited, and how the proposed penalty for each of the alleged violations was calculated.

10. Respondent has raised three defenses, two of which are generic in scope and thus, will be addressed at the outset.

Respondent's third defense is directed at specific, factual situations and, accordingly, will be discussed in the context of those facts.

Respondent's first defense is that the Citations cannot be sustained, because Mr. Grondolsky was not the appropriate employer representative for the inspection. We find, however, that the compliance officer had reasonable grounds to believe that Mr. Grondolsky was the proper employer representative for the inspection. The compliance officer was initially directed to speak to Mr. Grondolsky and, for the duration of the inspection, Mr. Grondolsky held himself out to the compliance officer as being knowledgeable about the operations of the facility and indicated that he would take corrective action.

The compliance officer's impression of Mr. Grondolsky is also corroborated by the testimony of Francis Martin, Respondent's owner and president, that Mr. Grondolsky was responsible for safety management, and Complainant's Exhibit V. This exhibit is a notice of violation dated October 10, 1997, issued by the Honolulu Fire Department, which indicates that Mr. Grondolsky acted as Respondent's agent for a fire inspection. Accordingly, we find that Respondent cannot prevail based on this defense.

Respondent's second defense is that the Citations should be vacated, because the issuance of the citations were prompted by an alleged quota system. Respondent refers to a newspaper article that was published around the time of its

inspection. The article reports on allegations made by a group of inspectors from Complainant's office that they were required to meet certain quotas for issuing citations.

We find that this defense is without merit, because the quota system is only alleged to have existed, the compliance officer who inspected Respondent's facility is not one of the inspectors who was claiming that there was a quota system, and the compliance officer confirmed that his responsibility is to identify all violations of Hawaii's occupational safety and health law.

Citation 1, Item 1: Lack of a hazard assessment

11. Standard 29 CFR §1910.132(d)(1) requires an employer to assess the workplace to determine if there are hazards that can be protected against by using personal protective equipment.

12. The compliance officer determined that Respondent was required to perform such an assessment. Mr. Grondolsky told the compliance officer that Respondent had not performed such an assessment prior to the inspection.

13. Respondent was cited for violating this standard, because no hazard assessment had been performed.

Citation 1, Items 2 and 3: Failure to post escape routes and mark access to exits

14. Stacked locker units approximately three feet deep and over 15 feet high on both sides of the Auahi Street fire exit doors prevented the doors from being clearly visible to occupants of the facility unless they were close to, and directly facing,

the doors.[1] No escape routes were posted nor were there any signs marking the access to the exit doors.

15. Under Standard §12-71-2(b)(5), every exit must be clearly visible. If, however, an exit is not clearly visible, then the shortest route to reach it must be conspicuously indicated to facilitate escape from a building or structure in an emergency.

16. The compliance officer determined that because the exits on the Auahi Street side of the facility were not clearly visible, Respondent was required to post escape routes under Standard §12-71-2(b)(5).

17. Respondent was cited for violating the standard, because no escape routes were posted in the facility at the time of the inspection.

18. Standard §12-71-2(r)(1) requires that an exit be marked by a readily visible sign or, if the exit or access to the exit is not immediately visible to the occupants, then access to the exit must be marked by readily visible signs.

19. The compliance officer determined that because the exit doors on the Auahi Street side of the facility were not immediately visible, Respondent was required to post signs directing the way to reach these exits under Standard §12-71-2(r)(1).

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[1]The citation refers to five exits, but it appears from the testimony at trial, that the citation is based on the three exits on the Auahi Street side of the facility.

20. Respondent was cited for violating this standard, because no signs directing the way to these exits, which were not immediately visible, were posted.

21. Because the storage lockers were made of compressed wood and welding activity was performed regularly since lockers were constructed on the site, the possibility of a fire was reasonably predictable. If a fire should occur in the facility, there was a substantial probability of death or serious injury because of the lack of posted escape routes and signs marking access to the exits. Workers would become disoriented and confused in such a large area and possibly be overcome with smoke and suffer burn injuries.

22. These alleged violations were grouped together, because they are closely related and constitute a single hazardous condition. Respondent was assessed a proposed group penalty of $375.00.

23. While Respondent contends that its evacuation signs were temporarily removed due to the renovation, the compliance officer testified that Mr. Grondolsky did not indicate that renovation was going on and that such signs had been removed. Even if the evacuation signs had been temporarily removed because of the renovation, however, we find that there still should have been some kind of posting of escape routes, in case of a fire.

Citation 1, Item 4: Lack of an emergency-action plan

24. All of Respondent's employees were required to evacuate the facility in the case of a fire.

25. Because Respondent required all employees to evacuate the facility, it was required to have an emergency-action plan that described emergency escape procedures, under Standard §12-71-3(a)(1). Mr. Grondolsky told the compliance officer that Respondent did not have such an emergency-action plan.

26. Respondent was cited for violating this standard, because it lacked the required emergency-action plan.

Citation 1, Item 5: Improperly stored oxygen cylinder and acetylene cylinder

27. An oxygen cylinder and acetylene cylinder were being stored in the open storage area. The cylinders were not separated, but were tied together with a piece of wire.

28. Standard §12-78.1-6(b)(4)(C) requires that oxygen cylinders in storage be separated from fuel-gas cylinders or combustible materials a distance of 20 feet or by a five-foot high wall with a fire rating of at least a half-hour.

29. The compliance officer determined that the two cylinders should have been separated in the manner specified by the standard.

30. Respondent was cited for violating this standard, because the cylinders were not separated in the manner described in the standard. Respondent was assessed a proposed penalty of $300.00.

31. The possibility of a fire was reasonably predictable, because there were power tools in the same area and sparks from operating power tools could trigger an explosion if

there was a slight leak in the acetylene cylinder. Acetylene is highly flammable. If the oxygen cylinder ruptured at the same time the acetylene caught on fire, a catastrophic explosion would occur. There was a substantial probability that employees could suffer death or serious physical harm if there were a fire and/or catastrophic explosion.

32. Respondent's defense is that it did not own the cylinders, which belonged to a customer. We find that Respondent has not presented any evidence to establish lack of ownership as a valid defense to the alleged violation. Even if, however, the cylinders were the property of a customer, and not of Respondent, we find that Respondent's lack of ownership would not necessarily be determinative of whether or not there was a violation in this case. We find that Respondent is still responsible for complying with the standard, because it knew that the cylinders were on the premises and there was no evidence that access to the cylinders had been restricted such that Respondent's workers could not have used them to perform welding.

Citation 1, Item 6: Radial arm saw deficiency

33. A radial arm saw in Respondent's open storage area did not have a retracting mechanism nor had the front of the unit been raised. When tested by the compliance officer, the cutting head did not return to the column, but, instead, rolled out towards the front of the table of the saw.

34. Under Standard §12-80-4(h)(5), a manually operated saw must be installed such that the front of the unit is raised

higher than the rear, or have some other means, so as to prevent the cutting head from rolling or moving out on the arm away from the column as a result of gravity or vibration.

35. Respondent was cited for violating this standard, because the saw lacked the safety features required under the standard. Respondent was assessed a proposed penalty of $375.00.

36. The possibility of an accident occurring was reasonably predictable. Because of the lack of safeguards, if the running saw blade came back towards an inattentive worker, there was a substantial probability that the worker could sustain serious injuries such as lacerations or even an amputated finger.

37. Respondent's defense is that the radial arm saw was not ever used in the course of business. Mr. Martin testified that Respondent used a table saw for cutting particle boards. Kurt Schnetzler, a maintenance/labor worker, also testified that the radial arm saw was not used because it did not work properly. Mr. Schnetzler did testify, however, that he used the saw once and that the cutting head would turn, but then it would stop.

38. Because the radial arm saw would operate if the power was turned on, we find that it still presented a hazard under the standard and should not have been kept in the open storage area, where it could have been used by an unsuspecting worker.

Citation 1, Items 7 and 8: Grinder deficiencies

39. A grinder in Respondent's open storage area had a 1/2-inch opening between the work rest and the grinding wheel.

Under Standard §12-80-5(a)(4), the distance should have been only an 1/8-inch.

40. The same grinder had a 1/2-inch opening between the safety guard and the grinding wheel.

Under Standard §12-80-5(b)(10), the distance should have been only a 1/4-inch.

41. Respondent was cited for violating these standards, because the distance between the grinding wheel and the work rest and the safety guard exceeded the maximum openings specified by the standards. These alleged violations were grouped together, because they are so closely related as to constitute a single hazardous condition. Respondent was assessed a proposed grouped penalty of $300.00.

42. The possibility of an accident occurring was reasonably predictable. Because of the excess distance between the grinding wheel and the work rest and the safety guard, the work piece could jam the wheel, causing the abrasive wheel to explode into shards. There was a substantial probability that a workers could suffer lacerations from the wheel shards.

43. Respondent's defense is that the grinder belonged to an employee, and, therefore, it should not be responsible for any hazardous condition related to the grinder. According to Respondent, an employee owned the grinder, which the employee used for personal projects during off-work time.

44. We do not agree entirely with Respondent's argument. While we agree that Complainant has not established

that the grinder belonged to Respondent, we do not find that Respondent is thereby relieved of responsibility. Even if the grinder was the personal property of an employee, we agree with Complainant's argument in its position memorandum that ownership is not determinative of responsibility under the law, and that an employer must make reasonable efforts to detect and abate the violative condition. We find that an employee could have used the personal grinder for Respondent's work, since it was in the work area and Respondent did not monitor its employees' personal projects.

Citation 1, Item 9: Uncovered electrical raceway

45. An electrical raceway[2] in the storage facility was not covered. There was exposed wiring within the raceway. The compliance officer tested the wiring and found it to be energized.

46. Standard §12-89-6(b)(2) requires all pull boxes, junction boxes, and fittings to be provided with covers approved for the purpose.

47. The compliance officer determined that the raceway should have been covered.

48. Respondent was cited for violating this standard, because the raceway was not covered. Respondent was assessed a proposed penalty of $300.00.

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[2]A raceway is a metal box mounted on the wall through which electrical lines are run.

49. The possibility of an accident occurring was reasonably predictable. A rack supporting metal strips used to construct the storage units was located a few inches above the uncovered raceway. If a worker removed one of the metal strips and the metal strip came into contact with the exposed wiring within the uncovered raceway, energizing the strip, there was a substantial probability that the worker could be severely shocked or electrocuted.

Citation 2, Item 1: Lack of first-aid trained personnel

50. Standard §12-62-3 requires an employer to have a certain number of first-aid trained employees on site, based on the total number of employees at that particular worksite.

51. The compliance officer determined that Respondent was required to have at least one first-aid trained personnel on site. Mr. Grondolsky told the compliance officer that Respondent had no first-aid trained personnel on site.

52. Respondent was cited for violating this standard, because it did not have any first-aid trained personnel on site.

CONCLUSIONS OF LAW

1. We conclude that Respondent violated Standard 29 CFR §1910.132(d)(1), because it had not performed the requisite hazard assessment.

a. We conclude that the characterization of the violation as "other-than-serious" was proper.

2. We conclude that Respondent violated Standards §§12-71-2(b)(5) and 12-71-2(r)(1), because it lacked the required posted escape routes and marked access to the exits.

a. We conclude that the characterization of these grouped violations as "serious" is appropriate, because there was a substantial probability of death or serious physical harm from the violative condition.

b. We conclude that a grouped penalty of $375.00, is appropriate.

3. We conclude that Respondent violated Standard §12-71-3(a)(1), because it lacked the required emergency-action plan.

a. We conclude that the characterization of the violation as "other-than-serious" is appropriate.

4. We conclude that Respondent violated Standard §12-78.1-6(b)(4)(c), because it did not separate the stored oxygen cylinder and the acetylene cylinder in the manner required by the standard.

a. We conclude that the characterization of this violation as "serious" is appropriate, because there was a substantial probability that death or serious physical harm could result from the violative condition.

b. We conclude that a $300.00 penalty is appropriate.

5. We conclude that Respondent violated Standard §12-80-4(h)(5), because the radial arm saw lacked the safety features required by the standard.

a. We conclude that the characterization of this violation is "serious" is appropriate, because there was a substantial probability that serious physical harm could result from the violative condition.

b. We conclude that a $375.00 penalty is appropriate.

6. We conclude that Respondent violated Standards §§12-80-5(a)(4) and 12-80-5(b)(10), because the grinder lacked the safety features required by the standards.

a. We conclude that the characterization of these grouped violations as "serious" is appropriate, because there was a substantial probability that serious physical harm could occur as a result of the violative condition.

b. We conclude that a grouped penalty of $300.00, is appropriate.

7. We conclude that Respondent violated Standard §12-89-6(b)(2), because the electrical raceway was not covered.

a. We conclude that the characterization of this violation as "serious" is appropriate, because there was a substantial probability that death or serious physical harm could result from the violative condition.

b. We conclude that a $300.00 penalty is appropriate.

8. We conclude that Respondent violated Standard §12-62-3, because it did not have at least one first-aid trained worker.

a. We conclude that the characterization of this violation as "other-than-serious" is appropriate.

ORDER

The October 20, 1997 Citations are hereby affirmed in their entirety.

Dated: Honolulu, Hawaii, OCT 23 2000.

EXCUSED
RANDALL Y. IWASE, Chairman

CAROL K. YAMAMOTO, Member

VICENTE F. AQUINO, Member

Frances Lum, Esq./Herbert Lau, Esq.
for Complainant

Francis Martin, President
for Respondent

NOTICE TO EMPLOYER:
You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted.

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on OCT 23 2000.

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