STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. OSH 2015-27
	)	
DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,	)	DECISION NO. 32
	)	
Complainant,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
	)	
and	)	
	)	
PIONEER MARBLE & GRANITE, LLC,	)	
	)	
Respondent.	)	
	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Following a *de novo* proceeding before the Hawaii Labor Relations Board ("Board"), and for the reasons discussed below, the Board finds in favor of Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director). The Board thoroughly reviewed all the evidence presented, and the Board issues these findings of fact, conclusions of law, and decision and order.

Any conclusion of law improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

I. PROCEDURAL HISTORY

On September 4, 2015, the Board received from the Director a Notice of Contest dated August 10, 2015, regarding a Notification of Failure to Abate Alleged Violation issued on August 3, 2015, to Respondent PIONEER MARBLE & GRANITE LLC (Respondent), resulting from Inspection Number 1076593, which was conducted on July 9, 2015, by the Hawaii Department of Labor and Industrial Relations, Occupational Safety and Health Division ("HIOSH"). Citation 1, item 1 alleged a "FTA-Serious" violation of 29 CFR 1910.178(a)(4) [Chapter 12-60-50(a), HAR], and proposed a penalty of $42,000.00. Respondent contested the Citation by letter to HIOSH dated August 10, 2015.

An initial/settlement conference was held on October 1, 2015, and a January 6, 2016 trial date was scheduled. By Board Order No. 749, the trial date was rescheduled to April 27, 2016.

On April 27, 2016, an evidentiary hearing was held where oral testimony and documentary evidence were received by the Board. Following the evidentiary hearing, the Board issued an oral decision to uphold the Notification of Failure to Abate Alleged Violation issued to Respondent in Inspection Number 1076593, alleging a "FTA-Serious" violation of 29 CFR 1910.178(a)(4) [Chapter 12-60-50(a), HAR], and its assessed penalty of $42,000.00. The Board assigned the preparation of the proposed Decision and Order in this case to counsel for the Director. On May 6, 2016, the document drafted by counsel was sent to Pioneer for its approval as to form and return to Director's counsel within five (5) business days. Pioneer did not return the approved document to counsel, and therefore on May 13, 2016, Director's counsel submitted the proposed order to the Board without Pioneer's approval as to form.

By copy of counsel's May 13, 2016 letter to the Board, Director notified Pioneer that it may submit a statement of objections or its own proposed order to the Board, with the admonition that failure to submit an objection of proposed order to the Board may constitute approval as to form in accordance with Rule 23(b) of the Rules of the Circuit Courts. Pioneer did not file any objection to the proposed decision and order by rule within five days after service of the proposed decision and order, and the Board now issues its Findings of Fact, Conclusions of Law and Decision and Order in this matter.

II. FINDINGS OF FACT

A. The Inspections and Citation.

Respondent operates a business that fabricates natural stone countertops, among other services. Its work site is located at 148 Mokauea Street, Unit 1, Honolulu, Hawaii 96819. During the course of a scheduled programmed inspection on January 5, 2015, HIOSH Inspector Lovelle Koike ("Koike") discovered that Respondent owned and used a Toyota vertical mast forklift, Model 42-4FGC25 SN 404FGC25-14689 ("Toyota Forklift"), in conjunction with a telescopic boom that was attached to the tines of the Toyota Forklift. Attached to the boom was an Abaco Lifter 50, Model ALG50 SN 050507 ("Abaco Lifter"). The boom extended the reach of the tines 147 inches, or approximately 12 feet. Koike found that Respondent used the Toyota Forklift in conjunction with the boom and Abaco Lifter to move stone slabs at the work site approximately four to five times per day, for about ten minutes during each use. Koike also found that the stone slabs were about 55 – 67 inches long and weighed up to 700 pounds. Koike determined that the use of the boom and the Abaco Lifter reduced the lifting capacity of the Toyota Forklift. Koike found that Respondent did not obtain the Toyota's prior written approval for the installation and use of the boom and Abaco Lifter, and Koike did not observe any capacity, operation, and maintenance instruction plate, tag, or decal on the equipment, hence, the operator would not know the safe lifting capacity or load center of the modified Toyota Forklift. As a result Koike found that the

use of the boom and the Abaco Lifter affected the safe operation of the Toyota Forklift because the modification presented an overload or tip-over hazard.

On April 1, 2015, HIOSH issued a Citation and Notification of Penalty ("Citation") to Respondent, alleging in citation 1, item 1, a "serious" violation of 29 CFR 1910.178(a)(4) [Chapter 12-60-50(a), HAR],[1] proposed a penalty of $1,050.00, and instructed Respondent to abate the violation by April 21, 2015.

On April 23, 2015, the parties attended an informal conference. The parties entered into an informal settlement agreement ("ISA") on the same date wherein the proposed penalty for citation 1, item 1 was reduced to $840.00, and the abatement date was extended to May 23, 2015. Respondent paid the amended penalty on April 23, 2015. The ISA was not contested, and it became a final order on April 23, 2015.

On June 22, 2015, Koike telephoned Respondent and was informed that Respondent had still not secured approval from Toyota for the use of the boom and Abaco Lifter together with the Toyota Forklift.

On July 9, 2015, HIOSH Inspector Nicholas Gosnell ("Gosnell") performed a follow-up inspection at the work site for the limited purpose of determining whether Respondent abated citation 1, item 1 of the Citation, alleging a "serious" violation of 29 CFR 1910.178(a)(4) [Chapter 12-60-50(a), HAR]. Gosnell found that the hazardous overload or tip-over hazard presented by the violation of citation 1, item 1 of the Citation of April 1, 2015, for use of the boom and Abaco Lifter with the Toyota Forklift, continued unabated since the first inspection of January 5, 2015. As a result, on August 3, 2015, HIOSH issued the Notification of Failure to Abate Alleged Violation to Respondent, with a proposed penalty of $42,000.00.

B. Penalty under the Citation.

According to HIOSH, the $42,000 penalty was calculated according to its standard policies and procedures to avoid any arbitrary determination by the Inspector. The penalty was determined by considering the severity of a resulting injury and the probability of an accident. A severity level of "high" was assessed due to the probable injuries in case of an accident, which include crushed bones, amputations and possible death of workers, and the probability of "lesser" was given due to the lower likelihood of an accident occurring. This resulted in a gravity-based penalty of $105,000. The gravity-based penalty was adjusted or reduced in consideration of the size of Respondent's company and its work safety history. Respondent qualified for a 60% discount based on having three employees. Hence, the gravity-based penalty was reduced by 60%, which resulted in the proposed penalty of $42,000.

[1] Other violations were also cited by HIOSH on April 1, 2015, however, those violations were abated in a timely fashion, penalties were paid, and are not at issue in this Contest.

C. Respondent's Challenge of the Citation.

Respondent's sole challenge to the Citation is based on its claim that it has purchased a new Hercules Boom (Hercules Boom Model #LM-EBT 4-24, Capacity – 4,000 lbs., KC – 1,810, Serial # - 015) that allegedly "rectifies the matter." Although Toyota, the manufacturer of the forklift, has not consented to the use of the boom and the Abaco Lifter in conjunction with the Toyota Forklift or the Hercules Boom, Respondent claims that it does not have the responsibility to obtain the consent of Toyota prior to using the boom and the Abaco Lifter or the Hercules Boom. In essence, Respondent argues that it should be Toyota's responsibility to supply the consent for the use of the boom and the Abaco Lifter or the Hercules Boom.

III. CONCLUSIONS OF LAW

The Board has jurisdiction over this case pursuant of HRS §§ 396-3 and 396-11.

Respondent 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."

A. Respondent's Failure to Abate Violation as Set Forth in the Notification of Failure to Abate Alleged Violation of August 3, 2015.

The Director's prima facie case of failure to abate violation is established upon a showing that: (1) the original citation has become a final order, and (2) the condition or hazard found upon re-inspection is the identical one for which the employer was originally cited. Director v. Cunningham Cabinets, Ltd., OSAB 95-016 (12/22/97), citing Secretary v. York Metal Finishing Company, 1 OSHC 1655, 1656, 1973-1974 OSHD ¶17,633 (4/9/74), and Arvin Millwork Company, 2 OSHC 1056, 1057, 1973-1974 OSHD ¶18,159 (7/1/74). An employer may rebut this prima facie case by showing that the condition was corrected or, if not corrected, that the employer has prevented the exposure of his employees to the violative condition. Secretary v. York Metal Finishing Company, supra.

Pursuant to HRS § 91-10(5), the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion; the degree or quantum of proof shall be a preponderance of the evidence. The "preponderance of the evidence" standard directs the fact-finder to decide whether the existence of the contested fact is more probable than its nonexistence; the party with the burden need only offer evidence sufficient to tip the scale slightly in the party's favor, while the party without the burden can succeed merely by keeping the scale evenly

balanced (*see*, Kekona v. Abastillas, 113 Hawaii 174, 180, 150 P.3d 823, 829 (2006) (citation omitted)).

1. The original citation has become a final order.

On April 1, 2015, Respondent was issued a Citation alleging in citation 1, item 1, a "serious" violation of 29 CFR 1910.178(a)(4) [Chapter 12-60-50(a), HAR]. A penalty of $1,050.00 was proposed, and the Citation instructed Respondent to abate the violation by April 21, 2015.

On April 23, 2015, an ISA was entered into whereby the proposed penalty for citation 1, item 1 was reduced to $840.00, and the abatement date was extended to May 23, 2015. Respondent paid the amended penalty on April 23, 2015. The ISA was not contested, and it became a final order on April 23, 2015. The Board hereby concludes that the original Citation issued on April 1, 2015, and the ISA entered into on April 23, 2015, became final orders of the Director.

2. The condition or hazard found upon re-inspection is the identical one for which the employer was originally cited.

29 CFR § 1910.178(a)(4) provides in relevant part:

> Modifications and additions which affect capacity and safe operation shall not be performed by the customer or user without manufacturer's prior written approval. Capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly.

A follow-up inspection was conducted at Respondent's work site on July 9, 2015. Inspector Gosnell determined that the hazardous condition presented by the violation of citation 1, item 1 of the Citation of April 1, 2015, continued unabated since the first inspection of January 5, 2015. At the hearing of April 27, 2016, Respondent did not deny this contention, and moreover, Respondent admitted that since the first inspection on January 5, 2015, it was unable to secure the written approval from Toyota necessary to abate the hazardous practice described in citation 1, item 1 of the Citation of April 1, 2015. The Board hereby concludes that Respondent's failure to secure the written approval from Toyota for the use of the telescopic boom and Abaco Lifter in conjunction with the Toyota Forklift is for the identical condition for which Respondent was originally cited, and was continually unabated since the original inspection of January 5, 2015.

The Board rejects Respondent's challenge based on its claim that it has purchased a new Hercules Boom. Respondent has not presented any written approval from Toyota permitting it to use the Hercules Boom in conjunction with the Abaco Lifter and the Toyota Forklift. Moreover, the Board rejects Respondent's contention that it should be Toyota's responsibility to supply the approval for the use of the boom and the Abaco Lifter or the Hercules Boom. It is Respondent's responsibility to secure the written approval from the forklift manufacturer.

B. The Penalty of $42,000 Assessed by the Director is Correct.

As stated in Section II.B above, the penalty was calculated according to HIOSH's standard policies and procedures to avoid any arbitrary determination of a penalty.

Respondent does not challenge HIOSH's calculation of the penalty. Since the Board has found that the Director has established its case, the Board finds the penalty of $42,000 assessed by HIOSH in the Notification of Failure to Abate Alleged Violation issued to Respondent on August 3, 2015, to be correct, and is hereby affirmed.

IV. DECISION AND ORDER.

For the reasons discussed above, the Board orders that the Notification of Failure to Abate Alleged Violation resulting from HIOSH Inspection Number 1076593 conducted on July 9, 2015, and issued on August 8, 2015, including the Director's characterization of the violations as "FTA-Serious" and the assessed penalty of $42,000.00, are hereby AFFIRMED. This case is closed.

The Board recognizes that the Director may take appropriate action pursuant to HRS Section 396-4(d)(4), which provides that the Department may apply to the circuit court for an injunction restraining the use or operation of any machine or equipment constituting an imminent hazard to the life or safety of any person.

Dated: Honolulu, Hawaii, May 23, 2016.

HAWAII LABOR RELATIONS BOARD,

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Herbert B.K. Lau, Deputy Attorney General
John Pham/Kelly Dung