HAWAII LABOR RELATIONS BOARD

STATE OF HAWAII

In the Matter of	)	CASE NO. OSH 2017-36
	)	(Inspection No. 1257287)
DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,	)	DECISION NO. 36
Complainant,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
and	)	
MKM DESSERTS, 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 makes 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, and 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 December 22, 2017, the Board received from the Director a Notice of Contest date-stamped December 7, 2017, regarding a Citation and Notification of Penalty ("Citation"), identified as inspection number 1257287, with an inspection date of August 22, 2017. The Respondent was identified as MKM DESSERTS, LLC ("Respondent"). The Citation was issued on October 23, 2017, by the Hawaii Occupational Safety and Health Division ("HIOSH").

On December 22, 2017, the Board issued a Receipt of Notice of Contest and General Information, which among other dates, scheduled a *de novo* hearing for March 29, 2018. On March 2, 2018, the Director filed a motion to continue trial, which was granted by the Board on March 15, 2018, Order No. 980. The Board rescheduled the trial to April 26, 2018, at 9:00 a.m.

On April 26, 2018, an evidentiary hearing was held where oral testimony and documentary evidence were received by the Board. Based upon the testimony and documentary evidence introduced by the Director, the Board upholds and affirms the alleged violations in their entirety and the associated proposed penalties contained in the Citation. The aggregate penalty affirmed by this Board is $9,450.00. The Board assigned the preparation of the proposed Decision and Order in this case to counsel for the Director. On April 27, 2018, the document drafted by counsel was sent to MKM Desserts, LLC for its approval as to form and return to Director's counsel within five (5) business days and informed MKM Desserts, LLC that if it failed to sign or return the proposed Decision and Order, he would submit it to the Board for approval without its signature, and it may submit its own proposed order to the Board. MKM Desserts, LLC did not return the proposed document to counsel, and therefore on May 4, 2018, Director's counsel submitted the proposed order to the Board without MKM Desserts, LLC's approval as to form.

MKM Desserts, LLC did not file any objections pursuant to Rule 23 of the Rules of the Circuit Courts of the State of Hawai'i to the proposed decision and order within five days after service of the proposed decision and order, and the Board now issues it Findings of Fact, Conclusions of Law and Decision and Order in this matter.

II. FINDINGS OF FACT

A. The Inspection and Citation.

Respondent operated a kiosk, trade name Mauna Kea Mist, in the Shirokiya Food Court at Ala Moana Center, selling frozen desserts and treats. One of the treats it sold to customers were cereal balls that were flash frozen using liquid nitrogen.

On August 22, 2017, HIOSH safety compliance officer, Bradley Shields, initiated an investigation of Respondent in response to a telephone complaint received on August 21, 2017. The complaint arose from an accident that occurred at Respondent's work place, Mauna Kea Mist, on August 19, 2017.

The inspector initially went to the victim's residence on the morning of August 22, 2017, to interview her. The victim was 16 years old and the inspector obtained her mother's consent to interview and take photographs of the victim's injuries. The victim's mother was present throughout the inspector's interview of the victim. The victim told the inspector that the accident occurred on her first day on the job. She accidentally knocked over a container of liquid nitrogen that she had just filled from the cylinder. The liquid nitrogen fell onto her right leg, soaked through her jeans and onto her skin. The only personal protective equipment ("PPE") she was using were thick cold-resistant gloves; she was not provided any face shield or eye protection nor any apron. She told the inspector she was provided some on-the-job training in the form of oral instructions. After the incident she continued to work for the rest of her shift. The next day she felt pain so she admitted herself to the hospital emergency room. She was subsequently diagnosed with 2nd degree cryogenic burns to her abdomen and right thigh.

The inspector arrived at Respondent's work place at approximately 1:15 p.m., on August 22, 2017. Stewart Shirasu, Respondent's owner and manager, accompanied the inspector during the walkaround inspection. At the time of the inspection Respondent employed 30 part-time workers, and had been operating at the Ala Moana location for approximately two weeks. The workers the inspector observed at the work place appeared to be of high school age.

The inspector observed and videotaped the process of making the dessert treat that involved the use of liquid nitrogen in its preparation. The video showed an employee using an insulated-gloved hand to open a valve on a cylinder containing liquid nitrogen. The liquid nitrogen flowed through a flexible metal hose that was held with the other insulated-gloved hand. While holding the flexible hose end, the employee filled a plastic container with liquid nitrogen. After the container was filled with liquid nitrogen cereal balls were added to the container. After taking off the gloves the employee stirred the contents with a plastic spoon, infusing the cereal balls with the nitrogen thereby flash freezing them. The nitrogen-infused cereal balls were ladled into serving cups by the employee without the use of gloves. The employee depicted in the video was wearing a short-sleeved shirt, a pair of shorts, and a footwear that only cover the front part of the foot with a cloth-like material; she was not wearing any eye protection or apron.

Liquid nitrogen is a cryogenic liquid that exists at a temperature of minus 320º F, thereby permitting the quick freezing of any substance or material with which it comes into contact. It is a hazardous chemical because it presents burn and inhalation hazards. Precautions to take when using liquid nitrogen, which are displayed on the cylinder label and safety data sheet ("SDS"), include wearing splash-resistant safety goggles, cold-insulating clothing, and insulated gloves, and providing adequate ventilation.

The inspector interviewed Mr. Shirasu. Mr. Shirasu admitted to reading the precautions but he decided to do what other companies do, that is, choosing not to abide by them except for the use of insulated gloves. Mr. Shirasu advised his workers to be careful not to get the liquid nitrogen on oneself, avoid splashing, and to let someone know if it splashes onto oneself. Mr. Shirasu also admitted to the inspector that no SDS for liquid nitrogen was made accessible to the workers.

The inspector interviewed other workers of Respondent. Based on all of the interviews, and the failure of Respondent to produce requested records, the Board concludes that Respondent did not maintain a written safety and health program as it related to the use of liquid nitrogen at the work place. The Board also concludes that Respondent failed to provide all the necessary PPE required by the hazard presented by the exposure to liquid nitrogen in the preparation of dessert treats. The Board concludes that Respondent failed to have a written hazard communication program that provided for labeling/warning, SDS, and employee information and training of hazardous chemicals, specifically as they pertain to liquid nitrogen and ethyl alcohol (product: Aqua-Foam). Lastly, the Board concludes that Respondent failed to certify that a hazard assessment had been performed addressing the requirement for PPE due to the presence and use of liquid nitrogen at the work place.

As a result of the investigation, HIOSH issued to Respondent a Citation and Notification of Penalty on October 23, 2017, alleging the following violations:

Citation 1 (serious):
Item 1: Section 12-60-2(b)(1)(A) of the Hawaii Administrative Rules ("HAR"). Penalty: $3,780.00.
Item 2: 29 CFR 1910.132(a) [section 12-60-50(a), HAR]. Penalty: $3,780.00.
Item 3a: 29 CFR 1910.1200(e)(1) [section 12-60-50(a), HAR]. Penalty: $1,890.00.
Item 3b: 29 CFR 1910.1200(g)(8) [section 12-60-50(a), HAR].
Item 3c: 29 CFR 1910.1200(h)(1) [section 12-60-50(a), HAR].

Citation 2 (other-than-serious):
Item 1: 29 CFR 1910.132(d)(2) [section 12-60-50(a), HAR].

Respondent conceded, or admitted, to the validity of all the violations alleged in the Citation.

B. Penalty under the Citation.

The penalty for each violation was calculated according to its standard policies and procedures to avoid any arbitrary determination by the inspector. The penalty was determined by initially determining the severity of a potential injury and the probability of an injury occurring from the cited hazardous condition; the combination of these factors resulted in a gravity-based penalty, which was then reduced by certain mitigating factors, the size of the Respondent and its prior citation history.

For citation 1, items 1 and 2, a severity level of "medium" was given due to the injury sustained by the victim, which was cryogenic burns. A probability of "greater" was given due to the following considerations: 1) the deliberate failure to supply PPE by Respondent; 2) the lack of effective training; and 3) the fact that after only two weeks of operation Respondent suffered its first employee accident. The combination of severity and probability factors resulted in a gravity-based penalty of $6,000.00, for citation 1, items 1 and 2, respectively. The gravity-based penalties for each violation were adjusted, or reduced, in consideration of the size of Respondent's company and its work safety citation history. Respondent qualified for a 30% discount based on its having only 30 employees, and another 10% discount based on the fact that it had not been previously cited by HIOSH[1]; these discounts are applied serially. In other words, the $6,000.00 gravity-based penalty is first reduced by 30%, and then the resulting product is further reduced by 10%; the $6,000.00 gravity-based penalty is not reduced by an aggregate 40% (30% + 10%). Hence, the final proposed penalties for citation 1, items 1 and 2, were $3,780.00 each.

[1] Board members Moepono and Musto expressed concern that the 10% penalty reduction was not fair given the evidence that Respondent was in operation for only two weeks until the accident on August 19, 2017. However, this concern does not alter the Board's affirmation of the penalty.

For citation 1, items 3a, 3b, and 3c, a grouped penalty was calculated. However, because these were for predominately document violations, a "low" severity assessment was given, and a "lesser" probability was assigned. This determination resulted in a gravity-based penalty of $3,000.00. The $3,000.00 gravity-based penalty was reduced by Respondent's size (30% reduction) and lack of a prior citation history (10% reduction). The discounts were serially applied which resulted in a final proposed grouped penalty of $1,890.00 for citation 1, items 3a, 3b, and 3c.

C. Respondent's Challenge of the Citation.

Respondent's sole challenge in this contested case hearing is to the proposed aggregate penalty of $9,450.00. As previously found and concluded, Respondent conceded, or admitted, to the validity of all the violations alleged in the Citation. Respondent requested this Board to reduce the aggregate penalty because it is no longer operating, having ceased operation on January 15, 2018. After having paid all its debts Respondent was left with only $750.00. Respondent did not allege or argue that HIOSH's penalty was unfairly or erroneously calculated.

III. CONCLUSIONS OF LAW

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

Respondent is an employer within the meaning of section 396-3, HRS, 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."

In order to establish a prima facie violation of a specific standard, the Director must prove 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. International Roofing & Building Construction, Inc., OSH 2007-6 (11/6/07), citing Director v. Maryl Pacific Constructors, Inc., OSAB 2001-18 (6/13/02), and Astra Pharmaceutical Products, Inc., 1981 OSHD §25,578 (1981), affirmed in part, remanded in part, 681 F.2d 69 (1st Cir. 1982).

Pursuant to section 91-10(5), HRS, 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)).

A. Citation 1, Item 1: Section 12-60-2(b)(1)(A), HAR

The Board concludes that the Director has established each element of this violation by a preponderance of the evidence. The standard applies because all employers in the State, except for those employing less than 25 workers[2], are required to have a written safety and health program to identify and control workplace hazards. A part of Respondent's workers' duties was to prepare treats involving a process utilizing liquid nitrogen, a hazardous chemical. Respondent was aware of the hazardous properties of liquid nitrogen because its manager and owner, Mr. Shirasu, admitted that he had read the precautions on the liquid nitrogen cylinder and consciously decided not to follow them. The Director has also established by a preponderance of the evidence that the serious characterization is appropriate. Moreover, Respondent has admitted to the violation.

B. Citation 1, Item 2: 29 CFR 1910.132(a) [section 12-60-50(a), HAR]

The Board concludes that the Director has established each element of this violation by a preponderance of the evidence. The standard applies because a part of Respondent's workers' duties was to prepare treats involving a process utilizing liquid nitrogen, a hazardous chemical. PPE, including eye protection and cold-protective clothing, was required for handling the chemical. Respondent was aware of the hazardous properties of liquid nitrogen because its manager and owner, Mr. Shirasu, admitted that he had read the precautions on the liquid nitrogen cylinder; he was also aware of the need for PPE when using liquid nitrogen and consciously decided that his workers were not required to follow them. The Director has also established by a preponderance of the evidence that the serious characterization is appropriate. Moreover, Respondent has admitted to the violation.

C. Citation 1, Item 3a. 29 CFR 1910.1200(e)(1) [section 12-60-50(a), HAR]

The Board concludes that the Director has established each element of this violation by a preponderance of the evidence. The standard applies because Respondent was aware of the presence and use of liquid nitrogen in its work place, and therefore, it was required to develop, implement, and maintain a written hazard communication program that provides for labeling/warning, SDS, and employee information and training of hazardous chemicals, specifically as they pertain to liquid nitrogen. A part of Respondent's workers' duties was to prepare treats involving a process utilizing liquid nitrogen. Respondent was aware of the hazardous properties of liquid nitrogen because its manager and owner, Mr. Shirasu, admitted that he had read the precautions on the cylinder. The Director has also established by a preponderance of the evidence that the

[2] The standard does not distinguish between full-time and part-time workers.

serious characterization is appropriate. Moreover, Respondent has admitted to the violation.

D. Citation 1, Item 3b: 29 CFR 1910.1200(g)(8) [section 12-60-50(a), HAR]

The Board concludes that the Director has established each element of this violation by a preponderance of the evidence. The standard applies because Respondent was aware of the presence and use of liquid nitrogen in its work place, and therefore, it was required to make readily accessible copies of SDS for liquid nitrogen. A part of Respondent's workers' duties was to prepare treats involving a process utilizing liquid nitrogen. Respondent was aware of the hazardous properties of liquid nitrogen because its manager and owner, Mr. Shirasu, admitted that he had read the precautions on the liquid nitrogen cylinder. The Director has also established by a preponderance of the evidence that the serious characterization is appropriate. Moreover, Respondent has admitted to the violation.

E. Citation 1, Item 3c: 29 CFR 1910.1200(h)(1) [section 12-60-50(a), HAR]

The Board concludes that the Director has established each element of this violation by a preponderance of the evidence. The standard applies because Respondent was aware of the presence and use of liquid nitrogen in its work place, and therefore, it was required to provide its workers with effective information and training on liquid nitrogen. A part of Respondent's workers' duties was to prepare treats involving a process utilizing liquid nitrogen. Respondent was aware of the hazardous properties of liquid nitrogen because its manager and owner, Mr. Shirasu, admitted that he had read the precautions on the cylinder. The Director has also established by a preponderance of the evidence that the serious characterization is appropriate. Moreover, Respondent has admitted to the violation.

F. Citation 2, Item 1: 29 CFR 1910.132(d)(2) [section 12-60-50(a), HAR]

The Board concludes that the Director has established each element of this violation by a preponderance of the evidence. The standard applies because Respondent was aware of the presence and use of liquid nitrogen in its work place, and therefore, it was required to verify through written certification that it performed an assessment to determine if work place hazards necessitated the use of PPE. A part of Respondent's workers' duties was to prepare treats involving a process utilizing liquid nitrogen. Respondent was aware of the hazardous properties of liquid nitrogen because its manager and owner, Mr. Shirasu, admitted that he had read the precautions on the cylinder. Moreover, Respondent has admitted to the violation.

G. The individual penalties associated with each violation was correctly computed.

The Board affirms the amount of the penalties associated with each violation.

IV. DECISION AND ORDER.

For the reasons discussed above, the Board orders that the Citation and Notification of Penalty resulting from HIOSH Inspection Number 1257287 conducted on August 22, 2017, and issued on October 23, 2017, including the individual violations, the characterization of each violation, and the individual penalties associated with each violation, resulting in the assessed aggregate penalty of $9,450.00, are hereby AFFIRMED. This case is closed.

Dated: Honolulu, Hawaii, May 14, 2018.

HAWAII LABOR RELATIONS BOARD,

MARCUS R. OSHIRO, Chairperson

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copies sent to:
Herbert B.K. Lau, Deputy Attorney General
Stewart Shirasu