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Case No. OSH 2018-01

HAWAII LABOR RELATIONS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and PIONEER MARBLE & GRANITE CORPORATION, Respondent.	)	CASE NO. OSH 2018-01 (Inspection No. 1237898) DECISION NO. 37 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

FINAL 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 and arguments 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.

Any proposed finding of fact submitted by a party not already ruled upon by the Board by adoption herein, or rejected by clearly contrary findings of fact herein, is hereby denied and rejected.[i] Any proposed conclusion of law clearly contrary to the conclusions of law herein, is hereby denied and rejected.

I. PROCEDURAL HISTORY

On January 19, 2018, the Board received from the Director a Notice of Contest date-stamped by the Hawaiʻi Occupational Safety and Health Division ("HIOSH") on December 22, 2017, regarding a Notification of Failure to Abate Alleged Violation, identified as inspection number 1237898, with an inspection date of June 5, 2017. The Respondent was identified as PIONEER MARBLE & GRANITE CORPORATION ("Respondent"). The Notification of Failure to Abate Alleged Violation was issued on December 5, 2017, by HIOSH.

On January 22, 2018, the Board issued a Receipt of Notice of Contest and General Information, and a *de novo* hearing was scheduled for May 11, 2018. On May 10, 2018, a Stipulation of Facts, signed by the representatives of the Director and Respondent, was submitted to the Board. The Board approved the Stipulation of Facts on May 11, 2018 by Board Order No. 987.

On May 11, 2018, the de novo hearing was held where evidence, including documentary evidence, was received by the Board and argument was presented by the parties. The hearing was continued to July 2, 2018.

By letter dated June 22, 2018, counsel for Respondent informed the Board that he was discharged as its counsel.

On July 2, 2018, the de novo hearing reconvened. Based upon the documentary evidence and the arguments presented by the Director and Respondent, the Board upholds and affirms the repeat failure-to-abate violation and the associated penalty of $92,400.00, as cited in the Notification of Failure to Abate Alleged Violation issued on December 5, 2017. At the conclusion of the de novo hearing, the Board ordered the Director to submit proposed findings of fact, conclusions of law, and decision and order.

II. FINDINGS OF FACT

1. At all relevant times, Respondent maintained a workplace at 148 Mokauea Street, Unit 1, Honolulu, Hawaii, 96819.

2. At all relevant times, Respondent was an employer, as defined in HRS § 396-3, and employed employees, as defined in HRS § 396-3, and was subject to the requirements of HRS chapter 396, the Hawaii Occupational Safety and Health Law.

3. On January 5, 2015, HIOSH conducted an occupational safety inspection of Respondent's workplace. On April 1, 2015, HIOSH issued a Citation and Notification of Penalty ("Citation") against Respondent. Citation 1, item 1, alleged a serious violation of 29 CFR 1910.178(a)(4) [Hawaii Administrative Rules ("HAR") § 12-60-50(a)], with an abatement date of April 21, 2015. Specifically, the violation alleged that a telescopic boom attachment with an Abaco lifter was coupled to the tines of a Toyota vertical mast forklift, without the forklift manufacturer's prior written approval. The use of the telescopic boom attachment and lifter affected the forklift's capacity and safe operation and exposed employees to potential struck by/crushed by hazards. The proposed penalty for citation 1, item 1, was $1,050.00.

4. On April 23, 2015, Respondent and the Director entered into an Informal Settlement Agreement ("ISA"). The ISA, among other things, reduced the penalty for citation 1, item 1 of the Citation, from $1,050.00 to $840.00, and postponed the abatement date for citation 1, item 1, from April 21, 2015 to May 23, 2015. The ISA did not otherwise alter the violation alleged in citation 1, item 1, 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)]. The ISA was not contested by any party, and hence, the Citation and the ISA became a final order of the Director.

5. On July 9, 2015, HIOSH conducted a follow-up inspection of Respondent's workplace to determine if Respondent abated or corrected the violation cited in citation 1, item 1 of the Citation. Specifically, HIOSH was attempting to determine whether Respondent obtained written approval from the forklift manufacturer for the attachment and use of the telescopic boom and lifter on the Toyota forklift. As a result of the July 9, 2015 inspection, HIOSH determined that the violation continued to exist unabated since its earlier inspection of January 5, 2015. On August 3, 2015, HIOSH issued a Notification of Failure to Abate Alleged Violations ("FTA Citation") against Respondent for failing to abate or correct the hazardous condition and/or practice alleged in citation 1, item 1, of the Citation. Specifically, the FTA Citation alleged a failure-to-abate-serious violation of 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)]. A $42,000.00 penalty was proposed.

6. Respondent contested the FTA Citation to the Board. On May 23, 2016, the Board upheld the FTA Citation and proposed $42,000.00 penalty. The Board's decision and order of May 23, 2016, was not contested by any party, and therefore, it became a final order of the Board.

7. On June 5, 2017, HIOSH initiated a second follow-up inspection of Respondent's workplace to determine whether Respondent abated or corrected the violation cited in the FTA Citation.

8. HIOSH determined the following after interviewing employees and Respondent's owner, John Pham:

a. Respondent is engaged in the fabrication of natural and man-made stone into finished products.

b. In the course of its work activities at its workplace, Respondent occasionally moved stones using a Toyota forklift with a telescopic boom and lifter. John Pham operated the forklift approximately twice a week, about 2 to 3 minutes per operation, for this purpose. The stones weighed between 300 and 900 pounds.

c. Since July 9, 2015, Respondent has continued to move stones at its workplace using the Toyota forklift with a telescopic boom and lifter without obtaining the written approval from the forklift manufacturer.

d. The HIOSH inspector observed that the forklift's capacity and operation plate or decal was not changed to account for the use of the telescopic boom and lifter.

e. The HIOSH inspector was of the opinion that the practice of using a Toyota forklift with a telescopic boom and lifter to carry stones affected the capacity and safe operation of the forklift. He was of the opinion that the practice could result in tip-over accidents and falling loads.

f. Respondent did not provide to HIOSH any written approval for use of the telescopic boom and lifter from the forklift manufacturer.

9. On December 5, 2017, HIOSH issued a second Notification of Failure to Abate Alleged Violations ("Repeat-FTA Citation") alleging in citation 1, item 1, a repeat-serious failure-to-abate violation of 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)].

10. Pursuant to the Stipulation of Facts approved on May 11, 2018, Order No. 987, Respondent stipulated a violation was committed and does not contest the validity of citation 1, item 1 of the Repeat-FTA Citation, the repeat-serious failure-to-abate violation of 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)].

11. Citation 1, item 1 of the Repeat-FTA Citation, citing the repeat-serious failure-to-abate violation of 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)], proposes a penalty of $92,400.00.

12. The proposed penalty of $92,400.00 was calculated according to HIOSH's standard policies and procedures. The penalty was determined by determining the severity of the most serious potential injury and the probability of an injury occurring from the cited hazardous condition or practice. The combination of these factors results in a gravity-based penalty. The gravity-based penalty can be reduced by certain mitigating factors, i.e., the size of the Respondent, "good faith," and its prior citation history. For failure-to-abate violations the gravity-based penalty is multiplied by the number of days of the continuing violation, up to 30 days.

13. For citation 1, item 1 of the Repeat-FTA Citation, a severity level of "high" was given due to the most serious potential injury that could be sustained if the forklift tipped over, e.g., broken bones requiring hospitalization and/or injury resulting in permanent disability. A probability of "lesser" was given because the investigator judged the likelihood of an accident to be relatively low due to the following findings: 1) only one individual (Mr. Pham) operated the forklift, and 2) it was operated only twice a week for approximately 2 to 3 minutes per operation. The combination of 'high' severity and 'low' probability factors result in a gravity-based penalty of $5,000.00. However, in this instance the gravity-based penalty was increased to the maximum of $7,700.00[1] because HIOSH determined that: 1) the unabated hazardous condition existed from January 2015 to the present, a period of over 3 years, 2) Respondent had been previously been cited twice (Citation of April 1, 2015 and FTA Citation of August 3, 2015) for the identical unabated hazardous condition/practice, and 3) there is continued employee exposure to the hazardous condition and practice. The gravity-based penalty of $7,700.00 was reduced by a maximum of 60% based upon the size of Respondent's work force (7 employees). This resulted in an adjusted penalty of $3,080.00 ($7,700.00 x .4). The

[1] The Field Operations Manual of HIOSH previously denoted a maximum of $7,000.00, however this was increased (multiplied) by a factor of 1.1 in 2016, resulting in a new maximum gravity-based penalty of $7,700.00 ($7,000.00 x 1.1).

adjusted penalty was multiplied by a maximum of 30 days to result in a propose penalty of $92,400.00 ($3,080.00 x 30 days).

14. Pursuant to the Stipulation of Facts approved on May 11, 2018, Order No. 987, Respondent stipulated the formula used to calculate the fine was in accordance with the applicable law/guidelines followed by HIOSH.

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, 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 failure-to-abate violation, the Director must prove 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, 13-14 (12/22/97), citing York Metal Finishing Company, 1 OSHC 1655, 1656, 1973-1974 OSHD ¶17,633 (4/9/74).

"A violation is repeated if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation." Director v. Kiewit Pacific Company, OSAB 94-009, 9 (3/1/96), citing Potlatch Corporation, 7 OSHC 1061, 1979 OSHD ¶23,294 (1979).

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: 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)]

The Board concludes that the Director has established each element of the repeat-serious failure-to-abate violation of 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)], alleged in citation 1, item 1 of the Repeat-FTA Citation of December 5, 2017. Based on the

Stipulation of Facts, the May 23, 2016 decision and order of the Board was not appealed by any party, and therefore, became a final order of the Board. Also, the condition or hazard found during the June 5, 2017 re-inspection was the identical one for which Respondent was previously cited for in the August 3, 2015 FTA Citation. Respondent continuously engaged in the hazardous practice of using the forklift in conjunction with the unapproved boom attachment and lifter. Hence, the violation observed by HIOSH on June 5, 2017, constitutes a failure-to-abate violation. The failure-to-abate violation is repeated in character because Respondent was previously cited for the same violation on April 1, 2015, which was settled through an ISA on April 23, 2015. Based on the Stipulation of Facts, the ISA was not contested, and the ISA and Citation of April 1, 2015 became a final order of the Director.

Moreover, pursuant to the Stipulation of Facts approved on May 11, 2018, Order No. 987, Respondent stipulated a violation was committed and does not contest the validity of citation 1, item 1 of the Repeat-FTA Citation, the repeat-serious failure-to-abate violation of 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)].

In so ruling that Director has established the repeat-serious-failure-to abate violation in this case, however, the Board notes the following. The Board's conclusion that the ISA was a final order and the basis for a repeat-serious failure-to-abate violation is limited to the particular facts of this case. Specifically, the Board relies on the Stipulation of Facts, paragraph 5 that, "On April 23, 2015, Respondent and the Director entered into an Informal Settlement Agreement ("ISA")… The ISA was not contested by either party, and hence, the Citation and the ISA became a final order of the Director[,]" and Board Decision 32 thereon, which concluded that the ISA was a final order of the Director. However, as the Director is well-aware, subsequent to Decision, 32, the Board rendered Decision No. 34A, Director, Dep't of Lab. and Ind. Rels. v. Hi-Power Solar, Board Case No. OSH 2015-34 (11/24/17) (Hi-Power Solar). In Hi-Power Solar, the Board agreed with Respondent Hi-Power Solar's position that an ISA is not a final order; and accordingly, cannot be the basis of a "repeat serious" violation. Consequently, henceforth, the Board will not accept a stipulation of fact that an ISA is a final order of the Director based on both Hi-Power Solar and a finding that this is not an appropriate factual finding but a legal conclusion. Finally, the Board, consistent with Hi-Power Solar, will not hold that an ISA is a final order of the Director upon which a repeat violation can rest.

B. The $92,400.00 penalty associated with the violation was correctly computed.

The Board affirms the $92,400.00 penalty associated with the violation. Moreover, pursuant to the Stipulation of Facts approved on May 11, 2018, Order No. 987, Respondent stipulated the formula used to calculate the fine was in accordance with the applicable law/guidelines.

IV. DECISION AND ORDER

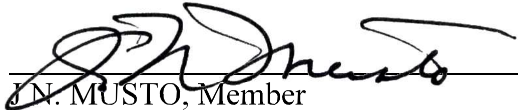
For the reasons discussed above, the Board orders that the Notification of Failure to Abate Alleged Violation, inspection number 1237898 conducted on June 5, 2017, and issued on December 5, 2017, the repeat characterization of citation 1, item 1, alleging a repeat-serious failure-to-abate violation of 29 CFR 1910.178(a)(4) [HAR § 12-60-50(a)], and the $92,400.00 penalty associated with the violation, are hereby AFFIRMED. This case is closed.

Dated: Honolulu, Hawaii, Aug. 15, 2018.

HAWAII LABOR RELATIONS BOARD,

MARCUS R. OSHIRO, Chairperson

SESNITA A.D. MOEPONO, Member



J N. MUSTO, Member

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[i] Pursuant to Hawaii Revised Statutes § 91-12, "[i]f any party to the proceedings has filed proposed finding of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented."