

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NO. OSH 2003-19 |
| |) | |
| DIRECTOR, DEPARTMENT OF LABOR |) | DECISION NO. 7 |
| AND INDUSTRIAL RELATIONS, |) | |
| |) | FINDINGS OF FACT, CONCLUSIONS |
| Complainant, |) | OF LAW, AND ORDER |
| |) | |
| vs. |) | |
| |) | |
| THE HOME DEPOT, |) | |
| |) | |
| Respondent. |) | |

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board) pursuant to a written notice of contest from a citation and notification of penalty issued against THE HOME DEPOT (HOME DEPOT or Respondent) by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director) via the Hawaii Division of Occupational Safety and Health (HIOSH) on July 11, 2003.

The Citation states, in part, the following violations:

Citation 1, Item 1 Type of Violation: Serious
29 CFR 1910.176(b) [Refer to chapter 12-73.1, HAR] was violated because:

Boxes and containers that were stacked 12 feet above the floor were torn and coming apart, exposing employees to falling objects.

29 CFR 1910.176(b) states "Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse."

Citation 2, Item 1 Type of Violation: Other
29 CFR 1904.40(a) [Refer to chapter 12-52.1, HAR] was violated because:

The employer did not maintain copies of the OSHA 300/300A log of injuries and illnesses in the establishment and did not make them available within 4 hours of the request.

29 CFR 1904.40(a) states “When an authorized government representative asks for the records you keep under Part 1904, you must provide copies of the records within four (4) business hours.”

Citation 2, Item 2 Type of Violation: Other

29 CFR 1910.136(a) [Refer to chapter 12-64.1, HAR] was violated because:

Employees are not required to wear safety shoes which have lead to four foot injuries in the past 5 months.

29 CFR 1910.136(a) states “The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, and where such employee’s feet are exposed to electrical hazards.”

The Board conducted a hearing on the case on March 3 and 4, 2004. At the start of the hearing on March 3, 2004, the parties indicated that they had reached a settlement as to Citation 1, Item 1 of the Citation and HOME DEPOT withdrew its appeal from Citation 2, Item 1. Thus, only HOME DEPOT’s contest of Citation 2, Item 2 proceeded to hearing.

On August 3, 2004, the Board issued Order No. 104 approving the Stipulation and Partial Settlement Agreement reached between the parties where the parties agreed to amend the characterization of Citation 1, Item from “Serious” to “Other” and affirm Citation 2, Item 1.

Having reviewed the record and provided all parties a full and fair opportunity to be heard, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. On May 27, 2003, Edward Sarapata (Sarapata), a HIOSH Compliance Officer, inspected the work site of Respondent HOME DEPOT a hardware retail store located at 100 Pakaula Street, Kahului, on the island of Maui. Sarapata’s inspection was complaint-driven. After his inspection of the complaints, Sarapata, noting that HOME DEPOT had not been subject to a comprehensive inspection since it opened, conducted a comprehensive inspection.

2. As a part of his inspection, Sarapata requested and reviewed reports of work injuries occurring within the several months preceding the investigation. Some of the documents were workers' compensation claim forms, WC-1 forms, and others were HOME DEPOT Accident Report Forms, unrelated to any workers' compensation claim. Sarapata had no knowledge of the circumstances or use of HOME DEPOT Accident Report Forms. Transcript of hearing (Tr.) 3/2/04, p. 143. Sarapata made no distinction between WC-1s which are the forms used to report workers compensation injuries and HOME DEPOT's Accident Report Forms. Tr. 3/2/04, pp. 145 - 46.
3. Sarapata asked to speak to the employees in question but was told that they no longer worked for HOME DEPOT or were not available to interview. Tr. 3/2/04, p. 102. In most instances Sarapata could not testify to the extent of the injuries or whether it was a recordable injury.
4. There were five reported foot incidents in the four months preceding the investigation by Sarapata and two reported incidents in the month following the investigation. There were as follows:
 - a. James Santiago: On March 4, 2003, while loading plywood on a cart, a piece fell and struck associate's right foot resulting in a bruised toe. Exhibit (Ex.) 16, Tr. 3/2/04, p. 45.
 - b. Larry Landry: On March 15, 2003, associate was struck by a toilet bowl that fell through the bottom of the box while assisting a customer in loading the product onto a flat cart causing pain and bruise to right great toe. Ex. 20, Tr. 3/2/04, p. 47.
 - c. Ronald Agonoy: On April 17, 2003 while stocking lumber with the help of another associate, a board slipped out of the other associate's hands and caused a contusion to the left foot. Ex. 15, Tr. 3/2/04, p. 42.
 - d. Robert Ince: On April 23, 2003, while stocking product, associate dropped product on his own foot causing an injury to his left big toe. Ince lost four work days and was limited to modified duty upon his return.¹ Ex. 12, Tr. 3/2/04, pp. 36 - 37.
 - e. John Sedillo: On May 1, 2003, while lifting a door onto a display rack with an assistant, the door slid off the rack and struck the top

¹According to the Robert Ince's accident report, PPE or personal protective equipment was required and used and the injury was not due to the non-use of PPE. Ex. 12.

of the associate's right foot causing a bruise and swelling. Ex. 18, Tr. 3/2/04, p. 46.

- f. Jean-Pierre Colimon: On May 28, 2003, associate was struck by the handle of a pallet jack loaded with ceramic tile causing soreness on the left foot. Ex. 19, Tr. 3/2/04, pp. 46 - 47.
 - g. Phillip Guenther: On July 1, 2003 while standing next to a forklift, the associate accidentally knocked it into gear causing the forklift to run over his left foot resulting in a bruise. Ex. 17, Tr. 3/2/04, p. 45.
5. All but two of the employees were injured by merchandise falling on the employee's foot or toe while manually stocking and handling merchandise or assisting customers in loading a shopping cart.
 6. At the conclusion of his inspection, Sarapata concluded that there may be an "alleged violation of an alleged hazard." Tr. 3/2/04, p. 90.
 7. On July 11, 2003, the Director issued a Citation and Notification of Penalty (Citation) to HOME DEPOT, which HOME DEPOT contested by letter dated July 22, 2003. The Citation included the violation of 29 CFR 1910.136(a) because, "[e]mployees are not required to wear safety shoes which have lead to four foot injuries in the past 5 months."
 8. 29 CFR 1910.136(a) provides:

General requirements. The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, and where such employee's feet are exposed to electrical hazards.
 9. The issue before the Board is "Whether Respondent violated 29 CFR 1910.136(a) as described in Citation 2, Item 2." The Characterization of the Citation is "Other" and there is no monetary penalty attached.
 10. Sarapata did not correlate the injuries reported with the location of the alleged hazardous conditions and could not confirm the existence of any hazard except what was contained in the injury report forms. Tr. 3/2/04, pp. 149 - 51.
 11. The Board finds Sarapata was equivocal in defining the areas of exposure to known hazards for foot injuries. According to Sarapata's worksheet, the location of the hazards were the "Merchandise aisles" and the receiving

department. Ex. 11. Sarapata also referred to the areas addressed in the accident reports or the WC-1's, i.e, lumber, plumbing supplies, stocking, garden and tools. Tr. 3/2/04, p. 150. Sarapata, however, indicated that he did not intend that every employee in the store have PPE but that a job analysis of each department should be performed. When questioned whether he was basically saying the exposure to any hazard was the entire store, he stated "No, they should have done a job hazard analysis of each department to find out whether or not there was a hazard that required PPE [personal protective equipment] in that department, and they didn't do that." Tr. 3/2/04, p. 153.²

12. Sarapata conceded that he observed no areas in the Maui store where there was a danger of foot injuries due to falling or rolling objects, objects piercing the sole or electrical hazards. Tr. 3/2/04, pp. 115 - 16, 123 - 125. The Board therefore finds that the DIRECTOR failed to establish that employees are

²Sarapata stated in response to questions by the Chair and Presiding Member Kunitake:

Mr. Kunitake: As I understand it, you're saying that all employees that work within the Home Depot store –

The Witness: Mm-hm.

Mr. Kunitake: – must wear steel toe shoes.

The Witness: No. I didn't say that.

The Chairman: The regulation applies to only employees in areas where there's exposure.

Mr. Kunitake: Yeah, but when he's talking about areas – when he's talking about areas, as I understand it, merchandise aisles and – and we're basically saying the exposure is the entire store.

The Witness: No, they should have done a job hazard analysis of each department to find out whether or not there was a hazard that required PPE in that department, and they didn't do that.

The Chairman: What where they cited for?

The Witness: For not requiring their employees to –

Mr. Kunitake: Wear safety – wear –

The Chairman: What should they have done?

The Witness: Pardon?

The Chairman: What should they have done?

The Witness: They should have done a job analysis of each area to determine whether or not safety shoes were required in that area because of forklift traffic or whatever.

Tr. 3/2/04, pp. 152-53.

working in areas where there is a danger of foot injuries due to falling or rolling objects, objects piercing the sole or electrical hazards.

13. Sarapata testified that foot injuries can be abated by “engineering controls, administrative controls, and personal protective equipment.” The order of priority for the elimination of a hazard is via engineering, administrative controls and then personal protective devices.
14. In response to a prior HIOSH inspection of the Honolulu HOME DEPOT, HOME DEPOT’s expert John Bobis (Bobis) performed a job analysis of each area at the Honolulu Home Depot in 2003. According to his job analysis, Bobis concluded that “via the use of engineering controls, administrative controls, personal protective equipment is not necessary because the hazard has been lowered to such a level that it would not increase safety whatsoever.” Tr. 3/2/04, pp. 205 - 06.
15. The Honolulu HOME DEPOT eliminated any hazard associated with foot injuries through engineering and administrative controls. The controls included barriers to keep objects from rolling or falling off shelves, the outsourcing of maintenance that eliminates the need for associates to perform work with potential foot hazards, training in material handling techniques and regular monitoring of safety and health issues through employee focus groups.
16. In a subsequent site visit to the Maui store, Bobis concluded that the identical means, processes and conditions that existed at the Honolulu store exist at the Maui store. Thus, according to Bobis’ job analysis, which the Board finds persuasive, personal protective equipment was not required in the Maui HOME DEPOT store.
17. The injuries suffered by the employees were, except in one instance, i.e., Robert Ince, insignificant and outside the scope of HOME DEPOT’s reporting and recording obligations set forth by regulation.³ Moreover, Ince had been using

³The reporting standard in 29 CFR 1904.39 states:

Within eight (8) hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, you must orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor that is nearest to the site of the incident.

The recording standard in 19 CFR 1904.4 provides as follows:

Personal Protective Equipment when he was injured. There was no evidence presented by HIOSH that the other injured employees lost days away from work, were restricted in their work, transferred to another job, or received medical treatment beyond first aid.

18. The incidents of work injuries contained in the forms considered by Sarapata, with the exception of one, do not meet the reporting and recording criteria of the OSHA standards and are insufficient to form the basis of a violation of 29 CFR 1940.136(a). In the one instance of employee Ince, the records indicate he was using PPE.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint.
2. To establish a violation of a standard, the Director must prove: “(1) the 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 should have known of the condition with the exercise of due diligence.”

Each employer required by this Part to keep records of fatalities, injuries and illnesses must record each fatality, injury and illness that:

- (1) Is work related; and
- (2) Is a new case; and
- (3) Meets one or more of the general recording criteria of section 1904.7 or the application to specific cases of section 1904.8 through 1904.12.

In addition, 29 CFR 1904.7 states in part:

You must consider an injury or illness to meet the general recording criteria and therefore to be recordable, if it results in any of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. You must also consider a case to meet the general recording criteria if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

3. Based on the Director's reliance solely on accident reports of injuries over a four-month period preceding the inspection and absent any finding of a hazardous condition upon inspection, the Board concludes that the DIRECTOR failed to prove by a preponderance of evidence that the standard applies as to the existence of the hazardous condition and that there was no way to deal with the hazard other than the use of safety shoes.
4. The Board concludes that the DIRECTOR failed to prove employee exposure to the alleged hazard by a preponderance of evidence based solely on a review of accident reports.

ORDER

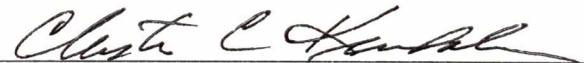
Citation 2, Item 2, for violation of 29 CFR 1910.136(a) is vacated.

DATED: Honolulu, Hawaii, August 5, 2004.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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