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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. HORITA CONSTRUCTION, INC., Respondent.	CASE NO. OSAB 95-027 (OSHCO No. C4756) (Report No. 120639760)

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a written Notice of Contest filed by HORITA CONSTRUCTION, INC. ("Respondent") to contest the Citations and Notifications of Penalty issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via the Division of Occupational Safety and Health ("Complainant").

Pursuant to the Board's pre-trial order, the issues to be determined are:

(1) Whether Chapter 121.1 exists and does it apply to Respondent;

(2) If so, whether Respondent violated Occupational Safety and Health Standard ("Standard") 29 C.F.R. §1926.501(a)(13);

a. If so, is that characterization of the violation as "serious" appropriate;

b. If so, was the imposition and amount of the proposed $1,100 penalty appropriate.

(3) Whether Respondent violated Standard 29 C.F.R. §1926.501(b)(4)(ii);

a. If so, is the characterization of the violation as "serious" appropriate;

b. If so, was the imposition and amount of the proposed $1,100 penalty appropriate.

(4) Whether Respondent violated Standard 29 C.F.R. §1926.503(a)(1);

a. If so, is the characterization of the violation as "serious" appropriate;

b. If so, was the imposition and amount of the proposed $1,100 penalty appropriate.

(5) Whether Respondent violated Standard 29 C.F.R. §1926.59(f)(5);

a. If so, is the characterization of the violation as "serious" appropriate;

b. If so, was the imposition and amount of the proposed $1,100 penalty appropriate.

(6) Whether Respondent violated Standard 29 C.F.R. §1926.59(h)(1);

a. If so, is the characterization of the violation as "serious" appropriate;

b. If so, was the imposition and amount of the proposed $1,100 penalty appropriate.

(7) Whether Respondent violated Standard 29 C.F.R. §1926.59(h)(3)(ii);

a. If so, is the characterization of the violation as "serious appropriate;

b. If so, was the imposition and amount of the proposed $1,100 penalty appropriate.

(7) Whether Respondent violated Standard 12-141-6(c)(1);

a. If so, is the characterization of the violation as "general" appropriate.

For the reasons stated below, we affirm, in part, modify, in part, and vacate, in part, the citations against Respondent.

FINDINGS OF FACT

1. Respondent was involved in the construction of a residential condominium project in Kapolei. On March 21, 1995, Complainant inspected Respondent's job site.

2. Complainant observed a second floor work site that was not protected by a guard rail system or other form of fall protection system. The second floor was about 8 feet above the ground or lower level. Complainant interviewed two of Respondent's employees, who stated that they performed decking work on the second floor. Complainant did not personally observe the two employees work 8 feet above ground without fall protection.

3. Respondent had knowledge of the fall hazard at the second floor work site.

4. A fall from a height of 8 feet could cause serious injuries, such as fractures.

5. At the time of the inspection, Respondent could not produce records of a fall protection training program that complied with the requirements of 29 C.F.R. §1926.503(a)(1). At the time of the inspection, Respondent did have a training program for fall protection that complied with the standard that preceded 29 C.F.R. §1926.503(a)(1).

6. During the inspection, Complainant observed undecked stairway landings. Respondent's employees told Complainant that they used the stairway landings to access the second floor.

7. Because the landings were not decked, there were openings between the structural supports of the landings. The openings were 8 inches wide and 4 feet in length. Employees who used the stairway landings were exposed to the hazard of tripping in or stepping into or through the openings. It was a 5 foot drop from the openings to the dirt ground below.

8. The hazard caused by the undecked landings could result in serious injuries, such as fractures.

9. We credit Complainant's testimony regarding the calculation of the penalty for not decking the stairway landing and the factors that were considered in determining the amount.

10. During the inspection, Complainant observed an unlabeled spray bottle that contained a chemical known as green guard wood treatment. The spray bottle did not have a label that identified its contents or warned of its hazards. The contents of the spray bottle were transferred from the original labeled container for immediate use. Complainant observed an employee using the spray bottle to spray lumber without gloves or proper protection. Complainant interviewed the employee, who stated that he had not received any training about the handling, usage, and hazards of the chemical.

11. Respondent did not know whether the employee observed by Complainant personally transferred the green guard chemical from the original labeled container to the portable unlabeled spray bottle.

12. According to the Material Safety Data Sheet, the subject chemical could cause irreversible eye damage and gastrointestinal symptoms if not used properly.

13. During the inspection, Complainant observed an unused slot or opening in a circuit breaker panel that was not covered. The situation created a hazard that could result in electric shocks or burns.

14. According to Respondent, the uncovered circuit breaker panel was located twenty yards away from the employees.

15. Complainant cited Respondent for the following:

(a). Violation of Hawaii Administrative Rules ("HAR") Chapter 121.1, specifically, 29 C.F.R. §1926.501(a)(13), for not using fall protection for employees working on the second floor, 6 feet above the lower or ground level.

(b). Violation of HAR Chapter 121.1, specifically, 29 C.F.R. §1926.501(b)(4)(ii), for not decking the stairway landings.

(c). Violation of HAR Chapter 121.1, specifically, 29 C.F.R. §1926.503(a)(1) for not providing a proper fall protection training program to its employees.

(d). Violation of HAR Chapter 203.1, specifically, 29 C.F.R. §1926.59(f)(5), for not properly labeling the spray bottle.

(e). Violation of HAR Chapter 203.1, specifically, 29 C.F.R. §1926.59(h)(1), for not providing information and training in the proper storage and usage of the wood treatment chemical.

(f). Violation of HAR Chapter 203.1, specifically, 29 C.F.R. §1926.59(h)(3)(ii) for not informing its employee about the physical and health hazards of the wood treatment chemical.

(g). Violation of HAR §12-141-6(c)(1) for not closing an unused opening in a circuit breaker panel.

16. Items (a), (b), and (c) refer to HAR Chapter 121.1. Chapter 121.1 was promulgated as an Emergency Temporary Standard ("ETS"), pursuant to Hawaii Revised Statutes ("HRS") §396-4(a)(2) and §91-3(b). HAR Chapter 121.1 incorporated Title 29, section 1926, subpart M, of the Code of Federal Regulations. Title 29 is the federal occupational safety and health standards.

Sections 1926.503(a)(1) and 1926.501(b)(4)(ii) are part of Subpart M of the federal standards. Section 1926.501(a)(13) does not exist and is not part of Subpart M.

17. The promulgation of the Chapter 121.1 as an ETS was based on the Director's determination that employees were

being exposed to new hazards and that the ETS was necessary to protect employees from such danger.

18. Notice of the promulgation of HAR Chapter 121.1 was published in a newspaper of general circulation in the State of Hawaii on March 10, 1995.

19. There is no evidence as to when, if ever, HAR Chapter 121.1 was filed with the Lieutenant Governor's office.

20. Items (d), (e), and (f) refer to HAR Chapter 203.1. Chapter 203.1 incorporated Title 29, §1910.1200 of the federal occupational safety and health standards, relating to hazard communication. Complainant's citation referred to Chapter 203.1, but cited Respondents for violations of various provisions under §1926.59 in Title 29. Chapter 149 is the incorporating chapter for §1926.59.

CONCLUSIONS OF LAW

I. Violation of Emergency Temporary Standard, Chapter 121.1, HAR:

Respondent contends that the citations for violations of Chapter 121.1, §§1926.503(a)(1), 1926.501(10(13), and 1926.501(b)(4)(ii) should be dismissed for several reasons. The first is that Chapter 121.1 was not properly adopted as an ETS by Complainant, and, was therefore, not effective or nonexistent on the date of the inspection. The second is that even if Chapter 121.1 was properly promulgated and became effective on March 10, 1995, Chapter 121.1 incorporated only subpart M of the federal

regulations, a subpart that does not include §1926.501(a)(13) of the federal standards. The third is that Complainant failed to meet its burden of proving that Respondent violated §1926.503(a)(1) and §1926.501(b)(4)(ii).

a. Adoption of Chapter 121.1 as an ETS

Section 91-3(a) of the Hawaii Administrative Procedures Act ("HAPA") requires an agency to give notice and to hold public hearings before it can adopt, amend, or repeal a rule authorized by law. However, pursuant to HRS §91-3(b),

> if an agency finds that an imminent peril to the public health, safety, or morals or to livestock and poultry health requires adoption, amendment, or repeal of a rule upon less than thirty days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

Section 91-4(b)(2) of the HAPA provides:

> An emergency rule shall become effective upon filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties, for a period of not longer than one hundred twenty days without renewal unless extended in compliance with the provisions of subdivision (1) and (2) of section 91-3(a), if the agency finds that immediate adoption of the rule is necessary because of imminent peril to the public health, safety, or morals. The agency's finding and brief statement of the reasons therefor shall be incorporated in the rule as filed. The agency shall make an emergency rule known to persons who will be affected by it by

> publication at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies within five days from the date of filing of the rule.

(emphasis added.)

According to Respondent, Chapter 121.1 was not in effect at the time of the inspection, because there has been no showing that the ETS was ever filed with the Lieutenant Governor, as required by HAPA §91-4(b)(2).

Complainant counters that HRS §396-4(2) governs the promulgation of ETSs. According to Complainant, Chapter 121.1 was properly adopted as an ETS, and took effect on March 10, 1995, when notice of the ETS was published in the newspaper.

HRS §396-4(2) provides:

> The department [of labor and industrial relations] shall adopt, amend, or repeal occupational safety and health standards in the manner prescribed by rules and regulations adopted hereunder. Emergency temporary standards may be promulgated without conforming to chapter 91 and without hearings to take immediate effect upon publication of a notice of such emergency temporary standard in a newspaper of general circulation in the State of Hawaii or upon such other date as may be specified in the notice. An emergency temporary standard may be adopted if the director determines:
>
> (A) That employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and
> (B) That such emergency standard is necessary to protect employees from such danger.

> Said emergency temporary standard shall be effective until superseded by a standard promulgated in accordance with the procedures set forth in chapter 91, but in any case shall be effective no longer than six months[.]

We agree with Complainant that the promulgation of ETS, Chapter 121.1, was governed by HRS §396-4(2), and not by §91-4(b)(2) of the HAPA. Section 396-4(2) specifically provides that an ETS may be promulgated without conforming to the requirements of chapter 91 of the HAPA. Reading §396-4(2) and §91-4(b)(2) together, we interpret §91-4(b)(2) to apply to the adoption of emergency administrative rules other than ETSs. Since notice of the adoption of Chapter 121.1 was published in the newspaper on March 10, 1995, the ETS or Chapter 121.1 became effective upon its publication.

In accordance with our interpretation of §396-4(2) and §91-4(b)(2), we conclude that ETS, Chapter 121.1, became effective on March 10, 1995, the date the notice was published in the newspaper, and was effective against Respondent at the time of the March 21, 1995 inspection.

b. Nonexistence of §1926.501(a)(13) in Subpart M

Complainant cited Respondent for a violation of §1926.501(a)(13), for its failure to provide fall protection to employees engaged in residential construction activities 6 feet or more above lower levels. Section 1926.501(a)(13) does not

exist. Complainant should have cited Respondent for a violation of §1926.501(b)(13).

We conclude that Complainant cited the wrong standard. Accordingly, there is no violation of §1926.501(a)(13).

c. Complainant met its burden of proof for violation of §1926.501(b)(4)(ii) and §1926.503(a)(1)

Based on the evidence presented, we conclude that Complainant met its burden of proving that Respondent violated §1926.501(b)(4)(ii) by not decking the stairways. The undecked stairways exposed its employees to the hazard of tripping in or stepping into or through holes or openings. This violation was appropriately characterized as serious. Accordingly, the imposition of a proposed $1,100 penalty was also appropriate.

We further conclude that Complainant met its burden of proving that Respondent violated §1926.503(a)(1) for not providing a training program that complied with the requirements under this section. However, we conclude that Complainant's characterization of this violation as "serious" was not appropriate, because Respondent did have an existing training program that complied with a standard that preceded 29 C.F.R. §1926.503(a)(1), and a violation of this section would probably not cause death or serious physical harm. We, therefore, conclude that Respondent's violation of §1926.503(a)(1) should be characterized as a "general" violation and that no penalty should be imposed for this violation.

II. Violations of Chapter 203.1, 29 C.F.R. §1926.59(f)(5), §1926.59(h)(1), and §1926.59(h)(3)(ii)

Chapter 203.1 of the Hawaii Occupational Safety and Health Standards incorporates Title 29, §1910.1200, of the Federal Occupational Safety and Health Standards, and not Title 29, §1926.59. Chapter 203.1 is under Part 8 of the health standards and applies to all industries in all work environments, except that Chapter 12-200 of Part 8 does not apply to construction work. Title 29, §1926.59 is part of Chapter 149 of the construction standards, and applies only to the construction industry.

Both §1910.1200 and §1926.59 relate to the communication of hazards of chemicals to employees, and are identical to each other. The only difference is that §1910.1200 applies to all industries and §1926.59 is specific to the construction industry.

Respondent contends that the citations for violations of Chapter 203.1, §1926.59(f)(5), -.59(h)(1), and -.59(h)(3)(ii), should be dismissed because Chapter 203.1 did not incorporate these sections of the federal standards.

While Complainant may have mistakenly identified Chapter 203.1 as the incorporating chapter for §1926.59, we conclude that error was "harmless". Section 1910.1200, which is under Chapter 203.1, is identical to §1926.59. Respondent did not cite to any authority to show that Chapter 149 of the

construction standards takes precedence over Chapter 203.1 of the general industry standards in cases where there are identical corollary standards. While we are not concluding that Respondent could have been cited for violations under both Chapter 203.1 and Chapter 149, we do conclude that both chapters were applicable to Respondent in this case.

Having determined that Respondent was cited under the proper standards, we now turn to whether Respondent violated §1926.59.

Section 1926.59(f)(5) provides as follows:

> Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:
>
> (i) Identity of the hazardous chemical(s) contained therein; and
> (ii) Appropriate hazard warnings, ... regarding the physical and health hazards of the hazardous chemical.

Section (f)(7) provides, in relevant part:

> The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer.

In this case, Respondent's employee was observed using an unlabeled portable spray bottle that contained wood treatment chemical. The contents were transferred into the spray bottle from its original labeled container for immediate use.

Respondent has not shown that the exception in (f)(7) applies in this case, because there was no evidence that the employee observed by Complainant personally performed the transfer of the chemical into the portable spray bottle.

Accordingly, we conclude that Complainant has met its burden of proving a violation of §1926.59(f)(5).

We further conclude that Complainant has met its burden of proving a violation of §1926.59(h)(1) and §1926.59(h)(3)(ii), based on the interview and statements made by Respondent's employee. Section 1926.59(h)(1) requires employers to provide employees with information and training on hazardous chemicals used in their work area. Section 1926.59(h)(3)(ii) gives the specifics as to what the training must include.

Because these two violations are so closely related so as to constitute a single hazardous condition, we will group them as one violation. We conclude that the violation under §1926.59(h) was appropriately characterized as "serious". Accordingly, we conclude that a penalty of $1,100 is appropriate for the single violation.

III. Violation of §12-141-6(c)(1)

Section 12-141-6(c)(1) provides as follows:

> Conductors entering boxes, cabinet, or fittings shall be protected from abrasion and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall also be effectively closed.

In this case, Respondent left an unused opening in a circuit breaker panel uncovered. This created a hazardous condition that could have led to electrical shocks or burns.

We do not accept Respondent's defense that there was no employee exposure, because the circuit breaker panel was located twenty yards away from the employees.

The fact that the hazard was located twenty yards from employees is, by itself, not sufficient to show a total lack of employee exposure in this case.

We conclude that, under the facts of this case and given the proximity of the hazard to the employees, Complainant's characterization of the violation as "general" was appropriate.

ORDER

In accordance with the foregoing, we vacate, in part, affirm, in part, and modify, in part, the citations, as follows:

We vacate the citation for violation of §1926.501(a)(13).

We affirm the citation for violation of §1926.501(b)(4)(ii). We also affirm the "serious" characterization and $1,100 penalty for this violation.

We affirm the citation for violation of §1926.503(a)(1), but modify the characterization of and penalty for this violation to a "general" violation with no penalty.

We affirm the citation for violation of §1926.59(f)(5). We also affirm the "serious" characterization and $1,100 penalty for this violation.

We affirm the citation for violations of §1926.59(h)(1), and §1926.59(h)(3)(ii) and the "serious" characterization of the violations. However, we modify the citation to group §1926.59(h)(1) and §1926.59(h)(3)(ii) as one violation and assess a penalty of $1,100 for this single violation.

We affirm the citation for violation of §12-141-6(c)(1). We also affirm the "general" characterization and $0 penalty for this violation.

Dated: Honolulu, Hawaii, JUL 17 1998.

FRANK YAP, JR., Chairman

CAROL K. YAMAMOTO, Member

VICENTE F. AQUINO, Member

Leo B. Young, Esq.,
for Complainant

Jeffrey S. Harris, Esq.,
for Respondent

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

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. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.