

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

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| In the matter of |) | CASE NO. OSAB 92-015 |
| |) | (OSHCO NO. C0308) |
| DIRECTOR, DEPARTMENT OF LABOR |) | (Report No. 103893483) |
| AND INDUSTRIAL RELATIONS, |) | |
| Complainant, |) | |
| vs. |) | |
| |) | |
| MAUI SUN DEVELOPMENT dba, |) | |
| MAUI SUN HOTEL, |) | |
| Respondent. |) | |

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STATE OF HAWAII

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DECISION AND ORDER

This occupational safety and health case is before the Board on appeal by Respondent, MAUI SUN DEVELOPMENT dba MAUI SUN HOTEL, from the Citation and Notification of Penalty issued by the Administrator of the Division of the Occupational Safety and Health, Department of Labor and Industrial Relations (hereinafter "DOSH") on July 16, 1992.

A Stipulation of Facts was filed on May 3, 1993. The parties waived a hearing on this matter and agreed to have the Board decide the case on the record and their written position statements.

The sole issue on appeal is what is the appropriate penalty that should be assessed for Respondent's violation of §12-89-5(f)(4) of the Hawaii Occupational Safety and Health Standards (HOSHS).

FINDINGS OF FACT

1. DOSH conducted an inspection of Respondent's work place on July 9, 1992. As a result of the inspection, Respondent

was cited for a number of violations of the HOSHS, one of which was §12-89-5(f)(4).

2. As a result of Respondent's violation of §12-89-5(f)(4), DOSH determined that Respondent committed a serious violation and assessed an initial penalty of \$2,000.00. After considering the adjustment factors of business size, good faith, and history of previous violations, DOSH reduced the \$2,000.00 penalty to \$900.00. This represented a reduction of 20% for business size, 25% for good faith, and 10% for history.

3. Respondent does not dispute that its violation of HOSHS §12-89-5(f)(4) constituted a serious violation, or that DOSH used the proper criteria and adjustment factors in evaluating the amount of penalty to be assessed. Respondent also does not challenge DOSH's initial penalty of \$2,000.00, or its 25% penalty reduction for good faith and 10% penalty reduction for history of previous violations.

4. In determining the size of Respondent's business, DOSH relied on payroll information prepared by First Hawaiian Bank on Respondent's behalf that wages were paid to a total of 106 employees for the month of July in 1992.

5. According to DOSH's Injury Violation Stamp form, it would have reduced Respondent's penalty by 40% for business size if Respondent employed 26-100 employees and by 20% if it employed 101-250 employees.

6. Respondent incurred out-of-pocket expenses in the amount of \$88.00 to correct the violations found by DOSH.

7. After receiving Respondent's receipts for expenses incurred to correct the violations, DOSH further reduced the

\$900.00 penalty by \$88.00, resulting in a final penalty of \$812.00.

8. Respondent did not deny that it employed 106 employees at some time in July 1992, but indicated that the payroll information from First Hawaiian Bank failed to take into consideration the fact that some of those employees who received compensation in July of 1992 may have, for one reason or another, left its employ before the end of the month. Respondent produced a premium notice for temporary disability insurance from its insurance company to show that it employed a total of 96 employees for July of 1992. According to Respondent, its premiums for July of 1992, were calculated based on the number of employees employed at the end of the subject month.

CONCLUSIONS OF LAW

Pursuant to Hawaii Revised Statutes §396-10(j) and HOSHS §12-51-15(b), the Director or its designee, DOSH, has the authority to determine the amount of civil penalties to be assessed against an employer for violations of HOSHS, after giving due consideration to the appropriateness of the penalty with respect to the gravity of the violation, the size of the business of the employer being charged with the violation, the good faith of the employer, and the history of previous violations. In consideration of these criteria, DOSH may reduce or increase the amount of penalty to be assessed.

Respondent contends that DOSH incorrectly determined the size of its business to be 106 employees for the month of July in 1992, because the payroll information supplied by First Hawaiian Bank failed to take into consideration employees who may

have worked during July, but for some reason or another, left its employ before the end of the month. Respondent argues that the size of its business was more accurately reflected in its insurance premium notice for the month of July, since its premiums for temporary disability insurance were calculated based on the number of employees employed at the end of the subject month. For these reasons, Respondent urges the Board to find that it employed 96 employees for July of 1992, and further reduce its penalty from 20% to 40% for business size, based on DOSH's recommendation that businesses with less than 101 employees qualify for a reduction of their fines by 40%.

According to DOSH's field operations manual, at page VI-8, the size of a business is measured on the basis of the maximum number of employees of an employer at all work places at any one time during the previous 12 months. Given that guidance, Respondent's argument that business size should be determined by the number of employees employed at the end of the subject month fails.

Accordingly, since Respondent did not deny having employed 106 employees at some time in July of 1992, we conclude that Responent's penalty was appropriately reduced by 20% for business size and that a final penalty of \$812.00 assessed against Respondent for a serious violation of HOSHS §12-89-5(f)(4) was reasonable. Respondent shall pay the penalty in accordance with HRS §396-10(1).

ORDER

The Citation and Notification of Penalty issued on July 16, 1992, is hereby affirmed, in accordance with the foregoing findings of fact, conclusions of law, and HRS §396-11.

Dated: Honolulu, Hawaii, NOV 15 1993.

Frank Yap, Jr.
FRANK YAP, JR., Chairman

Carol K. Yamamoto
CAROL K. YAMAMOTO, Member

Excused
CHARLES T. AKAMA, Member

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