LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. HONOLULU SHIRT SHOP, Respondent.	)	CASE NO. OSAB 93-073 (OSHCO ID L4124) (Inspection #120659602))

DECISION AND ORDER

This occupational safety and health case is before the Board on appeal by Respondent, HONOLULU SHIRT SHOP, from the Citation and Notification of Penalty issued by the Administrator of the Division of Occupational Safety and Health, Department of Labor and Industrial Relations, on March 22, 1993.

The issues on appeal are:

1. Whether the grouping of Standards Section 12-63-4(g)(2) and Section 12-75-6(i)(3) was proper.

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

(b) If so, is the imposition and amount of the proposed $750.00 penalty appropriate.

2. Whether the amount of the proposed $750.00 penalty for violation of Standard Section 12-72-3(c)(1) is appropriate.

3. Whether Respondent's violation of Standard Section 12-203-5(a) should be characterized as "serious."

(a) If so, is the imposition and amount of the proposed $600.00 penalty appropriate.

4. Whether Respondent's violation of Standard Section 12-203-6(e)(1) should be characterized as "serious."

(a) If so, is the imposition and amount of the proposed $600.00 penalty appropriate.

5. Whether Respondent violated Standard Section 12-203-7(m).

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

(b) If so, is the imposition and amount of the proposed $600.00 penalty appropriate.

6. Whether Respondent's violation of Standard Section 12-203-8(c)(2) should be characterized as "serious."

(a) If so, is the imposition and amount of the proposed $600.00 penalty appropriate.

FINDINGS OF FACT

1. Respondent, HONOLULU SHIRT SHOP, is a T-shirt printing business with an average employment of four full-time and three part-time workers.

2. Between February 25, 1993 and March 11, 1993, compliance officers from the Division of Occupational Safety and Health (DOSH), conducted inspections of Respondent's premises.

3. On March 22, 1993, DOSH issued a Citation and Notification of Penalty, alleging violations of Sections 12-63-4(g)(2) and 12-75-6(i)(3) (Citation #1); Section 12-72-3(c)(1) (Citation #2); Section 12-203-5(a) (Citation #3); Section 12-203-6(e)(1) (Citation #4); Section 12-203-7(m)

(Citation #5); and Section 12-203-8(c)(2) (Citation #6), of the Hawaii Occupational Safety and Health (HIOSH) Standards.

4. Citation #1 groups the violation of two separate standards, the first of which relates to storage and disposal of combustible waste material and residues. The second standard relates to the instruction of employees in fire extinguisher use and the hazards involved with incipient-stage fire fighting. These two standards require distinctly different methods of abatement.

5. Respondent's employees were not expected to use a fire extinguisher. They had not been required to extinguish a fire in the past, and they were not expected to extinguish any fires in the future.

6. Respondent uses inks in its operations. Although Respondent acknowledges that there was an uncovered container on its premises in which rags were stored for disposal, there is no evidence that the rags were combustible.

7. Respondent acknowledges the violation of the standard noted in Citation #2. An elevated floor located on Respondent's premises lacked a railing. Upon being made aware of the violation, Respondent expended $530.00 for materials and labor to correct the violation.

8. Citation #3 alleges that forms of warning such as labels, material safety data sheets (MSDS), and employee information and training, relative to Respondent's alleged use of Naz-Dar/KC GV-134 Chrome Yellow (Chrome Yellow) and Aeroflex Screen/Wash (Aeroflex), were not developed and implemented by

Respondent. Chrome Yellow, which contains lead chromate, was not used in Respondent's operations. Chrome Yellow was used solely by Respondent's President, Jay Yamamoto, as a consumer, and had not been used by him for more than a year prior to the inspections.

9. Although Respondent used Aeroflex to clean its equipment, the MSDS and labels for Aeroflex did not indicate it as containing 1,1,1 Trichloroethane (TCE).

10. At issue was whether the violation alleging an unlabeled container of silver ink on Respondent's premises should be characterized as a "serious" citation. Prior to the hearing before the Labor Appeals Board, Complainant offered to settle the issue by reclassifying the alleged violation to a "general" citation. Respondent accepted Complainant's offer to reclassify.

11. Complainant's Injury Violation Stamp notes that, according to Drager Tube Readings taken at Respondent's premises, there was no indication of TCE.

12. The MSDSs for Chrome Yellow and Aeroflex were available on Respondent's premises.

13. Training of new employees on the proper use of the cleaner with TCE was routine.

CONCLUSIONS OF LAW

1. Complainant asserts that the standards in Citation #1 should be grouped. This results in the characterization of the violations as "serious" and thereby potentially increases the penalty. We conclude that the violations should not be grouped.

Section 12-63-4(g)(1) provides:

> (1) Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide instruction for employees in the general principles of fire extinguisher use and the hazards involved with incipient-stage fire fighting.

Section 12-63-4(g)(2) provides:

> (2) The employer shall provide the education required in paragraph (1) above upon initial employment and at least annually thereafter.

Section 12-75-6(i)(3) provides:

> (3) Combustible waste material and residues in a building or unit operating area shall be kept to a minimum, stored in covered metal receptacles and disposed of daily.

In support of its position, Complainant argues that HIOSH Standards and caselaw do not dictate that the violations in Citation #1 be cited separately, and, further, that said violations deal with the hazard of fire. We do not agree that fire hazard potential, in this case, is sufficient to mandate grouping.

The Field Operations Manual (FOM) of the DOSH provides:

> When a source of a hazard is identified which involves related violations of different standards, the violations should be grouped into a single item if, as a result of the grouping, the citation more accurately reflects the scope and gravity of the hazardous circumstances.

According to the FOM, it is appropriate to group when: serious or general violations are so closely related as to constitute a single hazardous condition; two or more individual violations are found which, if considered individually, represent general violations, but if grouped, create a substantial probability of death or serious physical harm; or a number of

general violations are present in the same piece of equipment which, considered in relation to each other, affect the overall gravity of possible injury resulting from an accident involving the combined violations.

Section 12-63-4(g)(2) provides for training and education in the use of portable fire extinguisher, and Section 12-75-6(i)(3) addresses housekeeping in industrial plants. The former standard addresses the prevention of fires, while the latter standard addresses extinguishment of fires. We do not consider these to be similar or related hazards so as to mandate grouping.

(a). The characterization of the alleged violation of Sections 12-63-4(g)(2) and 12-75-6(i)(3) as "serious" is inappropriate. Under the FOM, a serious violation exists if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use.

Respondent's employees were not expected to use a fire extinguisher, had not been required to extinguish a fire in the past, and were not expected to extinguish one in the future. Respondent's employees had been instructed to leave the premises in case of a fire. The second violation alleged in Citation #1 was acknowledged by Respondent; however, it was not shown that there were combustible rags in the container. Under either standard, a serious violation does not exist. Accordingly, we conclude that

the proper characterization of the violations in Citation #1 is general.

(b). Having characterized both violations in Citation #1 as general, we conclude that no penalty is warranted.

2. Respondent acknowledged a violation of Standard Section 12-72-3(c)(1), which reads in relevant part:

> (1) Every open-sided floor or platform 4 feet above adjacent floor or ground level shall be guarded by a standard railing . . . on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder.

Respondent immediately abated the violation of Standard Section 12-72-3(c)(1), and in so doing, expended $530.00. Accordingly, we conclude that the proposed $750.00 penalty should be reduced by the amount of the cost of abating the violation.

3. Respondent acknowledged a violation of Standard Section 12-203-5(a), which reads in relevant part:

> (a) Employers shall develop and implement a written hazard communication program for their workplaces which at least describes how the criteria specified in sections 12-203-6, 7 and 8 for forms of warning such as labels, material safety data sheets, and employee information and training shall be met.

The record before us indicates, however, that Chrome Yellow was not used in Respondent's operations, and that according to the Aeroflex MSDS, Aeroflex did not contain TCE. Further, Drager Tube Readings showed no indication of TCE. Accordingly, we

conclude that the proper characterization of the violation of Section 12-203-5(a) is general.

(a) Having characterized the violation in Citation #3 as general, we conclude that no penalty is warranted.

4. Respondent accepted Complainant's offer to reclassify the violation of Standard Section 12-203-6(e)(1) as "general." Accordingly, the issues of characterization of the violation and the appropriate penalty are no longer before the Board.

5. Complainant alleges a violation of Standard 12-203-7(m), which reads in relevant part:

> (m) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work areas.

In order to establish a violation of Standard 12-203-7(m), Complainant must prove: (1) the standard applies; (2) there was a failure to comply; (3) an employee had access to the violative condition; and (4) the employer knew of or should have known of the condition with the exercise of due diligence.

Respondent was not required to have MSDSs for Chrome Yellow and Aeroflex, because Chrome Yellow was not used in Respondent's operations, and Aeroflex's MSDS and labels did not identify it as containing TCE. Therefore, there was no violation

for failing to have MSDSs for either product. Further, Drager Tube Readings showed no indication of TCE.

For the foregoing reasons, Complainant has not proven that Section 12-203-7(m) applies. Accordingly, we conclude that Respondent did not violate Standard Section 12-203-7(m), and that no penalty should have been proposed.

6. Complainant alleges a violation of Section 12-203-8(c)(2), which reads in relevant part:

> (c) Employee training shall include at least:
>
> (2) The physical and health hazards of the chemicals in the work area.

In order to establish a violation of Standard 12-203-8(c)(2), Complainant must prove the same elements identified in paragraph 5 above.

The inclusion of physical and health hazards of Chrome Yellow and Aeroflex in employee training was not required, because Chrome Yellow was not used in Respondent's operations, and the Aeroflex MSDS did not indicate Aeroflex as containing TCE. Further, Drager Tube Readings showed no indication of TCE.

Complainant has not proven that Section 12-203-8(c)(2) applies. Accordingly, we conclude that Respondent did not violate Standard Section 12-203-8(c)(2), and that no penalty should have been proposed.

ORDER

The Citations and Notification of Penalty, relating to Standards Section 12-63-4(g)(2) and 12-75-6(i)(3), 12-72-3(c)(1),

12-203-5(a), and 12-203-6(e)(1), are hereby amended in accordance with the foregoing findings of fact and conclusions of law. Respondent is ordered to pay to the Department of Labor and Industrial Relations $220.00, for violation of Standard 12-72-3(c)(1).

The Citations and Notification of Penalty, relating to Standards Section 12-203-7(m) and 12-203-8(c)(2), are hereby dismissed in accordance with the foregoing findings of fact and conclusions of law.

Dated: Honolulu, Hawaii, JAN 31 1996.

FRANK YAP, JR., Chairman

CAROL K. YAMAMOTO, Member

CHARLES T. AKAMA, Member

Steve Miyasaka
for Complainant

Harold Barks
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.