LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. ALBERT C. KOBAYASHI, INC., Respondent.	CASE NO. OSAB 94-023(M) (OSHCO ID J5687) (Inspection #103852323)

DECISION AND ORDER

This occupational safety and health case is before the Board on a notice of contest by Respondent, ALBERT C. KOBAYASHI, INC., from two Citations and Notifications of Penalty issued by Complainant, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, on January 20, 1994.

The issues to be determined are:

a. Whether Respondent violated Standard §12-115-1(d).

   (1) If so, is the characterization of the violation as "repeat" appropriate.

   (2) If so, is the imposition and amount of the proposed $7,500.00 penalty appropriate.

b. Whether Respondent violated Standard §12-141-6(b)(2)(B)(x).

   (1) If so, is the characterization of the violation as "repeat" appropriate.

   (2) If so, is the imposition and amount of the proposed $200.00 penalty appropriate.

On August 16, 1995, the Board granted Respondent's motion in limine in part, and excluded from the record the OSHA-168 report, as attached to Complainant's attorney's letter dated

March 16, 1995, and photographs taken during the inspection which were not part of the Board's file.

For the reasons stated below, we reverse and vacate the Citation and Notification of Penalty for Standard §12-115-1(d) and affirm the Citation and Notification of Penalty for Standard §12-141-6(b)(2)(B)(x).

FINDINGS OF FACT

1. On November 17, 1993, Complainant's compliance officer, Eric Jowell, inspected Respondent's jobsite at the Iao Parkside project in Wailuku, Hawaii. Respondent was the general contractor of the project, which involved the construction of townhouses on a three-acre site. Buildings #2 and #8 were part of the jobsite. Mr. Jowell was accompanied during the inspection by Earl Miyahira, Respondent's job superintendent.

2. Because Mr. Jowell died before trial, his immediate supervisor, Mr. Robert Cole, testified at the hearing. Although Mr. Cole had not visited the jobsite, he had personal knowledge about the case because he participated in an informal conference, reviewed the file, including Mr. Jowell's notes and reports, as well as photographs taken during the inspection, and discussed the inspection and citations with Mr. Jowell.

3. During his inspection, Mr. Jowell observed that Respondent had left scrap lumber, equipment, and miscellaneous materials around Building #2. Mr. Jowell also observed an extension cord that stretched across a roadway, unprotected from vehicular traffic, in an area fronting Building #8.

4. The extension cord was not connected to a power source. According to Mr. Cole, the hazard was that the cord could be damaged by vehicular traffic. Mr. Jowell told Mr. Cole that there was traffic going across the extension cord.

5. Based on Mr. Jowell's inspection, Respondent was cited on January 20, 1994, for two separate violations of the Occupational Safety and Health Standards, Hawaii Administrative Rules: an alleged "repeat" violation of Standard §12-115-1(d)[1], for which it was assessed a proposed $7,500.00 penalty, and an alleged "repeat" violation of Standard §12-141-6(b)(2)(B)(x)[2], for which it was assessed a proposed $200.00 penalty.

6. According to Mr. Miyahira, Respondent was in the process of clean-up in the area where the housekeeping violation had allegedly occurred. Four workers were assigned to clean out Building #2. Mr. Miyahira told Mr. Jowell that the workers were discarding debris/materials from the second floor to the ground floor, where it would be removed shortly thereafter. We credit Mr. Miyahira's testimony.

7. The clean-up work performed in the area where the housekeeping violation was alleged to have occurred was completed by the end of the work day.

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[1]This housekeeping standard provides that "[p]ersonnel shall not leave equipment, tools or material on the floor or ground in walking areas where they may constitute a tripping hazard, even for a short time, unless warning signs, barricades, and warning lights are provided."

[2]This electrical standard provides that "[f]lexible cords and cables shall be protected from damage such as sharp corners and projections. . . ."

8. Mr. Miyahira noted that when he and Mr. Jowell first passed through Building #8, there was no extension cord in the area. When they resumed the walk-around some time later, however, Mr. Miyahira saw the cord across the road and determined that it did not belong to Respondent. Mr. Miyahira did not say if the cord was promptly removed and discarded.

9. Respondent does not dispute that it had previously violated Standard §12-141-6(b)(2)(B)(x) in March 1991, or that a final order had been issued for such violation before the date of the alleged repeated violation.

10. Standard §12-141-6(b)(2)(B)(x) is a specific standard because it designates a specific means of preventing a hazard.

11. Respondent has not presented evidence to show that the imposition and amount of the proposed $200.00 penalty for the alleged repeated violation of Standard §12-141-6(b)(2)(B)(x) was inappropriate.

CONCLUSIONS OF LAW

1. We conclude that Respondent did not violate Standard §12-115-1(d), based on Mr. Miyahira's testimony that the nature of the work being performed at Building #2, where the violation had allegedly occurred, was clean-up. Four workers were assigned to clean out Building #2, in which debris was taken from the interior of the unit and deposited in a designated area for removal. No construction activity was occurring in the area, because Respondent was in the process of cleaning up. By the end

of the work day, the debris was removed. There was no hazard to the other workers at the jobsite, since the violation was alleged to have occurred at Building #2.

Having concluded that Standard §12-115-1(d) was not violated, we do not reach the remaining sub-issues.

2. We conclude that Respondent violated Standard §12-141-6(b)(2)(B)(x), because the extension cord was not protected from damage by vehicular traffic. While Mr. Miyahira did not see the cord initially, he did not indicate that upon seeing the cord later, he took action to remove and discard it. The fact that the cord was not "live" is irrelevant, since the standard does not require the cord to be connected to a power source in order for a violation to have occurred. The purpose of the standard is to safeguard workers against any hidden damage to electrical cords and cables.

3. Having concluded that Respondent violated Standard §12-141-6(b)(2)(B)(x), we must now determine whether the characterization of the violation as "repeat" was appropriate.

We addressed the issue of what constitutes a "repeat" violation in Director, DLIR v. Kiewit Pacific Co., OSAB 94-009 (March 1, 1996)(citing Potlatch Corporation, 7 OSHC 1061, 1979 OSHD ¶ 23,294 (1979)). Under Potlatch, 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. Furthermore, the government is required to establish a prima facie case of substantial similarity, at which point the

burden shifts to the employer to rebut the government's prima facie case. In Potlatch, the government was considered to have made a prima facie showing of substantial similarity, since the prior and present violations involved the same specific standard and the earlier citation had become a final order prior to the date of the alleged repeated violation.

Based on the foregoing, we conclude that Complainant has established a prima facie case of substantial similarity, because Respondent has violated §12-141-6(b)(2)(B)(x), the same specific standard for which it had been previously cited, and the prior citation had become final prior to the date of the alleged repeated violation.

Respondent, however, has failed to rebut Complainant's prima facie case of substantial similarity. Respondent has not presented sufficient evidence to show that the prior and present violations were dissimilar.

Therefore, at the time of Respondent's alleged repeated violation of Standard §12-141-6(b)(2)(B)(x), there was a final order against Respondent for a substantially similar violation. Accordingly, we conclude that Respondent's present violation of Standard §12-141-6(b)(2)(B)(x) was properly characterized as a "repeat" violation.

4. Since Respondent has not presented any evidence to the contrary, we conclude that the imposition and amount of the proposed $200.00 penalty for its repeat violation of Standard §12-141-6(b)(2)(B)(x), is appropriate.

ORDER

1. The Citation and Notification of Penalty for Standard §12-115-1(d) is vacated.

2. The Citation and Notification of Penalty for Standard §12-141-6(b)(2)(B)(x) is affirmed.

Dated: Honolulu, Hawaii, MAY 22 1996.

FRANK YAP, JR., Chairman

CAROL K. YAMAMOTO, Member

CHARLES T. AKAMA, Member

Leo Young
Deputy Attorney General
for Complainant

Janice Teramae/Gary Kam
for Respondent

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.

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