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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

DIRECTOR, DEPARTMENT OF LABOR)	CASE NO. OSAB 95-019
AND INDUSTRIAL RELATIONS,)	(OSHCO No. N7784)
Complainant,)	(Report No. 1200641170)
)	
vs.)	
)	
ALII TERMITE & PEST CONTROL,)	
Respondent.)	
)	

DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest, filed on June 14, 1996 by ALII TERMITE & PEST CONTROL ("Respondent"), to contest certain Citations and Notifications of Penalty issued to it by the Director of Labor and Industrial Relations, via the Division of Occupational Safety and Health ("Complainant").

At trial, Complainant withdrew Citation #2, Item 2a, for a violation of 29 C.F.R. §1910.132(d)(1).

The issues to be determined on appeal are:

Citation #1; Item 1a

(1) Whether Respondent violated §12-64.1-2(b)(2) of the Standards;

Citation #1; Item 1b

(2) Whether Respondent violated §12-64.1-2(f)(3) of the Standards;

a. If so, is the characterization of the violation as "serious" appropriate; if not, what is the appropriate characterization;

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b. If so, was the imposition and amount of the proposed \$2,250.00 penalty appropriate;

Citation #2; Item 1a

(3) Whether Respondent violated §12-64.1-2(g)(4) of the Standards;

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

Citation #2; Item 1b

(4) Whether Respondent violated §12-64.1-2(g)(2)(B) of the Standards;

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

Citation #2; Item 1c

(5) Whether Respondent violated §12-64.1-2(g)(2)(D) of the Standards;

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

Citation #2; Item 2b

(6) Whether Respondent violated 29 C.F.R. §1910.132(d)(2);

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

Citation #2; Item 3

(7) Whether Respondent violated 29 C.F.R. §1910.1200(e)(1);

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

Citation #2; Item 4

(8) Whether Respondent violated §12-202-1(e) of the Standards;

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

For the reasons stated below, we affirm Citations #2, Items 1c, 2b, 3, and 4. We vacate Citation #1, Items 1a and 1b, and Citation #2, Items 1a and 1b.

FINDINGS OF FACT

1. Before February 2, 1996, Alii Termite and Pest Control ("Alii") operated an extermination or fumigation business. In or around August of 1994, Servicemaster Consumer Services, Inc. ("Servicemaster"), who is the parent corporation of Terminix International Co. ("Terminix"), purchased Alii's tradename and most of its assets. After the purchase, Alii ceased operations and closed its business in or around February of 1996. Servicemaster, via Terminix, became the owner and operator of the extermination business, but continued to use the Alii tradename.

2. Between February 11, 1995 and March 7, 1995, Complainant sent an inspector to inspect Alii's work premises and job sites.

3. At the time of the inspections, Terminix was doing business as Alii.

4. Because Respondent was in the fumigation business, its employees were exposed to toxic materials or harmful physical agents, such as sulfuro chloride, an active ingredient that is used for tent fumigation of buildings or structures.

5. During the 1995 inspections, Complainant's inspector requested to see Respondent's written respiratory protective program and written procedures for the use of respirators. In response to the inspector's request for its written respiratory protective program and written procedures for the use of respirators, Respondent produced documents prepared by Terminix that purported to be the documents requested by Complainant. Complainant refused to accept the documents because they were identified as Terminix documents and did not bear the name of Alii on them. There is no evidence that the documents produced by Respondent were deficient or did not comply with the Standards requiring a written respiratory protective program and written procedures for the use of respirators.

6. Respondent did not keep or maintain written certifications of the performance of workplace hazard assessments.

7. During the 1995 inspections, Complainant's inspector requested to see Respondent's written hazard communication program. In response, Respondent presented the inspector with certain documents that purported to be the documents being requested. According to the inspector's notes, she reviewed the documents and determined that they included

MSDSs (material safety data sheets) and training records, but did not comply with the requirements of the standard requiring certification of the performance for a workplace hazard assessment and a hazard communication program.

8. According to the notes of the inspector and testimony of Russell Charlton, Respondent did check or inspect its self-contained breathing apparatuses ("SCBAs"), but did not keep a log or records of such inspections.

9. Complainant did not present any evidence to show that Respondent did not inspect or check its SCBAs on a monthly basis.

10. Respondent did not keep any records of inspections for any of its respirators.

11. Respondent measured and monitored employee exposure to toxic materials or harmful physical agents, but did not keep a log or record the levels of exposure.

12. Complainant presented no evidence to show that Respondent improperly replaced or repaired its respirators, in violation of §12-64.1-2(g)(4).

13. Complainant presented evidence that Respondent may have failed to develop a program for the maintenance and care of respirators, as required by §12-64.1-2(g)(1), but Respondent was not cited for a violation under that Standard.

CONCLUSIONS OF LAW

1. We conclude that Respondent did not violate §12-64.1-2(b)(2) of the Standards. This section requires

Respondent to establish and maintain a respiratory protective program. Complainant was presented with Terminix documents that purported to satisfy this section of the Standards. Since Alii was an operation of Terminix at the time of the inspection, Complainant should have accepted and reviewed the Terminix documents to determine if they complied with §12-64.1-2(b)(2). Because the Terminix documents were rejected by Complainant and there is no evidence that Alii did not comply with §12-64.1-2(b)(2), we conclude that there is no violation under this section.

2. We conclude that Respondent did not violate §12-64.1-2(f)(3) of the Standards. This section requires Respondent to prepare written procedures covering the safe use of respirators. Complainant was presented with Terminix documents that purported to satisfy this section of the Standards. Since Terminix was the owner and operator of the fumigation business at the time of the inspection, Complainant should have accepted and reviewed the Terminix documents to determine if they complied with §12-64.1-2(f)(3). Because the Terminix documents were rejected by Complainant and there is no evidence that Alii did not comply with §12-64.1-2(f)(3), we conclude that there is no violation under this section.

Having determined that Respondent did not violate §12-64.1-2(f)(3), we do not reach the issues of characterization and amount of penalty.

3. We conclude that Respondent did not violate §12-64.1-2(g)(4) of the Standards. This section relates to the replacement and repair of respirators, and states as follows:

Replacement or repairs [of respirators] shall be accomplished only by experienced persons with parts designed for the respirator. No attempt shall be made to replace components or to make adjustment or repairs beyond the manufacturer's recommendations. Reducing or admission valves or regulators shall be returned to the manufacturer or to a trained technician for adjustment or repair.

Complainant did not present any evidence that Respondent improperly replaced or repaired its respirators. Complainant presented evidence that Respondent may not have developed or maintained a program for the care and maintenance of respirators, as required by §12-64.1-2(g)(1), but did not cite Respondent for a violation of that section. Respondent was cited for a violation of §12-64.1-2(g)(4).

Accordingly, we conclude that there is no violation of §12-64.1-2(g)(4).

Having concluded that there is no violation of §12-64.1-2(g)(4), we do not reach the issue of characterization of the violation.

4. We conclude that Respondent did not violate §12-64.1-2(g)(2)(B). This section requires Respondent to inspect SCBAs on a monthly basis. According to the inspection notes and testimony of Russell Charlton, Respondent did inspect its SCBAs but did not keep a log or record of its inspections. Since Respondent did inspect its SCBAs, and there is no evidence that

it did not do so on a monthly basis, we conclude that there is no violation of this section.

Having concluded that there is no violation of §12-64.1-2(g)(2)(B), we do not reach the issue of characterization of the violation.

5. We conclude that Respondent violated §12-64.1-2(g)(2)(D). This section requires Respondent to keep a record of inspection dates and findings for respirators maintained for emergency use. Respondent admitted to Complainant's inspector that it did not keep records of inspections for any respirators.

a. We conclude that the characterization of this violation as "general" was appropriate.

6. We conclude that Respondent violated 29 C.F.R. §1910.132(d)(2). This section requires Respondent to "verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluation; the person certifying that the evaluation has been performed; the date of the hazard assessment; and, which, identifies the document as a certification of hazard assessment."

Respondent did not verify the performance of a required workplace hazard assessment in the manner provided in 29 C.F.R. §1910.132(d)(2).

a. We conclude that the characterization of Respondent's violation of 29 C.F.R. §1910.132(d)(2) as "general" is appropriate.

7. We conclude that Respondent violated 29 C.F.R. §1910.1200(e)(1). This section requires Respondent to develop, implement, and maintain a written hazard communication program.

At the time of the inspection, Respondent presented the inspector with documents that purported to comply with this section of the Standards. According to the inspector's notes, the documents presented by Respondent were reviewed. The inspector determined that the documents presented by Respondent included MSDSs and training records, but did not comply with the requirements of 29 C.F.R. §1910.1200(e)(1).

a. We conclude that the characterization of Respondent's violation of 29 C.F.R. §1910.1200(e)(1) as "general" is appropriate.

8. We conclude that Respondent violated §12-202-1(e) of the Standards. Respondent may have measured and monitored employee exposure to toxic materials or harmful physical agents, but did not keep a log or record the levels such exposure.

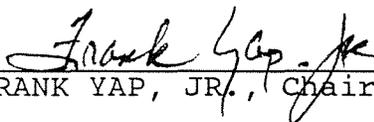
a. We conclude that the characterization of Respondent's violation of §12-202-1(e) as "general" is appropriate.

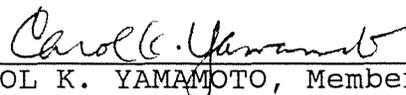
ORDER

Complainant's Citation #1, Items 1a and 1b, for violations of §12-64.1-2(b)(2) and §12-64.1-2(f)(3) shall be

vacated. Complainant's Citation #2, Items 1a and 1b, for violations of §12-64.1-2(g)(4) and §12-64.1-2(g)(2)(B) shall be vacated. Complainant's Citation #2, Items 1c, 2b, 3, and 4, for violations of §12-64.1-2(g)(2)(D), 29 C.F.R §1910.132(d)(2), 29 C.F.R. §1910.1200(e)(1), and §12-202-1(e) are affirmed.

Dated: Honolulu, Hawaii, SEP 25 1997.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member

EXCUSED
VICENTE F. AQUINO, Member

Leo B. Young, Esq.,
For Complainant

Jeffrey S. Harris, Esq.,
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.