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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

DIRECTOR, DEPARTMENT OF LABOR)	CASE NO. OSAB 94-029
AND INDUSTRIAL RELATIONS,)	(OSHCO No. R2407)
Complainant,)	(Inspection #120634191)
)	
vs.)	
)	
TERMINIX INTERNATIONAL COMPANY,)	
Respondent.)	
)	

FILED
 SEP 25 11:05
 HAWAII

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a written Notice of Contest filed by TERMINIX INTERNATIONAL, COMPANY ("Terminix") 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").

The issues to be determined on appeal are:

Citation #1, Item 1a

1. Whether Respondent violated §12-64-6(f)(2)(B) of the Hawaii Occupational Safety and Health Standards ("Standards");

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

Citation #1, Item 1b

2. Whether Respondent violated §12-64-6(b)(9) of the Standards;

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



Citation #3, Item 3

3. Whether Respondent violated §12-64-6(f)(2)(D) of the Standards; and

(a) If so, is the characterization of the violation as "general" appropriate; and

Citation #3, Item 4

4. Whether Respondent violated §12-64-6(f)(5) of the Standards;

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

For the reasons stated below, we affirm Citation #3, Item 3, for violation of §12-64-6(f)(2)(D) of the Standards. We vacate Citation #1, Items 1a and 1b, for violations of §12-64-6(f)(2)(B) and §12-64-6(b)(9) and Citation #3, Item 4 for violation of §12-64-6(f)(5).

FINDINGS OF FACT

1. Complainant's inspector inspected Respondent's job sites on December 9, 1993 and December 21, 1993.

2. During the inspections, Complainant's inspector determined that Respondent did not fully charge a self-contained breathing apparatus ("SCBAs") prior to its use.

3. Complainant did not present evidence to show that Respondent did not fully charge its SCBAs when testing the respirators' regulators during its monthly inspections of the SCBAs.

4. At the time of Complainant's inspections, Respondent used Scott Air-Pak IIA SCBAs in its business. There is no evidence that the SCBAs used by Respondent were not approved or accepted respirators.

5. Respondent advised the inspector that it routinely checked or inspected its SCBAs, but did not keep or was unable to produce to the inspector any written records or logs to evidence inspections of its respirators.

6. The fact that Respondent's SCBAs may not have been fully charged prior to each use is not evidence that the respirators were not approved or accepted respirators.

7. During the inspections, Complainant's inspector found two SCBAs that were stored outside of their carrying cases, unprotected from dust, sunlight, and chemicals. These two SCBAs were awaiting repairs.

CONCLUSIONS OF LAW

1. Section 12-64-6(f)(2)(B) provides as follows:

Self-contained breathing apparatus shall be inspected monthly. Air and oxygen cylinders shall be fully charged according to the manufacturer's instructions. It shall be determined whether or not the regulator and warning devices function properly.

Complainant contends that Respondent violated this Standard because it failed to fully charge its SCBAs prior to each use. We disagree.

This Standard for which Respondent was cited regulates the maintenance and care of respirators, not its use. We read §12-64-6(f)(2)(B) to require employers to conduct monthly

inspections of SCBAs and to have the SCBAs fully charged according to manufacturer's instructions when testing the regulators at the time of the monthly inspections.

Accordingly, we conclude that Respondent did not violate §12-64-6(f)(2)(B).

Having concluded that Respondent did not violate §12-64-6(f)(2)(B), we do not reach the issue of characterization of violation.

2. Section 12-64-6(b)(9) provides as follows:

Approved or accepted respirators shall be used when they are needed. The respirator furnished shall provide adequate respiratory protection against the particular hazard for which it is designed in accordance with standards established by competent authorities (NIOSH is recognized as an agency competent to test and approve this equipment.)

Complainant contends that Respondent did not use approved respirators, in violation of §12-64-6(b)(9), because it did not fully charge its SCBAs before each use. We disagree.

There is no evidence that Respondent did not use approved respirators in its business. The fact that Respondent may not have fully charged its respirators before each use is not evidence that the SCBAs were not approved under §12-64-6(b)(9). This Standard does not predicate approval of SCBAs upon the amount of air that is in the respirator.

Accordingly, we conclude that there is no violation of §12-64-6(b)(9).

Having concluded that there is no violation of §12-64-6(b)(9), we do not reach the issue of characterization of the violation.

3. Section 12-64-6(2)(f)(D) requires Respondent to keep a record of inspection dates and findings for respirators maintained for emergency use. Respondent was unable to produce any records of inspections for its respirators.

Accordingly, we conclude that Respondent violated §12-64-6(2)(f)(D).

a. We further conclude that the characterization of Respondent's violation of §12-64-6(2)(f)(D) as "general" was appropriate.

4. After inspection, cleaning, and necessary repair, respirators must be properly stored in the manner described in §12-64-6(f)(5) of the Standards.

We conclude that Respondent did not violate §12-64-6(f)(5), because the respirators that Complainant had determined were not properly stored were awaiting repairs. Accordingly, since the repairs had not yet been performed, the storage requirements of §12-64-6(f)(5) did not apply to those respirators.

Having determined that Respondent did not violate §12-64-6(f)(5), we do not reach the issue of characterization of the violation.

ORDER

We hereby affirm Citation #3, Item 3, for violation of §12-64-6(f)(2)(D) of the Standards. We vacate Citation #1, Items 1a and 1b, for violations of §12-64-6(f)(2)(B) and §12-64-6(b)(9), and Citation #3, Item 4 for violation of §12-64-6(f)(5).

Dated: Honolulu, Hawaii, SEP 25 1997.

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

Carol K. Yamamoto
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.

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