LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. CUNNINGHAM CABINETS, LTD., Respondent.	CASE NO. OSAB 95-016 (OSHCO No. H2733) (Report No. 120639174)

DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest filed by CUNNINGHAM CABINETS, LTD. ("Respondent"), to contest Notifications of Failure to Abate Alleged Violations as well as Citations and Notifications of Penalty, issued by the DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS, via its Division of Occupational Safety and Health ("Complainant"), on February 10, 1995.

The issues to be determined are:

(1) Whether Respondent failed to abate a violation of Standard §12-75-11(d)(2).

   (a) If so, was the imposition and amount of the proposed $12,000.00 penalty appropriate.

(2) Whether Respondent failed to abate a violation of Standard 29 CFR §1910.1200(e)(1).

   (a) If so, was the imposition and amount of the proposed $11,200.00 penalty appropriate.

(3) Whether Respondent failed to abate a violation of Standard §12-73-2(e)(4).

   (a) If so, was the imposition and amount of the proposed $12,000.00 penalty appropriate.

(4) Whether Respondent failed to abate a violation of Standard §12-75-11(a)(9).

(a) If so, was the imposition and amount of the proposed $12,000.00 penalty appropriate.

(5) Whether Respondent violated Standard §12-89-6(b)(1).

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

(b) If so, was the imposition and amount of the proposed $1,000.00 penalty appropriate.

(6) Whether Respondent violated Standard §12-89-6(g)(2)(C).

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

(b) If so, was the imposition and amount of the proposed $1,000.00 penalty appropriate.

(7) Whether Respondent violated Standard §12-89-4(b)(2).

(a) If so, is the characterization of the violation as "repeat" appropriate. If not, what is the appropriate characterization.

(b) If so, was the imposition and amount of the proposed $2,000.00 penalty appropriate.

(8) Whether Respondent violated Standard §12-89-5(e)(1)(D).

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

We affirm the Notifications of Failure to Abate Alleged Violations as to the uncorrected violations of Standards §12-75-11(d)(2), 29 CFR §1910.1200(e)(1), §12-73-2(e)(4), and §12-75-11(a)(9), and the amounts of the additional proposed penalties. We further affirm the Citations and Notifications of

Penalty as to the violations of Standards §12-89-6(b)(1) [Citation 1, Item 1], §12-89-6(g)(2)(C) [Citation 1, Item 2], §12-89-4(b)(2) [Citation 2, Item 1] and §12-89-5(e)(1)(D) [Citation 3, Item 1], and the characterizations of such violations, but modify the Citations and Notifications of Penalty as to the amounts of the proposed penalties.

FINDINGS OF FACT

1. Respondent has 18 employees and makes custom cabinetry for residential and commercial use. The fabrication process includes laminating plywood or pressboard and painting the finished products. Spraying work is performed in a spray booth.

2. On October 19, 1994, Complainant inspected Respondent's workshop at 1911 Kalani Street in Honolulu.

3. As a result of this inspection, Complainant issued Citations and Notifications of Penalty on November 14, 1994, alleging twelve violations of the safety and health standards, and assessed proposed penalties totalling $2,175.00.[1]

Because Respondent did not request extensions of the abatement dates or contest the citations within the time period specified by Hawaii Revised Statutes (HRS) §396-11, the citations became a final order of the Director on December 5, 1994.

4. On January 6, 1995, after all the abatement dates had passed, Complainant conducted a follow-up inspection.

---

[1]Three Citations and Notifications of Penalty were issued: Citation 1, Items 1-3, 4a, 4b, and 5-6, Citation 2, Item 1, and Citation 3, Items 1-4.

5. As a result of the subsequent inspection, Complainant issued Notifications of Failure to Abate Alleged Violations on February 10, 1995 (February 10, 1995 Notifications), alleging that four of the twelve violations had not been abated, and assessed additional proposed penalties totalling $47,200.00.

HRS §396-10 allows for the imposition of a daily penalty for the failure to abate a violation.[2] Pursuant to the statute and its field operations manual, Complainant assesses a minimum gravity-based penalty of $1,000.00 for each day that the violation continues unabated after the abatement date, for a maximum of 30 days, regardless of the characterization of the hazardous condition.[3] The maximum daily penalty is $7,000.00.

6. As a result of the subsequent inspection, Complainant also issued Citations and Notifications of Penalty on February 10, 1995 (February 10, 1995 Citations), alleging new violations.[4]

7. On March 2, 1995, Respondent timely filed its written Notice of Contest. The contested matters are set forth

---

[2]HRS §396-10(d) provides that "[e]ach day a violation continues shall constitute a separate violation except that during an abatement period only, no additional penalty shall be levied against the employer." See also HRS §§396-10(b) and (c).

[3]The number of days are counted on a calendar basis from the date following the abatement date up to, but not including, the date of the re-inspection.

[4]Three Citations and Notifications of Penalty were issued: Citation 1, Items 1-2, Citation 2, Item 1, and Citation 3, Item 1.

below, with the February 10, 1995 Notifications discussed first, followed by the February 10, 1995 Citations.

The February 10, 1995 Notifications

Storage of Flammable and Combustible Liquids

8. At the initial inspection, Complainant's inspector observed containers of flammable or combustible liquids, such as thinner, stored in the spray booth in a quantity exceeding the supply required for spraying operations for one day.

9. Under Standard §12-75-11(d)(2), Respondent was required to keep in the vicinity of its spraying operations only that quantity of flammable or combustible liquids which was necessary for its daily spraying operations.

10. If excessive amounts of flammable liquids are stored in the spray booth, there is an increased fire hazard.

11. As a result of the initial inspection, Respondent was cited for noncompliance with Standard §12-75-11(d)(2) [Citation 1, Item 2]. Respondent was required to abate the alleged violation by November 25, 1994.

12. At the re-inspection, the identical hazardous condition was observed. Containers of flammable or combustible liquids, including paint and solvent, were stored in the spray booth in a quantity exceeding the supply necessary for spraying operations on a daily basis.

13. As a result of its alleged failure to abate the violation, Respondent was assessed an additional proposed penalty of $12,000.00.

14. Complainant's inspector testified about how the penalty was calculated. Because more than 30 days had passed after the abatement date at the time of the re-inspection, the unadjusted gravity-based penalty was $30,000.00 ($1,000.00/day x 30 days). This amount was reduced by 60% due to the size of Respondent's business, resulting in a final proposed penalty of $12,000.00.

Written Hazard Communication Program

15. At the initial inspection, Respondent failed to produce a written hazard communication program. Because its employees are exposed to hazardous chemicals in the workplace, Respondent was required to develop, implement, and maintain a written hazard communication program, pursuant to Standard 29 CFR §1910.1200(e)(1).

16. The fact that Respondent may have had some material safety data sheets for the chemicals used in its workplace does not meet the requirements of the standard.

17. In the absence of a written hazard communication program, Respondent's employees would not be fully informed about the health effects of hazardous chemicals found in the workplace or properly trained to handle potential overexposure to hazardous chemicals.

18. As a result of the initial inspection, Respondent was cited for noncompliance with Standard 29 CFR §1910.1200(e)(1) [Citation 1, Item 4a]. Respondent was required to abate the alleged violation by December 8, 1994.

19. At the re-inspection, Respondent again failed to produce a written hazard communication program.

20. As a result of its alleged failure to abate the violation, Respondent was assessed an additional proposed penalty of $11,200.00.

21. Complainant's inspector testified about how the penalty was calculated. Because 28 days had elapsed after the abatement date at the time of the re-inspection, the unadjusted gravity-based penalty was $28,000.00 ($1,000.00/day x 28 days). This amount was reduced by 60% due to the size of Respondent's business, resulting in a final proposed penalty of $11,200.00.

Posting of Maximum Safe Load Limits of Floors Within Buildings

22. At the initial inspection, Complainant's inspector observed that the roof above the bookkeeper's office was used as a storage area for a large air compressor tank and cabinets on two pallets. The roof was approximately five feet above ground or grade level.

23. No sign was conspicuously posted, stating the maximum safe load limit of the roof/floor above grade over the bookkeeper's office, as required by Standard §12-73-2(e)(4).

24. If the maximum safe load limit is not posted, the structure could be overloaded, causing it to collapse.

25. As a result of the initial inspection, Respondent was cited for noncompliance with Standard §12-73-2(e)(4) [Citation 3, Item 3]. Respondent was required to abate the alleged violation by November 25, 1994.

26. At the re-inspection, the identical hazardous condition was observed. The air compressor tank and cabinets were still stored on two pallets on the roof/floor above grade over the bookkeeper's office. No maximum safe load limit sign was posted.

27. As a result of its alleged failure to abate the violation, Respondent was assessed an additional proposed penalty of $12,000.00.

28. Complainant's inspector testified about how the penalty was calculated. Because more than 30 days had elapsed after the abatement date at the time of the re-inspection, the unadjusted gravity-based penalty was $30,000.00 ($1,000.00/day x 30 days). This amount was reduced by 60% due to the size of Respondent's business, resulting in a final proposed penalty of $12,000.00.

Housekeeping of Spray Booths

29. At the initial inspection, Complainant's inspector observed stored wood and a wood finishing area up against one of the outer walls of Respondent's spray booth. The stored wood and wood finishing area were within three feet of the wall.

30. Respondent's spray booth lacked a clear space of at least three feet on all sides, free from storage and combustible construction, as required by Standard §12-75-11(a)(9).

31. If the required clearance around the perimeter of the spray booth is not maintained, combustible material may accumulate, resulting in an increased fire hazard.

32. As a result of the initial inspection, Respondent was cited for noncompliance with Standard §12-75-11(a)(9) [Citation 3, Item 4]. Respondent was required to abate the alleged violation by November 25, 1994.

33. At the re-inspection, the identical hazardous condition was observed. Wood boards and a cart of lumber and wooden cabinets were stacked against the same outer wall of the spray booth.

34. As a result of its alleged failure to abate the violation, Respondent was assessed an additional proposed penalty of $12,000.00.

35. Complainant's inspector testified about how the penalty was calculated. Because more than 30 days had elapsed after the abatement date at the time of the re-inspection, the unadjusted gravity-based penalty was $30,000.00 ($1,000.00/day x 30 days). This amount was reduced by 60% due to the size of Respondent's business, resulting in a final proposed penalty of $12,000.00.

36. Respondent has not asserted in defense of its alleged failure to abate the four violations of the safety and health standards, that the hazardous conditions were corrected by the time of the re-inspection, that it prevented the exposure of its employees to the violative conditions, or that the conditions for which it was cited were, in fact, not violative of the standards at the time of the initial inspection or at the time of the re-inspection.

The February 10, 1995 Citations

Unused Openings in Cabinets, Boxes, and Fittings

37. On January 6, 1995, Complainant's inspector observed, in plain view, a metal junction box that appeared to be in use. Any unused openings in the junction box were required to be effectively closed.

38. The metal junction box had an unused, open knockout hole that was not effectively closed.

39. The opening in the metal junction box was large enough for a person's finger or object to enter. If an employee were to come into contact with an exposed live wire, the employee could suffer electrical shock or burns.

40. Respondent, with the exercise of reasonable diligence, could have known about the presence of the open knockout hole in the metal junction box.

41. On February 10, 1995, Respondent was cited for a serious violation of Standard §12-89-6(b)(1) [Citation 1, Item 1], and was assessed a proposed penalty of $1,000.00.

42. Respondent has not presented any evidence to show that the characterization of the alleged violation as "serious" is inappropriate.

43. The reasonable likelihood of a person sticking an object into the opening of the metal junction box was remote.

Flexible Cords

44. On January 6, 1995, Complainant's inspector observed, in plain view, a flexible cord of a table saw that was

plugged into an electrical outlet. The cord, for which strain relief was required, was wound in such a manner that its outer covering had pulled away from the plug area, exposing insulated wires.

45. If an employee were to come into contact with an exposed live wire, the employee could suffer electrical shock or burns.

46. Respondent, through the exercise of reasonable diligence, could have known about the lack of adequate strain relief for the flexible cord.

47. On February 10, 1995, Respondent was cited for a serious violation of Standard §12-89-6(g)(2)(C) [Citation 1, Item 2], and was assessed a proposed penalty of $1,000.00.

48. Respondent has not presented any evidence to show that the characterization of the alleged violation as "serious" is inappropriate.

Use and Installation of Listed or Labeled Equipment

49. On January 6, 1995, Complainant's inspector observed a metal junction box on the floor of Respondent's workshop. The Underwriters Laboratory (UL) requires that this type of metal junction box be mounted to a permanent structure. All listed or labeled equipment must be used according to its instructions.

50. The metal junction box was not mounted to any permanent structure, as required by the UL.

51. On February 10, 1995, Respondent was cited for an alleged repeat violation of Standard §12-89-4(b)(2) [Citation 2, Item 1], and was assessed a proposed penalty of $2,000.00.

52. As a result of the October 14, 1994 inspection, Respondent had been cited for a violation of the same specific standard, when a mountable metal junction box was observed to be unmounted. Respondent did not contest the citation for that violation [Citation 1, Item 1],[5] which then became a final order of the Director on December 5, 1994.

53. While the junction box observed at the time of the re-inspection may not have been the same as the one observed previously, the hazardous condition presented was the same.

54. Respondent has not presented any evidence to show that the characterization of the alleged violation as "repeat" is inappropriate.

Overcurrent Devices

55. On January 6, 1995, Complainant's inspector observed stored items, including a large welding unit, in front of a circuit breaker panel. Overcurrent devices are required to be readily accessible to each employee or authorized building management personnel.

56. Because the stored items prevented access to the panel, the panel was not readily accessible to the employees or authorized building management personnel.

---

[5]That item of the November 14, 1994 Citation reflects that the violative condition was corrected by the specified abatement date.

57. Respondent's representative indicated that there was a main breaker located nearby that could be tripped in an emergency.

58. Respondent, with the exercise of reasonable diligence, could have known about the existence of the blocked access to the circuit breaker panel.

59. On February 10, 1995, Respondent was cited for a general violation of Standard §12-89-5(e)(1)(D) [Citation 3, Item 1]. No proposed penalty was assessed.

60. Respondent has not presented any evidence to show that the characterization of the alleged violation as "general" is inappropriate.

CONCLUSIONS OF LAW

1. The Board has not previously addressed the issue of failure to abate a violation. In the past, however, where applicable, we have looked to the decisions of the Occupational Safety and Health Review Commission for guidance in reviewing occupational safety and health cases before the Board. See Director of Labor and Industrial Relations v. Kiewit Pacific Co., OSAB 94-009 (March 1, 1996).

The Review Commission has stated that where there is no contest of the original citation and there is a re-inspection subsequent to the scheduled abatement date, a prima facie case of failure to abate is made upon a showing that: (1) the original citation has become a final order, and (2) the condition or hazard found upon re-inspection is the identical one for which

the employer was originally cited. York Metal Finishing Company, 1 OSHC 1655, 1656, 1973-1974 OSHD ¶17,633 (April 9, 1974); and Arvin Millwork Company, 2 OSHC 1056, 1057, 1973-1974 OSHD ¶18,159 (July 1, 1974).

An employer may rebut a prima facie case by showing that the condition was corrected, or, if not corrected, that the employer has prevented the exposure of its employees to the violative condition. A prima facie case may also be rebutted by a showing that the condition for which the employer was cited was, in fact, not violative either at the time of the original inspection or at the time of the re-inspection. Braswell Motor Freight Lines, Inc., 5 OSHC 1469, 1977-1978 OSHD ¶21,881 (May 19, 1977).

Because Respondent did not contest the original citations and the re-inspection occurred after the scheduled abatement dates, we can apply the analysis in York to issues #1 through #4 and determine whether a failure to abate a violation has been proven in this case.

We conclude that Respondent failed to abate a violation of Standard §12-75-11(d)(2), because at the time of the re-inspection, it continued to store flammable or combustible liquids in its spray booth in a quantity exceeding the supply required for its daily spraying operations. Complainant has established that the condition or hazard found upon re-inspection is the identical one for which Respondent was originally cited. Respondent has not presented any rebuttal evidence.

a. We conclude that the imposition and amount of the proposed $12,000.00 penalty was appropriate.

2. We conclude that Respondent failed to abate a violation of Standard 29 CFR §1910.1200(e)(1), because it still lacked a written hazard communication program at the time of the re-inspection. Complainant has established that the condition or hazard found upon re-inspection is the identical one for which Respondent was originally cited. Respondent has not presented any rebuttal evidence.

a. We conclude that the imposition and amount of the proposed $11,200.00 penalty was appropriate.

3. We conclude that Respondent failed to abate a violation of Standard §12-73-2(e)(4), because of its continued failure to post a maximum safe load limit sign for the roof/floor above grade over the bookkeeper's office at the time of the re-inspection. Respondent has not presented any rebuttal evidence.

a. We conclude that the imposition and amount of the proposed $12,000.00 penalty was appropriate.

4. We conclude that Respondent failed to abate a violation of Standard §12-75-11(a)(9), because at the time of the re-inspection, it continued to store combustible material within three feet of one of the sides of its spray booth. Complainant has established that the condition or hazard found upon re-inspection is the identical one for which Respondent was originally cited. Respondent has not presented any rebuttal evidence.

a. We conclude that the imposition and amount of the proposed $12,000.00 penalty was appropriate.

5. We conclude that Respondent violated Standard §12-89-6(b)(1). Under this standard, unused openings in cabinets, boxes, and fittings are required to be effectively closed. Respondent failed to comply with this standard, because the metal junction box in question had an unused, open knockout hole that was not effectively closed.

a. We conclude that the characterization of the violation as "serious" is appropriate, because there was a substantial probability that death or serious physical harm could have resulted, if an accident were to occur.

b. We conclude that the appropriate penalty is $25.00.

6. We conclude that Respondent violated Standard §12-89-6(g)(2)(C). This standard requires that strain relief on flexible cords be provided to prevent pull on the joints or terminal screws of the cords. Respondent failed to comply with this standard, because the flexible cord of the table saw lacked adequate strain relief. Because of the manner in which the cord was wound, its rubber covering had become frayed at the plug end, exposing the insulated wires.

a. We conclude that the characterization of the violation as "serious" is appropriate, because there was a substantial probability that death or serious physical harm could have resulted, if an accident were to occur.

b. We conclude that the appropriate penalty is $100.00.

7. We conclude that Respondent violated Standard §12-89-4(b)(2). Under this standard, listed or labeled equipment must be used in accordance with its instructions. Respondent failed to comply with this standard, because the metal junction box in question was not mounted to a wall or any other permanent structure, as required by its instructions.

a. We conclude that the characterization of the violation as "repeat" is appropriate, because, at the time of the alleged repeat violation, there was a final order against Respondent for a substantially similar violation. See Director of Labor and Industrial Relations v. Albert C. Kobayashi, Inc., OSAB 94-023(M) (May 22, 1996).

In this case, the requirement of substantial similarity has been met because the prior and present violations concern the same specific standard and Respondent has not presented any evidence to rebut the showing of substantial similarity.

b. We conclude that the appropriate penalty is $200.00.

8. We conclude that Respondent violated Standard §12-89-5(e)(1)(D). Under this standard, overcurrent devices must be readily accessible to each employee or authorized building management personnel. Respondent failed to comply with this standard, because access to the circuit breaker panel was blocked by stored items.

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

ORDER

1. The Notifications of Failure to Abate Alleged Violations relating to Standards §12-75-11(d)(2), 29 CFR §1910.1200(e)(1), §12-73-2(e)(4), and §12-75-11(a)(9), are affirmed as to the violations and the amounts of the additional proposed penalties.

2. The Citations and Notifications of Penalty, or more specifically, Citation 1, Items 1 and 2 relating to Standards §§12-89-6(b)(1) and 12-89-6(g)(2)(C), Citation 2, Item 1 relating to Standard §12-89-4(b)(2), and Citation 3, Item 1, relating to Standard §12-89-5(e)(1)(D), are affirmed as to the violations and the characterizations, but modified as to the amounts of the proposed penalties.

Dated: Honolulu, Hawaii, DEC 22 1997.

FRANK YAP, JR., Chairman

CAROL K. YAMAMOTO, Member

EXCUSED
VICENTE F. AQUINO, Member

Frances Lum/Herbert Lau
for Complainant

Steve Cunningham
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 post a copy of this Decision and Order to a duly recognized representative of the employees.