

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)
)
DIRECTOR, DEPARTMENT OF LABOR)
AND INDUSTRIAL RELATIONS,)
)
Complainant,)
)
vs.)
)
SI-NOR, INC.,)
)
Respondent.)
_____)

CASE NO. OSH 2003-3
DECISION NO. 8
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

This is a contested case that arises out of a Citation and Notification of Penalty that was issued by the Complainant, DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), through the Hawaii Division of Occupational Safety and Health (HIOSH) on November 15, 2002 against Respondent SI-NOR, INC. (Respondent or SI-NOR). By letter, dated and faxed December 5, 2002, Respondent contested the citation. On February 25, 2003, HIOSH transmitted to the Hawaii Labor Relations Board (Board) the Respondent's appeal of HIOSH's denial of the notice of contest as untimely.

On March 17, 2003 the Board held an initial conference attended by counsel for the respective parties. Pursuant to a Pretrial Order, the issues are:

1. Whether Respondent's notice of contest faxed on December 5, 2002 was timely filed?
2. Whether the Citation and Notification of Penalty was properly issued and delivered to Respondent?
3. Whether Respondent violated the Hawaii Occupational Safety and Health standards as described in Citation 1, Items 1a and 1b, issued on November 15, 2002?
 - a. If so, whether the characterization of "serious" and the proposed penalty of \$1,400.00 are appropriate?

4. Whether Respondent violated the Hawaii Occupational Safety and Health standards described in Citation 2, Item 1, issued on November 15, 2002.
 - a. If so, whether the characterization of “other” and the proposed penalty of \$2,100.00 are appropriate?

On May 27, 2003, the Director moved to dismiss this appeal for an untimely notice of contest. Respondent filed its memorandum, dated June 13, 2003, opposing the Director’s dispositive motion, and the Director filed his reply to Respondent’s memorandum in opposition to motion to dismiss for untimely contest on July 7, 2003. The Board conducted a hearing on July 14, 2003 and after consideration of the record, arguments and legal authorities raised, denied the Director’s motion to dismiss and deemed the Respondent’s December 5, 2003 notice of contest as timely filed.

After the time for discovery was twice extended and finally completed by the parties, the Director filed on September 22, 2003, a Motion for Reconsideration of Director’s Motion to Dismiss for Untimely Notice of Contest Filed May 27, 2003. On September 24, 2003 Respondent filed its Memorandum in Opposition to Motion for Reconsideration of Director’s Motion to Dismiss. Following oral arguments and the taking of testimony on September 25, 2003, the Board denied reconsideration concluding that the notice of contest was timely and based on findings discussed, infra.

The Board proceeded to conduct a de novo hearing on September 25, 26, 29, 30, October 1, 13, 24 (motion hearing only), and November 5 and 6, 2003. The parties were represented by counsel and were given full opportunity to present evidence, examine and cross-examine witnesses and make argument. Post hearing closing memoranda were filed by the parties on December 29, 2003.

Having reviewed the entire record and provided the parties a full and fair opportunity to be heard, the Board issues the following findings of fact, conclusions of law, and order affirming the Director’s Citation and Notification of Penalty.

FINDINGS OF FACT

1. SI-NOR is a refuse collection and recycling company, incorporated in California. Its administrative and fiscal offices are located at 1345 Fitzgerald Avenue, Suite F, Rialto California.

2. On October 9, 2002,¹ HIOSH compliance officer (CO) Hervie Messier, conducted a comprehensive inspection at SI-NOR's baseyard--a large fenced in lot--located at 91-559 Nukuawa St., Lot 16, in Kapolei, Hawaii. The inspection was in response to a complaint of workplace violence filed by an employee, Charles K. Ke-a (Ke-a aka Keoni), a refuse truck driver, who reported he was physically assaulted by his supervisor, Lionel Deguzman (Deguzman) on September 30, 2002.
3. The inspection began with an opening conference with Ryan Hamili (Hamili), SI-NOR's project manager in Hawaii. The HIOSH CO asked to review SI-NOR's written safety and health program, the workplace violence prevention program, and the OSHA 200, 300 logs. Hamili did not provide the documents to the HIOSH CO at the time, but instead deferred to SI-NOR's Vice-President in charge of operations in Hawaii, Anthony Uwakwe (Uwakwe), whose office was located in Rialto, California.
4. On October 10, 2002, the HIOSH CO asked Uwakwe for SI-NOR's written safety and health program, workplace violence prevention program and the OSHA 200, 300 logs. Uwakwe indicated he would forward the written safety and health program by mail to Hamili.
5. Not having received any documents, the HIOSH CO made a second request to Hamili on October 14, 2002 and Uwakwe on October 15, 2002. Because SI-NOR was not forthcoming with the documents requested, HIOSH issued an administrative subpoena for SI-NOR's records on October 18, 2002. The subpoena was addressed to Hamili's home address at 156 Makani Avenue, Wahiawa, Hawaii 96786, but was personally served on Hamili at a pre-designated area around Keehi Lagoon mutually agreed to with HIOSH.²

¹The HIOSH CO first attempted a safety inspection on October 8, 2002, but found no one at SI-NOR's baseyard.

²The subpoena described the documents as follows:

1. Current OSHA 300 log and OSHA 200 logs from 1996 through 2002 for Si-Nor Incorporated employees in Hawaii.
2. Copies of all WC-1 forms from 1998 through 2002 for Si-Nor Incorporated employees in Hawaii.
3. Si-Nor Incorporated's current safety and health program with any amendments or revisions made in the year 2002 for employees in Hawaii.
4. All Si-Nor Incorporated's records for safety and violence in the workplace training conducted between 1999 through 2002 for employees in Hawaii.

6. On October 22, 2002 in response to the subpoena, Hamili delivered two of the five subpoenaed items, i.e., the WC-1 forms and safety training records. HIOSH did not receive the OSHA 200 and 300 logs, the current safety and health program, or any records of SI-NOR's workplace violence prevention program.
7. On October 30, 2002 the HIOSH CO conducted a closing conference with Hamili at SI-NOR's baseyard.
8. On November 15, 2002, the Director issued the instant Citation and Notification of Penalty by mail to Hamili's residence address. The Citation and Notification of Penalty states, in part, as follows:

Citation 1, Item 1a: Type of Violation: Serious

HAR 12-60-2(a)(3) The Employer did not provide safe working places and practices by elimination or reduction of existing or potential hazards. Elimination of existing or potential hazards by design, process substitution, or other appropriate methods is preferred because it eliminates the need for further employee protection. When elimination is not feasible, reduction of existing or potential hazards to acceptable levels using methods such as engineering or administrative controls, isolation, or guarding must be promptly used. When these methods are inadequate to reach acceptable levels, personal protective equipment must be provided and used; i.e., the employer did not provide a work place free from the potential hazard of personal violence by the institution of an administrative control in the form of a workplace violence prevention program.

Abatement certification documentation in the form of a copy of the company's workplace violence prevention program is required.

Proposed Penalty: \$1,400.00

Citation 1 Item 1b: Type of Violation: Serious

HAR 12-60-2(b)(1) The employer had not instituted and maintained an effective written safety and health program to identify, evaluate and control workplace hazards; i.e., the

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5. Si-Nor Incorporated written records of disciplinary action and employees' attendance records from 1999 through 2002.

employer did not have a written safety and health program at the time of this inspection.

Abatement certification documentation in the form of a copy of the company's written safety and health program is required.

Citation 2 Item 1: Type of Violation: Other

29 CFR 1904.2(b)(2) [Refer to chapter 12-52.1, HAR] A copy of the log and summary of occupational injuries and illnesses (OSHA Form No. 200, 300, or equivalent) was not available and current to within 45 calendar days at the establishment; i.e., the OSHA 300 log for 2002, to date and OSHA 200 logs for 2000 and 2001, were not available at the time of inspection.

Abatement certification documentation in the form of a copies of the current OSHA 300 log and the OSHA 200 logs for 2000 and 2001 required.

Proposed Penalty: \$2,100.00

9. During the course of HIOSH's inspection, Hamili was employed as SI-NOR's project manager and acted as SI-NOR's agent for receiving and delivering documents in response to HIOSH's subpoena. The Board finds the Citation and Notification of Penalty was properly sent by certified mail to Hamili as SI-NOR's agent in Hawaii on November 15, 2002, with a return receipt on November 16, 2002. However, the confusion and uncertainty that arose in this case regarding the filing of SI-NOR's Contest could have been avoided if HIOSH had mailed the Citation and Notification of Penalty directly to SI-NOR's corporate office in California since that information was available to HIOSH.
10. On December 5, 2002, Hamili forwarded the HIOSH Citation and Notification of Penalty by facsimile (fax) and U.S. mail to Uwakwe's office in Rialto, California. Upon receipt, Uwakwe sent SI-NOR's notice of contest to HIOSH dated December 5, 2002 by fax, clearly expressing SI-NOR's intent to appeal the Citation and Notification of Penalty prior to the expiration of the 20-day deadline which fell on December 6, 2002.
11. By the close of business on December 5, 2002, HIOSH received SI-NOR's faxed letter contesting the Citation and Notification of Penalty. HIOSH called SI-NOR's office in California acknowledging receipt, but instructed SI-NOR to send the original notice of contest by mail postmarked no later than midnight on December 6, 2002.

12. On December 6, 2002, Uwakwe received HIOSH's telephone message instructing him to mail the original notice of contest and called HIOSH to verify the message with HIOSH's personnel. The Board credits the testimony of Uwakwe that he put the original notice of contest dated December 5, 2002, in the outgoing mail receptacle before noon on December 6, 2002. When Uwakwe returned from lunch, the envelope containing the original notice of contest had been picked up by the mail carrier. Transcript (Tr.) Volume (Vol.) 1, 9/25/03, pp. 38-41.
13. HIOSH denied SI-NOR's notice of contest because it never received the original notice mailed by Uwakwe on December 6, 2002. On February 25, 2003, the Director transmitted SI-NOR's appeal of HIOSH's denial of the notice of contest to the Board.
14. SI-NOR began operations in Hawaii on or about June of 1999 under a contract with the U.S. Navy to provide refuse collection and disposal services for the Pearl Harbor Naval Base on Oahu. SI-NOR's contract manager, Annette King (King) set up operations in Hawaii for the Navy contract, which included the shipment of six heavy trucks from its transfer station in California. King hired SI-NOR's first project manager, and the majority of heavy truck drivers and helpers from the Red River Service Corporation – the refuse collection company which held the government contracts for the military bases prior to SI-NOR. King was responsible for distributing copies of SI-NOR's written health and safety manual, and the employee handbook to the new hires in Hawaii, as well as for conducting safety training. King left SI-NOR sometime in early 2000.
15. Since 1999, SI-NOR has acquired the government contracts from the Air Force, Army, Marine Corps and Coast Guard for refuse collection on military bases on Oahu, as well as the Federal Detention Center.
16. Uwakwe has been employed by SI-NOR for approximately nine years in various positions including, project manager, operations manager and general manager for SI-NOR's projects in other states. Before working for SI-NOR, Uwakwe practiced law as a barrister and solicitor in Nigeria. Before becoming Vice-President of Operations at the end of 1999, Uwakwe was a trainee project manager and received safety and health training from King that covered operations, human resources, interpersonal safety skills and the use of heavy-duty equipment. From King, Uwakwe learned of the need to have ongoing safety training or "refresher courses, that after the initial discussion with the workers, that you still have to keep reminding them as to the do's and don'ts and also the company policy manual, so that there will not be any lax." Tr. Vol. 7, dated 11/5/03, pp. 1098-99.

17. According to Uwakwe, between 1994 and 1996 Silas Ugorji (Ugorji), SI-NOR's President and King were in the process of drafting a safety policy manual when the corporation was still small with under 19 employees. By June of 1999, SI-NOR had a Written Safety Policy Manual (Injury & Illness Prevention Program).
18. Uwakwe first came to Hawaii in December 1999 for about two to three weeks. At the time, Uwakwe attended and observed one safety training conducted by King.
19. In February 2000, Uwakwe returned to Hawaii for approximately one month to work out modifications to the terms of SI-NOR's contract with Hickam Air Force Base. Upon securing the Hickam contract, SI-NOR's employee count was over 25. The first project manager for the Hickam contract was Myron Espinda (Espinda), a former employee of Red River, who was terminated by SI-NOR after approximately one year on the job.
20. King hired Hamili in mid-1999 as a heavy truck driver for the Navy contract. Before working for SI-NOR, Hamili was employed by Red River as a heavy truck driver for three years. Hamili succeeded Espinda as the project manager for the Hickam contract.
21. Uwakwe promoted Hamili to project manager responsible for covering the Navy contract. A second project manager, Terry Clark, was promoted from heavy truck driver to project manager responsible for overseeing operations for the Hickam contract.
22. In February 2000, while in Hawaii for approximately one month, Uwakwe "personally trained both [Hamili and Clark]. [He] walked them through operations training, contract administration issues. And also safety issues. Because now these employees were all their responsibility. So I had to let each one know his duties regarding, you know, the employee safety issues and also equipment-handling issues." Tr. Vol. 7, dated 11/5/03, p. 1116. Uwakwe's training of Hamili and Clark spanned several days. As part of the training, Uwakwe held a safety meeting with the combined Hickam and Navy crews where Hamili and Clark each conducted a safety meeting and were critiqued by Uwakwe. Uwakwe testified that the employees at the time had copies of SI-NOR's safety policy manual and Employee Handbook. Uwakwe conducted no other safety training in Hawaii, and did not attend any further safety training meetings conducted by either Hamili or Clark.
23. As project manager for the Navy contract, Hamili was put in charge of managing all aspects of the operations, that included hiring, training, distribution of the safety policy manual and employee handbook, assignment of crews, time cards,

tonnage reports, workers compensation and injury records, as well as being the contact person for responding to any complaints from the military base personnel. Uwakwe also put Hamili in charge as project manager when SI-NOR acquired the Coast Guard and Army contracts in 2002. Hamili had no work experience in a managerial or supervisory position before his employment with SI-NOR.

24. In 2002, Hamili forwarded to SI-NOR monthly sign in sheets for safety training meetings attended by his crews on practically every first Saturday for the months of January to October. Based on the testimony of Ke-a, who signed in on several sheets, Chad Pasoquen (Pasoquen) and Deguzman, whose names were listed by Hamili as attending training on October 5, 2002 but who could not remember attending safety training meetings, it's doubtful that Hamili conducted meaningful safety training meetings for his crews. Hamili simply asked the employees to sign blank safety training forms, which were subsequently filled in by Hamili and forwarded to Uwakwe. A review of the "safety topics" supposedly covered by Hamili, does not indicate any specific safety training covering workplace violence prevention. There is also no evidence that safety training was conducted for the refuse crews assigned to the Hickam contract by either project manager, Terry Clark or Pasoquen. There is further no documentation of other safety training meetings held in previous years by SI-NOR's project managers, even though SI-NOR's Safety Policy Manual provides as follows:

SI-NOR will maintain the following safety and health records in the main office under the following conditions:

1. Records of scheduled and periodic inspections, which identify unsafe conditions and work practices, and the actions taken to correct the identified unsafe conditions and work practices. The inspection records will be maintained for three years in the main office.
 2. Documentation of safety and health training for each employee including the employee's name, training dates, types of training, and training instructors will be maintained for three years.³
25. Sometime in 1999, SI-NOR leased an office trailer that was located at its baseyard at 91-559 Nukuawa St. Lot. 16, in Kapolei. By April 2002, the office trailer had been broken into and vandalized. On or about June 2, 2002, the office trailer was repossessed by Hawaii Modular Space. Although Hamili was

³Respondent's Ex. B, p.10.

notified by Hawaii Modular Space to claim any of the furniture or materials that remained in the office trailer, he never did.

26. Ke-a was initially hired by SI-NOR, as a helper, at the start of operations in Hawaii. Eventually, Ke-a obtained a commercial driver's license and was promoted to a refuse truck driver. Hamili was his supervisor and good friend.
27. On or about September of 2002, Lionel Deguzman was hired by SI-NOR as the quality control officer to oversee the refuse collection services for the majority of military bases on Oahu, except Hickam. Deguzman's responsibilities included Pearl Harbor, Ford Island, Schofield Barracks, Radford, Kaneohe Marine Corps, Wheeler Air Force, and Navcom covered by government contracts with the Army, Navy, Marine Corps and Coast Guard. Hamili recommended Deguzman for the job because of his skills as a mechanic. According to Hamili, the job of quality control officer called for Deguzman to be with the pick-up crews throughout the day to ensure the work was done right and the trucks were maintained and operated correctly. Hamili familiarized Deguzman with the routes and introduced him to the military contacts for each base. Deguzman reported directly to Uwakwe and Hamili, primarily by company cell phone.
28. From the start of his employment, Deguzman was met with hostility by Ke-a, who resented that SI-NOR hired an outsider instead of promoting him. He expressed as much to Hamili. At one point, Deguzman reported to Hamili that he had daily disagreements with some workers when he demanded that they report to work on time and maintain and clean their trucks. Deguzman personifies a "tough guy" with an equally rough truck driver manner of speech, that can be viewed as intimidating, but was probably not so, to a group of equally tough, and relatively young crew of refuse truck drivers and helpers hired by SI-NOR, who had been working together for more than a year under Hamili. No doubt, however, Deguzman's way of managing an unruly workforce was in stark contrast to Hamili's quiet and calm personality with a "we're all friends" approach of dealing with a few disagreements that arose more out of personality clashes. This contrast in management style is best demonstrated by the fact that Hamili never disciplined any employee. By contrast, within one month on the job, Deguzman began issuing disciplinary action forms to employees for infractions such as showing up late for work. In addition, because Hamili was noticeably absent from the worksite during the work week and available only through his cell phone, Deguzman was left to respond to complaints called in by the military personnel, as well as deal with a workforce not used to having a quality control manager telling them what and how to do their job.
29. On Monday, September 30, 2002, Deguzman was driving Ke-a to Whitmore to pick up his truck which had broken down the previous Friday. Based on the

testimony of Ke-a⁴ and Deguzman assessing their demeanor, propensity for truthfulness and interest in the outcome of the case, the Board finds that on September 30, 2002, Deguzman and Ke-a got into a verbal fight when Deguzman scolded Ke-a over the need to clean his hopper to prevent his truck from breaking down in the future. Both men started swearing at each other. At one point, Deguzman lost his temper, stopped the truck, got out of the truck to cool off, then continued the drive to Whitmore. When they arrived at Whitmore, both Deguzman and Ke-a approached each other outside of the truck out of view of the other employees. According to Deguzman,⁵ Ke-a swung at his head, he

⁴Ke-a described the morning of September 30, 2002 as follows:

Q. [by Mr. Lam] Can you briefly describe what happened that day.

A. [by Mr. Ke-a] Okay. Upon arriving to work, got into a truck with three other employees—actually four, including Mr. Deguzman, proceeded to Whitmore. I got yelled at, sworn at by Mr. Deguzman. I told him that I didn't appreciate, you know, the way he was talking to me. He got mad. Another employee said something as well, Paulie Espinda. He got mad, stopped the truck on the way up to Whitmore. He got out, and basically my impression was he wanted to fight, you know.

* * *

I stayed in the truck, didn't exit the truck. After a while, he got back in. We proceeded to Whitmore, got out of the truck, proceeded to my garbage truck, checking it. I saw him coming around. So I approached him to talk about, you know, what we had argued about, try to squash it. After a few words, he struck me twice in my face. I stumbled back.

I ran back around the truck. He came towards me. I put — I put up my fists to defend myself. At that time I decided, you know, not to go any further, put my hands up. He began to chase me. I ran away. You know, threatening to kill me and stuff. I ran clear away into an open field, and that's when I proceeded to call the police. Tr. Vol. 1, 9/25/03, pp. 78-79.

⁵Deguzman described his confrontation with Ke-a on September 30, 2003 as follows:

A. [by Mr. Deguzman] We're on our way to Whitmore and it was asked to him by me how to prevent what had happened to his truck, how he can prevent it from breaking again. I tried to explain to him how —

Q. [by Mr. Lam] Who is him?

A. Ke-a. It was told to him that reason why his truck broke was he didn't come work on a certain day, another driver took his truck.

It broke on him. The truck didn't want to be fixed by him because he said Charles Ke-a's truck. This was on a Friday. Sunday was brought up to Whitmore to fix. Monday came, they needed to go pick it up.

Q. What broke?

A. The hopper, the packer that packs the rubbish. Rubbish was thrown behind by accident by, you know, just dumping rubbish. Rubbish gets thrown behind of the hopper and they get stuck underneath the packer and you cannot release the packer from dumping rubbish or picking up rubbish. You can't pack nothing. Just gets stuck. On the job site they were stuck for like two-and-a-half hours. Went out there to tell them if they could clean it. They said no. He grumbled at me and said: No, it is Ke-a's truck. He needed to fix it, clean it. He didn't come work Friday. I called him on Saturday and told him he needed to come in to clean his hopper. He said: Fine. He didn't come in on Saturday. The truck was took up to the yard to Whitmore to fix. When I was explaining to him how to prevent it from breaking again, he yelled at me and told me—am I --am I allowed to swear, the words that he used?

* * *

Yeah, exactly what he had said.

He told me: Lionel, we're not fucking kids. You don't got to remind us. We're not fucking kids.

He kept bitching at me like that. I told him: Why you needing to be reminded is because what did I tell you to do on Saturday? Didn't I tell you to come in on Saturday, clean you hopper.

He told me: Oh, I needed to babysit my kids. I told him: See, that's why you got to be reminded.

And it was told to him nicely how to prevent it from breaking again, and he just kept bitching at me. Just kept telling me: Lionel, fuck you, I not one kid. You don't got to remind me. You don't got to remind us, he kept saying.

Then he kept saying: And what? What did Ryan fucking hire you for, strong arm us? He just kept going on about Ryan: How come Ryan went hire you? Why he never hire us? Just kept going on like that.

So I tried changing the subject about it and just let it go. I stop talking to him. Every time I look in the mirror, he would look at me—sitting in the back of me in my truck. He would look at me and tell me: What, you fucker? Just kept doing that. So I tried avoiding him, looking at him already in the mirror, tried changing the subject about it.

ducked, moved out of the way and his shoulder and back hit a part of the truck. Deguzman testified that in self defense he “swung back at him” slapping Ke-a with his left hand. At this point, Ke-a ran away yelling to his friends to call the police contending that Deguzman hit him twice. The altercation ended with Ke-a running out of Whitmore to wait by the side of the road for the police.

30. While waiting for the police, Ke-a called Hamili, who put Uwakwe on the phone to speak to Ke-a to report that Deguzman hit and threatened him. Hamili met Ke-a on the road. Ke-a gave a statement to the police that he had been hit and his life threatened by Deguzman. Hamili drove Ke-a back to his car at the baseyard. Ke-a left work for the day. Deguzman drove out of Whitmore in his truck, and also left work for the day. He made a police report from his home about his fight with Ke-a and denied making any threats to his life. Tr. Vol. 3, 9/29/03, pp. 425-30.

As we going up, I was talking – I mentioned my daughter was coming in from the mainland, and he recall he knows my daughter. He said something about he wouldn't mind fucking my daughter. It really ticked me off right there. He was kind of getting on my skin. That's what he was doing. He was doing this from the first day I started work. He was questions (sic) about days that he wasn't coming in for work and he was getting paid for it. That day, he never come in, I would get on him and tell him why didn't you come in. But on the payroll he was still getting paid. Ryan was paying this guy. So he was getting really upset with me because I was taking away his free ride. That's what he was doing.

* * *

I asked him what did he have against me and why is he approaching me, talking to me like that. And he told me: Fuck you, Lionel. And he swung at me. I ducked, he hit my shoulder. I hit the back of the cab and had one bruise on my back – on my shoulder, but I didn't notice it until two days later my wife told me I had one bruise.

When he hit me, I swung back at him. I hit him with my left hand. I slapped him. He turned and ran. He was yelling: Call the cops, call the coops. He ran out of Whitmore at this job site we were at. He ran out of Whitmore. As I left, I went straight home and made -- called the cops and made a complaint. The cop came to my house and said that Charles Ke-a made one complaint about me hitting him.

... He said that I threatened to kill him and his wife. I never met his wife before, and I never told him I threatened him. Tr. Vol. 3, 9/29/03, pp. 425-30.

31. Ke-a is one generation younger than Deguzman; a former high school football player; and a few inches taller, but lighter in weight, than Deguzman. In addition, Ke-a is more articulate and literate, than Deguzman, who relied on his wife to write up and type out his disciplinary action forms.
32. Since Uwakwe was in town, he decided to handle the matter and investigate the fight between Deguzman and Ke-a. After speaking with Ke-a by phone, he arranged to meet with him. Ke-a refused to attend a joint meeting with both Deguzman and Uwakwe. Ke-a reported to Uwakwe that Deguzman hit him twice in the face. Deguzman reported that Ke-a struck him first, but initially denied touching Ke-a at all out of fear that he would lose his job.⁶ Uwakwe learned that the three employees did not see Deguzman or Ke-a hit each other.
33. By letter dated October 2, 2002, Ke-a wrote to Ugorji to report the fight and that Deguzman threatened “to kill him” on September 30, 2002 as the basis for complaining about an unsafe work environment as follows:

I made a Police report and will be pressing charges against Lionel for assault and terroristic threatening. I went to the hospital and have x-rays of my face. I have gotten little response from Ryan Hamili about the situation. Since, this incident I have not returned to work. I do not feel that this is a safe environment to work in. I spoke with one of your representatives, Tony, [Uwakwe] and I felt that he did not take this incident seriously. He suggested that he, Lionel and I go to dinner to solve this problem. (HIOSH Ex. 19).

34. On October 4, 2002, Ke-a filed a safety complaint of workplace violence with HIOSH against SI-NOR, which triggered the inspection conducted on October 9, 2002 by the HIOSH CO, and resulted in the instant Citation.
35. On Saturday, October 5, 2002, Hamili gave his last safety meeting. As part of the sign-in form, Hamili added the names of Pasoquen and Deguzman, because they were also part of management. Neither supervisor recalls attending Hamili’s training meeting. The safety topic listed by Hamili was: “Si-Nor Safety Policy/Driver/Helper Awareness.” Hamili described his safety meeting as covering workplace violence and the incident between Ke-a and Deguzman. Uwakwe did not attend this safety training meeting even though he assumed

⁶On or about December 17, or 18, 2002, Deguzman confessed to a private investigator, Mauro Edwards (Edwards), that he had actually hit Ke-a, after Ke-a struck him first. Edwards was initially hired to investigate Deguzman’s reports to SI-NOR of overtime abuse and phantom employees on SI-NOR’s payroll, who were not actually working for SI-NOR. Uwakwe learned from Edwards that Deguzman had initially lied about not hitting Ke-a. Tr. Vol. 4, 9/30/03, pp. 703-06, 708-10.

responsibility for handling the investigation. Based on Hamili's description of his safety meeting on workplace violence,⁷ the Board finds Hamili's training if any occurred, was ineffective and inadequate as a means of reducing existing or potential hazards of workplace violence in the form of growing hostility against Deguzman by employees loyal to Ke-a.

36. Uwakwe admits that workplace safety is a requirement of the HIOSH standards, which includes training on workplace violence. Tr. Vol. 7, 11/5/03, p. 1264.

⁷On direct examination by SI-NOR's attorney Hamili testified as follows:

- Q. [by Mr. Gima] This meeting was designed to discuss the workplace violence incident revolving around Charles Ke-a?
- A. [by Mr. Ke-a] Yes.
- Q. Tell the Board what was discussed.
- A. I guess it was triggered off more or less by a lot of questions by employees wondering what this – what happened between the two. I remember questions asking why Lionel was still at work and Charles wasn't. I guess how it could have been prevented or how it should have been prevented. Consequences.
- Q. You talked about prevention. What was discussed with regard to preventing further incidences?
- A. Well, first of all, I guess at the time, there was rumor of why things happened the way they did. It was said by one person that somebody was talking about his daughter, then another one had another story, and I just tried to explain to them that, you know, this kind of personal stuff was only going to cause them problems, like it did with these guys. Just trying to get them to realize that all they're doing is coming to work to do a job and not to bring their personal problems with – or bring their personal problems to work.
- Q. With regard to consequences, what did you talk to them about?
- A. Oh, the questions about why Charles [Kea] wasn't there and Lionel [Deguzman] still was. I said as far as I knew that the mainland or Tony [Uwakwe] was handling this situation and that – it was hard to – some questions came in, Oh, but so-and-so said that he got punched, and, you know, I tried to explain to them that nobody seen anything happen. As far as something happening beyond this, a fight that people witnessed and – it's going to result in termination.
- Q. So you told them that if actually it was proven that somebody hit somebody, it could result in termination?
- A. Yeah, if it was true. Tr. Vol. 2, 10/1/03, pp. 807-09.

Consequently, SI-NOR developed its workplace violence policy with the intent of reducing the potential threat of workplace violence. *Id.*, p. 1265.

37. Section 6 of SI-NOR INC.'s Employee Handbook, dated December 2001, entitled Personal Conduct, Workplace Violence and Reimbursements, contains a workplace violence policy that provides, in part, that it is "committed to creating and maintaining a workplace environment that is free from intimidation, threats and violent acts. Nothing is more important to Si-Nor, Incorporated than the safety and security of its employees, customers, and visitors."

The workplace violence policy also provides in part as follows:

Any and all acts of intimidation, threats or acts of violence will be considered serious misconduct and will be the basis of disciplinary action, up to and including dismissal. These acts will be referred, when appropriate, to legal authorities.

Assurance of a safe working environment is important to everyone. It is the responsibility of all members of our work team to report any occurrence of intimidation, threat or violence to the Corporate Office. Threats, threatening behavior, or acts of violence against an employee, a customer, a visitor, or any other individual cannot and will not be tolerated. All reports of workplace violence will be taken seriously and will be investigated promptly and thoroughly. For the purpose of this policy, the workplace is considered to be anywhere an employee is engaged conducting business or providing service as a representative of Si-Nor, Inc.

Any form of violence or threat of violence – whether actual or reasonably perceived – involving an employee or occurring in the workplace must be reported to a supervisor, manager, or the Corporate Office. Such behavior must be reported whether it is committed by another employee, a contractor, a customer, or a member of the public. If management determines that an employee has engaged in workplace violence, appropriate action will be taken, which may include discipline up to and including discharge.

* * *

So that this policy will accomplish its objectives, the Vice President Corporate is directed to develop the procedures, guidelines, and training programs needed to prevent and appropriately respond to incidents of violence. Each Office, with the assistance of the Corporate Office, shall communicate

workplace violence prevention and violence management techniques to employees on a regular basis and insure that appropriate security measures are taken to minimize the likelihood of violence occurring. See, Respondent Exhibit A.

38. SI-NOR's workplace violence policy defines workplace violence to include intimidation, threat of violence, and acts of violence specifically defined as: "exercise of physical force against another person or against property." Although SI-NOR contends that prior to the fight between Deguzman and Ke-a on September 30, 2002, there was no precipitating workplace violence incident, the Board finds the vandalism of SI-NOR's trailer at its baseyard on or about April of 2002, meets its own definition of workplace violence as a recognized hazard.
39. SI-NOR recognized workplace violence was a potential risk in its work environment, and believed it could reduce workplace violence by having a policy that included encouraging employees to report incidents of violence to the Corporate Office, a prompt and thorough investigation, and safety training programs. Uwakwe admitted that SI-NOR recognized that workplace violence was a potential in any workplace setting, including its own, and wanted to take proactive steps to minimize or reduce that potential risk. As Uwakwe explained it, "Once you have two people together in any environment, it has the potential for violence." Tr. Vol.7, 11/5/03, p. 1264.
40. SI-NOR's Safety Policy Manual (Injury & Illness Prevention Program) covers the assignment of injury prevention responsibilities, supervisor's responsibilities to the safety program, compliance,⁸ company/employee

⁸Compliance with Si-Nor's Injury and Illness Prevention Program states in part:

To insure that everyone in Si-Nor is encouraged to comply with Si-Nor's Injury & Illness Prevention Program, SI-NOR will:

* * *

3. SI-NOR will not tolerate any employee's unsafe act or unsafe attitude. Employees who violate this principle will be disciplined in the same manner as SI-NOR disciplines employees who violate other company performance standards. There is no exact procedure for disciplining employees. Depending on the offense and the employee's work history, SI-NOR may give an employee a verbal warning, a written warning, or a suspension from work. When appropriate the employee will be discharged. In any event, SI-NOR maintains the right to discharge employees at any time,

communications, inspection for hazards, investigation of accidents and procedures, correcting hazards, training employees and maintenance of safety and health records.

41. The Board finds SI-NOR did not maintain and/or distribute its Employee Handbook and Safety Policy Manual to all employees in a consistent manner and in accordance with its own procedures; did not give its Hawaii-based employees adequate, if any, training on workplace violence prevention; and did not use reasonable and effective measures to ensure its employees received proper safety training on workplace violence prevention.
42. The Board finds that SI-NOR did not use reasonable efforts to reduce workplace violence as called for in its own internal policy, which provides that: “the Vice President Corporate is directed to develop the procedures, guidelines, and training programs needed to prevent and appropriately respond to incidents of violence. Each Office, with the assistance of the Corporate Office, shall communicate workplace violence prevention and violence management techniques to employees on a regular basis and insure that appropriate security measures are taken to minimize the likelihood of violence occurring.” Uwakwe did not routinely check on the monthly safety training meetings performed by Hamili, whose testimony that he provided monthly safety training was rebutted by the collective testimony of Ke-a, Pasoquen, Deguzman and Rene Mateo. The Board credits their testimony that they received no training on workplace violence.
43. As Vice President of Operations in Hawaii, Uwakwe only visited the operations in Hawaii twice, in early 2002 and in September 2002. He unreasonably placed too much reliance to implement effective training and enforcement on workplace violence on Hamili, whose management experience and supervisory skills were non-existent at the start of his employment. Hamili was not given adequate and continuous on-the-job training when he became project manager nor was he qualified to act as a coordinator with general manager responsibilities. Uwakwe nevertheless expected Hamili to undertake these responsibilities in the second half of 2002, even though by the first quarter of 2002, Uwakwe had concerns that Hamili was not performing his duties adequately, based on complaints from customers and employees. Uwakwe’s sporadic management presence and reliance on Hamili, contributed to the lack of communication on workplace violence prevention. This was demonstrated by his not learning of the vandalism to the office trailer when it occurred, but rather approximately two months later, when the trailer was repossessed; and his

for any reason, with or without prior notice, and with or without good cause.

failure to take responsibility to ensure that Hamili's training on workplace violence on October 5, 2002 was adequate to prevent future incidents of violence.

44. Uwakwe's distrust of Hamili grew after he learned the office trailer was vandalized then repossessed. By mid 2002, and following Deguzman's hiring in September 2002, Uwakwe knew there was substance to his suspicions about Hamili's involvement with missing containers, overtime abuse, and "phantom employees," i.e., employees receiving payroll checks but not actually working. Nevertheless, Uwakwe approved the hiring of Deguzman to serve as another supervisor with responsibility that included enforcing a workplace violence policy even though he had no management or supervisory work experience, did not receive SI-NOR's Employee Handbook, or any meaningful training on workplace violence prevention.
45. At the time leading up to the incident between Deguzman and Ke-a, Uwakwe maintained Hamili as project manager for all of the military contracts except Hickam, which was managed by Pasoquen (even though Uwakwe admittedly had no confidence in Pasoquen's supervisory capabilities). When Deguzman was hired in early 2002, he entered an unruly workforce as part of the management team even though he had no prior managerial or supervisory experience or safety training covering workplace violence prevention.
46. The Board finds that given SI-NOR's practice of promoting truck drivers to project managers as in the case of Hamili and Pasoquen, without any managerial skills or supervisory experience, and putting them in charge of their friends on a day-to-day basis, without a bonafide person of authority present on a regular basis, led to an unruly workforce. SI-NOR's absence of management allowed for a work environment conducive to the potential hazard of workplace violence. By failing to have bonafide management personnel present in Hawaii to properly hire and train persons with supervisory skills qualified to oversee operations, SI-NOR's refuse crews were left to their own devices, prone to abusive language and physical violence, and resentful of outsiders like Deguzman brought in as a quality control manager to watch and assess their job performance.
47. SI-NOR's failure to follow and enforce its own training policies, its sporadic managerial presence in 2002, and its reliance on employees with inadequate supervisory abilities and training, support a finding that it did not implement an effective workplace violence prevention program to reduce the risk of employee exposure to the potential hazard of workplace violence.
48. The Board finds SI-NOR did not submit its workplace violence program included in its Employee Handbook, written safety and health program, and OSHA 200/300 logs to HIOSH at the time of inspection after repeated requests,

including the issuance of a subpoena. SI-NOR did not provide any reasonable or credible explanation for not submitting the documents requested upon receipt of the subpoena.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contested case pursuant to HRS §§ 396-3 (Supp. 2002) and 396-11.
2. The Board concludes that based on HIOSH's receipt of SI-NOR's notice of contest faxed and dated on December 5, 2002, and Uwakwe's testimony that he mailed the original on December 6, 2002, SI-NOR proved by a preponderance of evidence that its notice of contest was timely. HIOSH's non-receipt of the original notice of contest dated December 5, 2002, does not persuade the Board to conclude otherwise.
3. To establish a violation of a standard, the Director must prove by a preponderance of evidence that: "(1) the standard applies, (2) there was a failure to comply with the cited standard, (3) an employee had access to the violative condition, and (4) the employer knew or should have known of the condition with the exercise of due diligence." Director v. Honolulu Shirt Shop, OSAB 93-073 at 8 (Jan. 31, 1996).
4. Hawaii Administrative Rules (HAR) §12-60-2(a)(3)⁹ requires employers to "provide safe work places" by eliminating or reducing existing or potential hazards. Where elimination is not feasible, employers must promptly reduce existing or potential hazards to acceptable levels using methods such as engineering or administrative controls.

⁹HAR § 12-60-2(a)(3) provides:

Every employer shall provide safe work places and practices by elimination or reduction of existing or potential hazards. Elimination of existing or potential hazards by design, process substitution, or other appropriate methods is preferred because it eliminates the need for further employee protection. When elimination is not feasible, reduction of existing or potential hazards to acceptable levels, using methods such as engineering or administrative controls, isolation, or guarding, shall be promptly used. When these methods are inadequate to reach acceptable levels, personal protective equipment shall be provided and used." See also, HRS § 396-6(a).

5. We conclude that the Director proved by a preponderance of evidence that the general duty clause applies and SI-NOR violated the provisions of this standard by failing to provide a work place free from the potential hazard of violence by the institution of an administrative control in the form of a workplace violence prevention program. SI-NOR did not implement an effective workplace violence prevention program by safety training as a means to reduce the risk of employee exposure to the hazard of workplace violence.
6. Given SI-NOR's lack of managerial presence in 2002, and its unreasonable reliance on employees with inadequate supervisory abilities and training, all of which contributed to the creation of an unruly workforce, we conclude that the Director proved by a preponderance of evidence that it was reasonably certain that some employee was or could be exposed to the hazard of workplace violence. Mineral Industries v. Occupational Safety & Health Review Comm'n, 639 F.2d 1289, 1294 (5th Cir. 1981).
7. Under HAR § 12-60-2(b),¹⁰ SI-NOR is required to institute and maintain an effective written safety and health program to identify, evaluate and control work place hazards. We conclude that the Director proved by a preponderance of evidence that SI-NOR did not maintain an effective written safety and health program to identify, evaluate and control the hazard of workplace violence at the time of the inspection.
8. Under 20 CFR 1904.2(b)(2), SI-NOR is required to have the OSHA 200 logs for 2000 and 2001, respectively, and the OSHA 300 log for 2002, that provide a summary of occupational injuries and illnesses incurred by its employees in Hawaii, available at the time of inspection. Violations of record keeping standards require no proof that noncompliance also creates a safety hazard. See, Secretary of Labor v. Capitol Tunneling, Inc., 15 O.S.H. Cas. (BNA) 1304, 1307

¹⁰HAR § 12-60-2(b)(1) provides in part.

An employer subject to this standard shall meet the following requirements:

- (1) Written safety and health program.
 - (A) The employer shall institute and maintain an effective safety and health program to identify, evaluate and control workplace hazards. . . . An exception to this requirement only applies to employers with "less than 25 employees." See, HAR § 12-60-2(a).

(OSHRC Sept. 16, 1991). In such cases, it is presumed a hazard already exists. Id. We conclude that the Director proved by a preponderance of evidence that SI-NOR did not make the OSHA 200 and 300 logs available at the time of inspection.

9. Under HRS § 396-3, a “serious violation” means “a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation. The Board also concludes that the Director’s characterization of Citation 1, Items 1a and 1b as “serious,” and the penalty imposed are appropriate.
10. The Board concludes that HIOSH properly characterized the recording-keeping violation described in Citation 2, Item 1 as “other,” and the penalty imposed is appropriate.

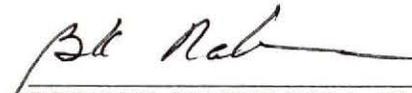
ORDER

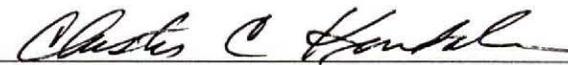
The Board therefore affirms the instant citation and penalty.

1. Citation 1, Items 1a and 1b, for violations of HAR §§ 12-60-2(a)(3) and 12-60-2(b)(1), the characterization, and penalty of \$1,400.00 are affirmed.
2. Citation 2, Item 1, for violation of 29 CFR 1904.2(b)(2), the characterization, and the penalty of \$2,100.00 is affirmed.

DATED: Honolulu, Hawaii, September 10, 2004.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS v. SI-NOR, INC.
CASE NO. OSH 2003-3
DECISION NO. 8
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

NOTICE TO EMPLOYER

You are required to post a copy of this Decision 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 order to a duly recognized representative of the employees.

Copies sent to:

J. Gerard Lam, Deputy Attorney General
Preston A. Gima, Esq.