STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and THYSSENKRUPP ELEVATOR CORP., Respondent.	CASE NO. OSH 2012-20 DECISION NO. 30 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Following a *de novo* proceeding before the Hawaii Labor Relations Board (Board) and for the reasons discussed below, the Board finds in favor of Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or DLIR). After a thorough review of all of the evidence and arguments presented,[1] the Board issued proposed findings of fact, conclusions of law, and decision and order pursuant to Hawaii Revised Statutes (HRS) § 91-11, which provides in relevant part:

> Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision[.]

Having complied with HRS § 91-11, the Board now renders its final decision in this matter.

[1] Although Board Chair Komatsubara did not participate in the hearing in this matter, he reviewed the entire record, including the pleadings, transcripts, and exhibits filed in this case.

PROCEDURAL HISTORY

On November 28, 2012, the Board received a Notice of Contest dated November 23, 2012 from the Director regarding a Citation and Notification of Penalty (Citation) issued on October 29, 2012 to Respondent THYSSENKRUPP ELEVATOR CORP. (Respondent), and based on Inspection Number 316265842, which was conducted on June 5, 2012 (Inspection), by the Director's Occupational Safety and Health Division (HIOSH). The Director determined "serious" violations of 29 CFR § 1910.178(1)(4)(iii) [refer to HAR § 12-60-50(a)] and 29 CFR § 1910.178(l)(6) [refer to HAR § 12-60-50(a)] occurred and assessed a total penalty of $962.50. Respondent contested the Citation by a letter to HIOSH, dated November 6, 2012.

An initial conference/settlement conference was held on February 26, 2013. On May 30, 2013, an evidentiary hearing was held where oral testimony and documentary evidence were received by the Board. Following the evidentiary hearing, the Director submitted a post-hearing position statement (Director's position statement) on July 31, 2013. Respondent submitted its post-hearing position statement on September 5, 2013 (Respondent's position statement) .

By Order No. 781, the Board issued its Proposed Findings of Fact, Conclusions of Law, and Decision and Order (PFFCLDO) to the parties on January 6, 2016. In the PFFCLDO, the Board gave notice to the parties of the right to file exceptions to the PFFCLDO within ten days after service of the PFFCLDO and to present argument to the Board should any party file exceptions. Neither Complainant nor Respondent has filed exceptions to the PFFCLDO at the Board, and the ten-day period to file exceptions has now passed.

I. FINDINGS OF FACT

Any conclusion of law improperly designated as a finding of fact, shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact. To the extent the parties' post-hearing memoranda contain statements that may be construed as proposed findings of fact, any such proposed findings not incorporated by the Board as a finding herein or that are clearly contrary to the findings herein, are denied.

A. The Inspection.

The Citation involved safety violations observed by HIOSH Compliance Officer Darrell Suzuki (Suzuki) and HIOSH Environmental Health Specialist Roy Talaeai (Talaeai) during the Inspection. The Inspection was a program planned inspection of Respondent's baseyard operations (Base Yard) located at 2880 Ualena Street, Honolulu, Hawaii on June 5, 2012.

Participating in the Inspection for Respondent was Darren Hamasaki (Hamasaki), the construction/modernization manager for Respondent.

On June 5, 2012, Suzuki, Talaeai and Hamasaki met in an opening conference, which was followed by a "walk-around" of Respondent's administrative office and warehouse and a closing conference.

1. Suzuki and Talaeai's Observations During the Inspection.

During the Inspection, Suzuki and Talaeai met and spoke with one of Respondent's employees, Mr. Bill Ellersick (Ellersick), who operated a forklift[2] at the Base Yard on a daily basis. According to HIOSH, Ellersick was asked to produce his forklift certification, and it was discovered that his forklift training certification had expired and Ellersick had not been evaluated by Respondent for the past three years.

2. Citation issued by HIOSH.

As a result of the Inspection, the following citations and penalty were issued:

Citation 1 Item 1a: A "serious" violation of 29 CFR § 1910.178(1)(4)(iii) [refer to HAR § 12-60-50(a)] and assessed a total penalty of $962.50 for failing to evaluate at least once every three years the performance of the individual tasked with operating Respondent's forklift at the Base Yard. 29 CFR § 1910.178(1)(4)(iii) states "[a]n evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years." The last evaluation was conducted by Respondent on May 11, 2003.

Citation 1 Item 1b: A "serious" violation of 29 CFR § 1910.178(l)(6) [refer to HAR § 12-60-50(a)] because an employee driving the forklift at the Base Yard was not properly certified. 29 CFR § 1910.178(1)(6) states "Certification. The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation."

Penalty: A combined penalty of $962.50 was levied against Respondent for Citation 1, Items 1a and 1b.

[2] The forklift was a Toyota Propane powered forklift, Model No. 5FGC15/SSN 74301.

B. Director's Argument in Support of Citation 1, Items 1a and 1b.

The Director asserted in its post-hearing position statement that Respondent's representative stipulated to the following at the May 30, 2013 evidentiary hearing:

a. The cited standards applied;
b. Respondent failed to comply with the terms of the cited standards;
c. Respondent's employees had access to the violating conditions;
d. Respondent either knew or could have known with the exercise of reasonable diligence of the violating conditions; and
e. Respondent confirmed that it was not contesting the amount of the penalty assessed and that the sole issue before the Board was whether the characterization of the violations should be "serious" or "other than serious."

Supporting HIOSH's characterization of Respondent's failure to certify Ellersick's training and evaluation as required by 29 CFR § 1910.178(1)(4)(iii) as a "serious" violation, the Director cited and relied upon an Occupational Safety and Health Review Commission (Commission) decision in *Secretary of Labor v. Virginia Construction & Management Company, Inc.*, 2012 CCH OSHD P 33217 (No. 11-0328 2012)(*Virginia Construction*). In *Virginia Construction* the Commission held that it is the employer's duty to ensure that its employees successfully complete the training and evaluation specified in 29 CFR § 1910.178(1)(4)(iii); and that based on the employer's admission that it had not checked the employee's certification and ensured that his training was up to date, this constituted a "serious" violation.

In addition to *Virginia Construction,* the Director cites *Secretary of Labor v. Giant Distribution Center, Inc.*, 14 BNA OSHC 1416 (1989) (ALJ) (*Giant Distribution*). In *Giant Distribution,* the ALJ held that Occupational Safety and Health standards imposed a present, ongoing requirement for operator training and that "past experience was not a method of training." Further, *Giant Distribution* determined that the failure to train employees in the safe operation of forklifts could result in serious injuries or death. Accordingly, the ALJ concluded that the employer in *Giant Distribution* committed a "serious" violation of 29 CFR § 1910.178(1).

C. Respondent's Challenge to Citation 1, Items 1a and 1b.

Respondent's post-hearing position statement disputes the Director's description of Respondent's stipulations.

With respect to Citation 1 Item 1a, Respondent admitted that no documentation of Ellersick's forklift performance evaluation occurred, but Respondent did not admit that (a) it failed to comply with the cited standard or (b) that its failure to document its compliance exposed any

employee to increased risk of harm. Respondent claimed that Ellersick was fully trained and repeatedly observed and evaluated by his supervisor, Hamasaki. In essence, Respondent contended that it merely stipulated that no documentation of those repeated evaluations of forklift performance occurred.

With respect to Citation 1 Item 1b, Respondent admitted its error in failing to certify the evaluation required by 29 CFR § 1910.178(l)(4)(iii) but asserted that this failure to document did not rise to the level of a failure to train, and therefore, did not pose a serious hazard to employee safety and health.

The Board has reviewed the tape recording of the evidentiary hearing of May 30, 2013, and it is clear that Respondent's representative, Landon DeVille, Branch Manager for Respondent, stipulated to the matters outlined in Director's post-hearing position statement. As such, the only question before the Board at the evidentiary hearing was whether Respondent's violations in Citation 1, Items 1a and 1b, should be characterized as "serious" or "other than serious."

II. CONCLUSIONS OF LAW

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

The Board has jurisdiction over this case pursuant to HRS §§ 396-3 and 396-11.

Respondent is an employer within the meaning of HRS § 396-3, which provides in relevant part:

"Employer" means:

* * *

(5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.

To establish a violation of a standard, the Director must prove by a preponderance of the evidence that:[3]

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[3] *Director, DLIR v. Permasteelisa Cladding Techs., Ltd.*, 125 Hawaii 223, 227, 257 P.3d 236, 240 (App. 2011) (*quoting, Director v. Maryl Pacific Constructors, Inc.*, Case No. OSAB 2001-18, 2002 WL 31757252, at *6 (*Maryl Pacific Case*)).

(1) the cited 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.

As stated above, the Respondent stipulated to factors (1), (2), (3) and (4) and did not contest the amount of the penalty. Based on the stipulation made by Respondent, the scope of the evidentiary hearing was limited to the sole issue of whether the violations by Respondent should be characterized as "serious" versus "other than serious."

Section 396-3, HRS, defines "serious violation" as "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." Two elements are required to characterize a violation as "serious": 1) a substantial probability of death or serious physical harm from the existence of the violative condition; and 2) employer knowledge of the violative condition.

Pursuant to HRS § 91-10(5), the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion; and the degree or quantum of proof shall be a preponderance of the evidence. The "preponderance of the evidence" standard directs the factfinder to decide whether the existence of the contested fact is more probable than its nonexistence; the party with the burden need only offer evidence sufficient to tip the scale slightly in the party's favor, while the party without the burden can succeed merely by keeping the scale evenly balanced (*see*, Kekona v. Abastillas, 113 Hawaii 174, 180, 150 P.3d 823, 829 (2006) (citation omitted)).

A. Regarding Citation 1 Items 1a, the Characterization of the Subject Notice of Violation as "Serious" is Correct.

During the evidentiary hearing, much time and discussion was centered on the nature of the violation in Citation 1 Item 1a. The Director stated that this violation arose because Respondent failed to evaluate in a timely fashion Ellersick's training and ability to safely operate a forklift. According to 29 CFR § 1910.178(1)(4)(iii), Respondent was required to evaluate Ellersick's forklift skills and abilities and certify his competence at least once every three years. In this case, Respondent does not deny that Ellersick's forklift certificate expired in 2003 because he did not have any documented re-training and evaluation since 2000; however, Respondent claims that Ellersick was training and evaluating other forklift operators that worked for Respondent and therefore it should be accepted that Ellersick himself was properly trained and

possessed the required abilities to properly operate a forklift. Furthermore, Hamasaki stated that he observed Ellersick's training and ability to properly operate a forklift.

It seems to the Board that the entire discussion of this specific issue was raised by Respondent for the purpose of demonstrating that the violation in Citation 1 Item 1a was more in form rather than substance. In essence, Respondent argues that although Ellersick was not issued his formal certificate as a forklift operator, he possessed all of the necessary training, evaluation and skills to properly operate a forklift. The Board does not agree with Respondent's position on this issue.

First, the Board notes that Respondent does not disagree that the person conducting the re-training and evaluation of a forklift operator for re-certification purposes must possess the necessary training, skills and certifications. In this case, Hamasaki stated that he previously held his forklift certification and that he observed and evaluated Ellersick's performance as a forklift operator for Respondent. However, Hamasaki also admitted that his certification expired, and he was not certified at the time Ellersick's need for re-certification arose. As such, Mr. Hamasaki could not have overseen and evaluated Ellersick's re-certification.

Second, if Respondent claims that its other forklift operators received their certification through a training and evaluation program overseen by Ellersick, who was himself not certified, this raises the question whether the certification of Respondent's other forklift operators are also invalid. The record is not clear on this point, and the Board will not pursue any further inquiry regarding the legitimacy of the certification of Respondent's other forklift operators. Instead, the Board leaves this matter to the Director's discretion to further investigate and address with the Respondent.

Lastly, the real focus on the inquiry regarding Citation 1 Item 1a should be on the question whether the stated violation should be characterized as a "serious" versus "other than serious" violation. As previously stated, two elements are required for the imposition of a serious characterization: (1) a substantial probability of death or serious physical harm from the existence of the violative condition; and (2) employer knowledge of the violative condition.

Regarding the first element, the Director argued that HIOSH assessed the violation as "serious" because of the possible type of injury involving an accident with a forklift and cited *Giant Distribution* and *Virginia Construction* for support of its position.

The Board previously held in *Director, DLIR v. R.D. Olson Construction, Inc.* HLRB Order 725 dated December 3, 2015 (*R.D. Olson*) that the applicable test in determining whether a violation is "serious" or "other than serious" is the type of injury that probably would result in the event of an accident rather than acts or omissions of the violating worker. The Board agrees with the Director's characterization of the violation as "serious" based on the substantial probability of serious injury from an accident resulting from the misuse of a forklift, which in this case includes the potential for an accident leading to the death of a worker. This approach to characterizing the seriousness of a violation, i.e. focusing upon the probable or predictable seriousness of any resulting injury, is consistent with the approach and reasoning taken in other cases involving use

of forklifts. For example, in *E. Tex. Motor Freight, Inc. v. OHSRC*, 671 F.2d 845 (1982), the Fifth Circuit affirmed the administrative law judge's characterization of a forklift safety violation as serious because injuries that could result from a work safety violation involving a forklift ranged from "crushed toes to death." *Id.* At 849.

Similarly, in *Accident Prevention Div. v. Roseburg Forest Products*, 806 P.2d 172, 173 - 74 (Or. Ct. App. 1991), the Oregon Court of Appeals came to the conclusion that "it was reasonably predictable, given the heavy loads carried on the forklift, that serious physical harm or death could result" from a violation of work safety standards. Accordingly, for similar reasons, the Board concludes that the Director's characterization of the violations in this case as "serious" is warranted based on the substantial probability that a serious injury, including death, could occur from the improper operation of a piece of machinery such as a forklift, which is a powerful motor vehicle that lifts and moves heavy and bulky loads.

In this case, Respondent stipulated and agreed that it did not comply with the cited standard that required Ellersick to be re-certified and that he was not certified at the time of the Inspection. Respondent did not argue against the legitimacy of the cited standard and did not claim that a violation of the cited standard (i.e., the operation of a forklift by an untrained and unskilled worker) **could not result** in substantial probability of death or serious physical harm on the job site. As the Board held in *R.D. Olson,* the focus should not be on the actual skills or abilities of Mr. Ellersick to operate a forklift, instead, the focus should be on what **could result** from Respondent's failure to comply with the safety requirements to certify the competence of its forklift operators.

Regarding the second element, Respondent does not deny that Ellersick did not possess a forklift operator's certificate at the time of the Inspection. The testimony at the evidentiary hearing established that Respondent knew that every forklift operator is required to be re-trained and evaluated every three years in order to be re-certified and, in fact, such a training and evaluation was performed for Ellersick by Respondent when Ellersick obtained his certificate back on May 11, 2000.

In conclusion, the Board agrees with the Director's characterization of the violation as "serious" and finds in favor of the Director on this issue.

B. Regarding Citation 1 Item 1b, the Characterization of the Subject Notice of Violation as "serious" is Correct.

Respondent admits it failed to certify Ellersick's training and evaluation as required by 29 CFR § 1910.178(l)(4)(iii). However, it argues that this failure was in not documenting Ellersick's retraining and evaluation rather than not having actually trained and evaluated Ellersick's ability to properly operate a forklift. Respondent claims that its violation in Citation 1 Item 1b does not pose a serious hazard to employee safety and health and that this violation should be characterized as "other than serious." Respondent cites the federal OSH Act where the Occupational Safety and

Health Review Commission explained that a "serious" violation is one in which "there is *substantial probability* that death or serious physical harm could result."[4]

The Board does not agree that Respondent's alleged failure to document its evaluation of Ellersick's performance in properly operating a forklift in accordance with the applicable worker safety rules is a minor and forgivable oversight. Without adequate documentation, how will HIOSH or any entity overseeing the worker safety laws properly police and enforce the laws intended to protect workers from dangerous working conditions?

As stated in Section III.A. above, the failure to obtain the forklift operator re-certification for Ellersick calls into question whether Respondent's other forklift operators were properly trained, evaluated and certified. Thus, this illustrates the need to properly document the certification process, including the training and performance evaluation of all forklift operators. The Director cited 29 CFR § 1910.178(1)(6) which states that the employer shall certify that each forklift operator has been trained and evaluated as required by this paragraph (l). Paragraph (l) also provides that the employer's certification shall include the name of the forklift operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation. It became apparent in the evidentiary hearing that Hamasaki is no longer a certified forklift operator and therefore he could not have properly evaluated and attested to Ellersick's competence to properly operate a forklift.

In conclusion, the Board agrees with the Director's characterization of the violation as "serious" and find in favor of the Director on this issue for Citation 1 Item 1b.

III. DECISION AND ORDER.

For the reasons discussed above, the Board affirms: (a) the Citation resulting from HIOSH Inspection Number 316265842, conducted on June 5, 2012, (b) affirms Citation 1 Items 1a and 1b, including the characterization of the violation as "serious," and (c) the penalty of $962.50.

Dated: Honolulu, Hawaii, January 28, 2016.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

KERRY M. KOMATSUBARA, Chair

[4] Citing *Cranesville Block Co.*, 2012 CCH OSH P 33,227 (Nos. 08-0316 & 0317, 2012) addressing 29 U.S.C. § 66(k) of the OSH Act.

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